

## How effective is the dispute settlement system of the World Trade Organisation in relation to environmentally sustainable development?

Sarah Alshahrani

**ABSTRACT:**It has been argued that considering environmental protection may limit the WTO role of providing free trade across the globe. Thus, the main reason for establishing the WTO, which is providing free trade, may be affected by environmental concerns. This can be witnessed especially when environmental protection is given priority over free trade. In contrast, it has been argued that there is no conflict between trade and environmental protection. Therefore, this article attempts to investigate these arguments and highlight the effectiveness of the WTO dispute settlement system in relation to environmentally sustainable development.

### I. INTRODUCTION

One of the main reasons for establishing the World Trade Organization (WTO) is to liberalize trade and reduce trade barriers. In addition, sustainable development and environmental protection can be considered fundamental goals of the WTO.<sup>1</sup> It has been argued, however, that considering environmental protection may limit its role of providing free trade across the globe. Thus, the main reason for establishing the WTO, which is providing free trade, may be affected by environmental concerns. This can be witnessed especially when environmental protection is given priority over free trade. In contrast, it has been argued that there is no conflict between trade and environmental protection.

The increase in environmental awareness and the high number of unilateral environmental measures and environmental treaties, however, have led to recognition of the actual and potential conflicts between trade and environment.<sup>2</sup> Over recent decades, the compatibility of environmental protection and trade liberalization has been a subject of debate.<sup>3</sup> Such conflicts have been witnessed in many cases, including matters that deal with environmental violations, which come before the Appellate Body (AB) of the WTO, previously the General Agreement on Tariffs and Trade (GAAT). In these cases, the success of the AB in promoting environmentally sustainable development has been subject to debate. On one hand, it can be argued that the WTO is 'perfectly equipped to deal with environmental issues,' and that the cases that ruled against environmental protection were simply due to the circumstances of each case where there was a clear violation to GAAT principle.<sup>4</sup> At the end of its first decade, the WTO Disputes Settlement Body (DSB) still appears to operate well and it has fewer controversial cases than the first decades of establishment. Such successes in promoting a more environmentally friendly WTO can be seen in a couple of cases. For instance, in the Shrimp/Turtle Case, the AB considered animals an 'exhaustible resource'.<sup>5</sup> It also interpreted Art XX (g) in a more environmentally friendly manner, which stated that 'likeness' could be influenced by the health risks of a product.<sup>6</sup> On the other hand, although each case has its own facts and surrounding circumstances, AB consideration of environmental issues in its decisions is varying. This raises concerns regarding whether or not the AB follows an established approach in its dealings with environmental issues.

<sup>1</sup> WTO, 'Trade and environment' <[http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_e.htm)> accessed 19 June 2019.

<sup>2</sup> Antonia Walter, 'Environmental Protection in the EU and the WTO: Is Article XX GATT in its Present Interpretation Consistent with the Current Standard of Environmental Protection of the EU?' (2014) 23 (1) European Energy and Environmental Law Review 2, 3

<sup>3</sup> James Watson, *The WTO and the Environment: Development of competence beyond trade* (Routledge 2013) 200

<sup>4</sup> Schiano (n17) 301

<sup>5</sup> Walter (n2) 20

<sup>6</sup> Walter (n2) 20

This essay will highlight WTO consideration of environmental issues. In doing so, it will be divided into four parts. First, an overview of the relationship between the WTO and environmental issues will be provided. Second, some of the main WTO Appellate Body and panel reports regarding environmental/trade cases will be discussed. Third, obstacles facing the WTO in promoting environmentally sustainable development will be highlighted. Finally, some possible solutions will be suggested.

## II. THE WTO AND THE ENVIRONMENT

The WTO has agreements such as the ‘Agreement on Technical Barriers to Trade’ and the ‘Agreement on Sanitary and Phytosanitary Measures’ (SPS)<sup>7</sup> that deal with some environmental issues, such as, food safety. Although there is no special environmental agreement under the WTO, Member States (MS) can adopt any environment-related agreement unless it has discriminatory measures.<sup>8</sup> It is important to mention, however, that the GAAT has indirect references to the environment in Article XX.<sup>9</sup> Article XX has exemptions that allow MS to adopt measures inconsistent with the GAAT in favour of environmental and health protection. Article XX (b) gives exemption to a measure ‘necessary to protect human, animal or plant life or health’, while Article XX (g) gives measures to protect national resources. In order to allow the practice of such inconsistent environmental measures, two requirements must be proved by MS. First, at least one of the exemptions in Article XX must be met.<sup>10</sup> Second, MS must prove that the chapeau of Article XX has been met.<sup>11</sup> The chapeau states that such exemptions will not apply when the exemption will produce ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, when the measure is merely ‘a disguised restriction on international trade’.<sup>12</sup> The chapeau is significant, in that most unilateral environmental measures have failed to meet the chapeau requirement.<sup>13</sup> This article has been criticized, however.<sup>14</sup>

A dispute can arise between MS when environmental measures taken by one MS are considered a violation of WTO rules by another MS. Such disputes can be resolved by DSB in several steps. First, the DSB, which consisted of all MS, has the sole authority to establish a panel of experts to solve the dispute and has the authority to reject or accept the panel’s decision.<sup>15</sup> Under the GAAT, it has been argued that the legitimacy of the decision might be affected, since the MS who lost the case will logically vote against the decision. This rule has been changed in Dispute Settlement Understanding (DSU)<sup>16</sup>, however, where the decision is automatically adopted after 30 days. Second, under the DSU, the panel’s decision can be challenged before the WTO’s Appellate Body, which ensures the correct interpretation of WTO rules.<sup>17</sup> The AB and the panels have been criticized as usually consisting of trade lawyers and not environmental experts who can assess or evaluate environmental measures.<sup>18</sup> The DSU, however, has the right to insist that the panel seek advice or consult experts.<sup>19</sup> It can be argued, therefore, that the DSB is qualified to deal with environmental issues, as it could get expert advice when needed. This can be seen in the case of EC — Asbestos,<sup>20</sup> where the panel based its decision on scientific evidence. An important issue must be mentioned, however, as the panel has the final decision in

<sup>7</sup> WTO, ‘An Introduction to Trade and Environment in the WTO’

<[http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm)> accessed 19 June 2019

<sup>8</sup> ‘Trade and Environment’ (n1)

<sup>9</sup> Nordström Håkan and Scott Vaughan *Trade and Environment* (Geneva, WTO 1999) 8

<sup>10</sup> WTO, ‘WTO rules and environmental policies: GATT exceptions’

<[http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)> accessed 19 June 2019

<sup>11</sup> Ibid

<sup>12</sup> Article XX of the GAAT

<sup>13</sup> Walter (n2) 20

<sup>14</sup> Criticisms of Article XX will be discussed in the discussion of the cases.

<sup>15</sup> WTO, ‘Understanding The WTO: Settling Dispute’

<[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)> accessed 19 June 2019

<sup>16</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, (15 April 1994)

<sup>17</sup> Di Pepe Schiano, ‘World Trade Organization and the Protection of the Natural Environment: Recent Trends in the Interpretation of GATT Article XX (b) and (g)’ (2000) 10(1) *Transnational Law & Contemporary Problems* 271.

<sup>18</sup> Richard Tarasofsky, ‘Report on Trade, Environment, and the WTO Dispute Settlement Mechanism’ (2005) Chatham House the Royal Institute of International Affairs

<<http://www.chathamhouse.org/publications/papers/view/108087>> accessed 20 June 2019

<sup>19</sup> Article 13 of DSU.

<sup>20</sup> European Communities – Measures Affecting Asbestos and Asbestos – Containing Products, Panel Report (adopted 18 September 2000) WT/DS135/R

assessing the experts' advice. The panel still has discretion in deciding the solicitation of this advice and whether it will be given weight.<sup>21</sup>

### III. WTO/GAAT Cases

The WTO plays a controversial role in trade/environment conflicts. Its success in promoting sustainable environmental protection can be considered debatable, however. In GAAT and WTO cases history, some cases seem to promote environmentally sustainable development, and others do not.

#### A. The Dolphin-Tuna Case

Over the last half-century, sensitive legal disputes concerning the conflict between trade regulations and environmental policies have been on the rise.<sup>22</sup> The first in a series of landmark cases was the Tuna-Dolphin<sup>23</sup> case decided under the GAAT in 1947.<sup>24</sup> This case was between Mexico and the United States. Tuna fishing methods in Mexico resulted in the deaths of hundreds of thousands of dolphins every year.<sup>25</sup> As a result of such harmful methods, the US banned Mexican tuna imports.<sup>26</sup> Such ban was based on the national US law<sup>27</sup> that bans all imports from countries that don't meet the required dolphin-safety standards; US fishers are also required to adopt the same standards.<sup>28</sup> In 1991, however, Mexico won the case before a GAAT panel that declared that the US ban violated its GAAT obligations.<sup>29</sup> The panel stated that the US ban couldn't be justified under Article XX (b), (d) or (g), while it was inconsistent with Article XI (1) and Article III.<sup>30</sup> Regarding Article XX, the panel interpreted it narrowly,<sup>31</sup> stating that the ban was not consistent with the exceptions in Article XX as the US embargo was not considered 'necessary' to achieve the conservation objective.<sup>32</sup> That meant that the panel did not consider the ban 'necessary to protect human, animal or plant life or health'.<sup>33</sup> Moreover, the panel's decision stated that the US embargo violated Article II, which prohibits 'discrimination of imported products on the basis of process and production methods'.<sup>34</sup>

This decision can be justified because of the high possibility that accepting the US' argument might influence other countries to impose bans on importing products from another country simply because the exporting country has health and environmental policies that differ from its own.<sup>35</sup> One could argue, however, that such a justification is doubtful, since the US ban was based on a clear harm to the environment and was not implemented simply because the exporting country has a different standard of protection. This harm is observable; hundreds of thousands of dolphins were killed as a result of tuna fishing in Mexico.

The Tuna-Dolphin ruling was widely criticized and GAAT members did not adopt it as a legally binding dispute settlement.<sup>36</sup> One of the main criticisms was that the panel based its decision on an intuition that environmental protection measures might open the door for 'green' protectionism.<sup>37</sup> Although the decision was not adopted, the environmental community feared that such a decision was a threat to environmental policy making in

<sup>21</sup> Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1997) 10(2) *The Georgetown International Environmental Law Review* 915, 928

<sup>22</sup> Tarasofsky (n 18) 4

<sup>23</sup> United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Appellate Body Report (16 May 2012) WT/DS381/AB/R

<sup>24</sup> Walter (n2) 12

<sup>25</sup> Richard Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12(1) *Georgetown International Environmental Law Review* 1, 10

<sup>26</sup> Daniel Esty, 'Bridging the Trade-Environment Divide' (2001) 15(3) *Journal of Economic Perspectives* 113, 117

<sup>27</sup> The US Marine Mammal Protection Act 1972

<sup>28</sup> Walter (n2) 12

<sup>29</sup> Esty (n 26) 117

<sup>30</sup> Report of the Panel (DS21/R - 39S/155), United States - Restriction on Imports of Tuna (1991)

<sup>31</sup> Walter (n2) 12

<sup>32</sup> Håkan and Vaughan (n 9) 9

<sup>33</sup> GATT, Art XX.b

<sup>34</sup> Håkan and Vaughan (n 9) 9

<sup>35</sup> WTO, 'Mexico etc versus US: tuna-dolphin'

<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm)> accessed 20 June 2019

<sup>36</sup> Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 (1) *Columbia Journal of Environmental Law* 491, 493

<sup>37</sup> Howse (n 36) 493

general.<sup>38</sup> Since the tuna-dolphin decision, however, WTO jurisprudence has developed and raised the importance of the DSB by establishing authoritative interpretations that ‘in some ways go well beyond what has been feasible to achieve at the political level’.<sup>39</sup>

### B. The Gasoline Case

The Gasoline case<sup>40</sup> was the first case established under the WTO’s DSB in 1996.<sup>41</sup> The dispute was between Venezuela, and later Brazil, against the US.<sup>42</sup> The claim was that the US applied discriminatory rules against gasoline imports. Such rules required gasoline imported to the US to have certain chemical characteristics. Such strict standards did not apply to, and were not followed by, US domestic gasoline refiners.<sup>43</sup> The US claimed that such standards were to protect the environment and it justified its claim under Article XX. The panel found the US law inconsistent with the national treatment principles of Article III:4 of the GAAT. The US appealed the panel decision, but the AB ruled the US’ actions unjustified under Article XX, since the US measures contravened the non-discrimination principles of the GAAT.<sup>44</sup> The AB found that the US measures could not be justified under Article XX because they were not ‘necessary’ to protect the environment.<sup>45</sup> Some panel decisions have held that the issue at play in the term ‘necessary’ is whether there is a reasonable alternative.<sup>46</sup> Such alternatives can be either whether a country had any GAAT consistent or less GAAT-inconsistent and ‘whether the country could reasonably be expected to use that alternative method’.<sup>47</sup> In this case, the AB found that the US had a clear GAAT-consistent measure that would have had no discriminatory trade effect.<sup>48</sup> This use of the ‘necessity test’ had been adopted in the tuna-dolphin decision, however, which had been criticized as being so open-ended that ‘any measure might have hypothetical alternatives more consistent with the GAAT’.<sup>49</sup>

Finally, although it decided against the US, the AB found that countries should have adequate discretion to enact measures necessary to promote environmental protection; therefore, the decision is considered to be more environmentally friendly.<sup>50</sup> Thus, under the GAAT, countries have the right to enact environmental measures that might be inconsistent with the GAAT as long as they meet the requirements of Article XX. Meeting such requirements can be difficult, however, and they might be considered an obstacle in implementing the exemption of environmental measures in Article XX. Moreover, it has been argued that it is difficult to justify the Article XX requirements, particularly the chapeau.<sup>51</sup> This can be seen in the DSB’s strict interpretation of Article XX. In theory, however, any national environmental measures that do not discriminate between trading parties should be consistent with GAAT principles.<sup>52</sup>

### C. The Shrimp-Turtle Case

In this case,<sup>53</sup> the dispute was brought by a couple of developing countries (the Complainant)<sup>54</sup> against the US ban on importing shrimp from countries that do not meet US requirements<sup>55</sup> for shrimp harvesting. The core aim

<sup>38</sup> Håkan and Vaughan (n 9) 10

<sup>39</sup> Tarasofsky (n 18) 5

<sup>40</sup> United States— Standards for Reformulated Conventional Gasoline, Panel Report (adopted 2 May 1996) WT/DS2/R.

<sup>41</sup> Jennifer Schultz, ‘The Demise of ‘Green’ Protectionism: The WTO Decision on the US Gasoline Rule’ (1996) 25(1) Denver Journal of International Law and Policy 1, 1

<sup>42</sup> WTO, ‘Venezuela, Brazil versus US: Gasoline’

<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis07\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm)> accessed 22 June 2019

<sup>43</sup> WTO, ‘Venezuela, Brazil versus US’ (n 42)

<sup>44</sup> Schultz (n 41) 6

<sup>45</sup> Cynthia Maas, ‘Should the WTO Expand GATT Article XX: An Analysis of United States-Standards for Reformulated and Conventional Gasoline’ (1996) 5 (2) Minnesota Journal of Global Trade 415, 439

<sup>46</sup> Maas (n 45) 433

<sup>47</sup> *ibid*

<sup>48</sup> *ibid*

<sup>49</sup> Schultz (n 41) 10

<sup>50</sup> William Davey, ‘The WTO Dispute Settlement System: The First Ten Years’ (2005) 8(1) Journal of International Economic Law (2005) 17, 20

<sup>51</sup> Schultz (n 41) 24

<sup>52</sup> Schultz (n 41) 6

<sup>53</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report (12 October 1998) WT/DS58/AB/R

of the embargo was to protect sea turtles, which are affected by shrimp fishing technology.<sup>56</sup> The Compliment claimed that the ban was inconsistent with Article XI (1) and Article I (1) of the GAAT.<sup>57</sup> The US response was that such a ban was justified under Article XX (b) and (g).<sup>58</sup> The WTO panel decision heavily relied on tuna-dolphin logic and rules,<sup>59</sup> despite the criticisms that had been laid against them.<sup>60</sup> In Shrimp-Turtle, Article XX had been interpreted by the WTO panel in a strict and narrow fashion that prohibited forcing measures on other MS requiring changes to their national environmental policies.<sup>61</sup> The WTO panel ruled against the US, as it found such an embargo inconsistent with the chapeau of Article XX.

It interpreted Article XX narrowly and stated that the reformulated preamble favoured environmental measures only in so far as they were the result of international cooperation and generally rejected unilateral attempts to improve the environment. Strikingly, it thus emphasized that the central focus of that agreement remains the promotion of economic development through trade.<sup>62</sup>

Even though the panel's decision has been overruled, it might be important to highlight its findings. The AB criticised the WTO panel's decision in many respects. One is that the panel followed a wrong order, in that it first analysed the chapeau, which it found had been violated, and it did not examine the individual exceptions.<sup>63</sup> The AB's decision repudiated the Tuna-Dolphin panel's approach.<sup>64</sup> The AB clearly stated that WTO MS have the right to take trade action in order to protect the environment, and that protecting sea turtles would be legitimate under Article XX.<sup>65</sup> Despite this view of the AB, however, it ruled against the US because it had discriminated between WTO members.<sup>66</sup> This discrimination can be seen in the financial assistance and longer time needed to start using the required 'turtle-excluder devices', which had been given to certain countries in the Caribbean. Other countries had not been given such assistance and flexible time, which means that the US' approach is contrary to the most-favoured-nation principles of the GAAT.

It can be noted, therefore, that the new approach of the AB was to favour environmental protection measures, although the decision was based on the US' violation of a GAAT principle. Although the US lost the case, the AB report was seen as a welcome step by many, since it makes the WTO more environmentally friendly.<sup>67</sup> It also represents an important development in WTO/GAAT jurisprudence for environment and trade.<sup>68</sup> In fact, the reason for such successes is that the AB recognized and legitimized the adoption of unilateral measures under the GAAT that aim to amend other MS' national environmental policies.<sup>69</sup> The effect of such an approach has been doubtful, however. This is because the AB's decision was not based on those reasons. Therefore, it is unclear whether these arguments will have any major impact on future disputes.<sup>70</sup> Another issue that might affect the expected positive impacts on environmental protection is the limitation in the chapeau of Article XX. One could argue that decision against the US should not be underestimated because it suggests that the chapeau could be a formidable barrier to the full implementation of paragraphs (b) and (g).<sup>71</sup>

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<sup>54</sup> Those countries are India, Malaysia, Pakistan and Thailand

<sup>55</sup> Public Law, Section 609

<sup>56</sup> WTO, 'India etc versus US: Shrimp-Turtle'

<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)>accessed 21 May 2014

<sup>57</sup> Rohan Hardcastle, 'Environmental Trade Measures Under Siege: The WTO US Shrimp Case' (1998) 3(1) Asia Pacific Journal of Environmental Law 157, 158

<sup>58</sup> Ibid

<sup>59</sup> Walter (n 2) 14

<sup>60</sup> Hardcastle (n 57) 166

<sup>61</sup> Schiano (n 17) 219

<sup>62</sup> Walter (n 2) 15

<sup>63</sup> Walter (n 2) 15

<sup>64</sup> Tarasofsky (n 18) 4

<sup>65</sup> WTO, 'India etc versus US: Shrimp-Turtle'

<[http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)>accessed 21 May 2014

<sup>66</sup> Ibid

<sup>67</sup> De la Fayette Louise, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia' (2002) 96 (1) American Journal International Law (2002) 685, 688

<sup>68</sup> Hardcastle (n 57) 171

<sup>69</sup> Schiano (n 19) 298

<sup>70</sup> Ibid 299

<sup>71</sup> Ibid 302



Moreover, although the shrimp/turtle case seems to be a successful step in promoting environmental protection, the AB decision was highly criticized. The most controversial criticism was that the AB interpreted Article XX (g) in a way that runs contrary to the original intent of the drafters when it included living resources such as turtles under the term ‘exhaustible resources’.<sup>72</sup> This inclusion was rejected by the Compliment, which claimed that such a term could be only applied to resources incapable of biological reproduction, such as coal reserves.<sup>73</sup> The AB approach was to consider endangered species ‘exhaustible’, however, even though ‘individual members of the species [have] reproductive capacities’.<sup>74</sup> Despite such criticism, it can be noted that AB interpretation was based on the aim of promoting sustainable development, which is an objective of the WTO.

#### D. The European Communities-Asbestos Case

The Asbestos case<sup>75</sup> has a different conclusion from the previous cases mentioned above. Its decision was in favour of environmental protection. It is also a classic example of science affecting litigation.<sup>76</sup> In 2001, the rulings in the Asbestos case were adopted.<sup>77</sup> Both the panel and the AB ruled in favour of environmental measures restricting trade.

The facts of the case were that for public health reasons, France imposed an embargo on imported asbestos and products containing asbestos.<sup>78</sup> Canada alleged that such a ban violated several WTO laws, such as Articles III, XI and XIII of the GAAT.<sup>79</sup>

The decision in this case can be divided into two parts. First, the panel found that the measure ‘protects human life or health’ and that ‘no reasonably available alternative measure’ existed.<sup>80</sup> The panel had to weigh evidence to ensure that the French embargo was established to protect health.<sup>81</sup> In doing so, it consulted scientists and relevant international bodies such as the World Health Organization, and found that the WHO widely recognizes that asbestos has carcinogenic and deadly characteristics.<sup>82</sup> One could argue that neither the panel nor the AB explained how much evidence of risk is needed to justify the protection of health.<sup>83</sup> Arguably, the risk requirement minimums ‘assert with some plausibility that the measure is directed towards the goal of protecting health’.<sup>84</sup> The AB held a more environmentalist view in this regard. It clearly states that each MS has the ‘right to determine the level of protection of health that they consider appropriate in a given situation’.<sup>85</sup> Such an approach could be considered by environmentalists as a welcome step in giving more freedom to countries to

<sup>72</sup> Iida Keisuke, ‘Is WTO Dispute Settlement Effective?’ (2004) 10(1)

Global Governance 207, 219

<sup>73</sup> Howse (n 36) 397

<sup>74</sup> Howse (n 36) 397

<sup>75</sup> European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report (12 March 2001) WT/DS135/AB/R

<sup>76</sup> Cristiane Carneiro, ‘Dispute Settlement in Trade & Environment Disputes: How Does the WTO Mechanism Perform?’ Research Center for Comparative and International Studies <<http://neci.fflch.usp.br/en/node/482>> accessed 23 June 2019

<sup>77</sup> WTO, ‘European Communities-Asbestos’ <[http://www.wto.org/english/tratop\\_e/envir\\_e/edis09\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis09_e.htm)> accessed 23 June 2019

<sup>78</sup> *ibid*

<sup>79</sup> WTO, ‘European Communities — Measures Affecting Asbestos and Products Containing Asbestos’ <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds135\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm)> access 23 June 2019. Canada claimed that France’s asbestos ban violated the National Treatment obligation in Article III:4 of the GATT, because it afforded less favourable treatment to imports of chrysotile fibres and chrysotile-cement products from Canada than to ‘like products’—substitute fibres and products—some of which are of EC origin.

<sup>80</sup> WTO Dispute Settlement, ‘EC – ASBESTOS’ <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds135sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds135sum_e.pdf)> accessed 23 June 2019

<sup>81</sup> RoperHowse and ElisabethTuerk, ‘The WTO Impact on Internal Regulations: A Case Study of the Canada–EC Asbestos Dispute’ in Gráinne De Búrca and Joanne Scott (eds) *The EU and the WTO* (Hart Publishing 2001) 322

<sup>82</sup> Howse and Tuerk (n 81) 322

<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos—Containing Products*, WT/DS135/AB/R, 12 March 2001 para 168

impose environmental measures on trade, although it will be at the discretion of the AB to find appropriate measures to promote such protection.

Second, the panel held that the measure is consistent with the Article XX chapeau, because the measure neither led to unjustifiable or arbitrary discrimination, nor included a disguised restriction on international trade.<sup>86</sup> This decision rejected Canada's claims that European countries had more favourable treatment.

The decision in this case can be considered a strong message to end the commercial use of asbestos in all countries, not only in France.<sup>87</sup> In addition, this decision has been seen by health groups and environmentalists as favourable for environmental and health issues for the first time in WTO history<sup>88</sup>. This decision also highlights the lack of transparency that has always been a criticism of the DSB. The lack of transparency was overcome in this case by accepting friend of the courts briefs and issuing instructions to that effect.<sup>89</sup>

#### IV. OBSTACLES FACING THE WTO IN PROMOTING ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT

##### A. Differences in Environmental Standards

Differences in environmental protection standards can be an obstacle to achieving the aim of environmentally sustainable development. These differences clearly appear between developing and developed countries, often creating 'pollution havens' for industries and firms seeking less regulatory oversight.<sup>90</sup> Such problems of different protection standards can be overcome by harmonising these standards, at which point it would be easy to determine whether there is a violation of such standard that arise in different jurisdictions. Such solutions can be hard to achieve, however, as developing and less developed countries may not have the financial capacity to meet those global standards.

The idea of harmonising environmental standards might also face difficulties in practice, because some countries could adopt higher standards than the international ones. This can be seen in the case of EC-Hormones.<sup>91</sup> In this case, the EC imposed standards higher than the international standard of Codex. The panel argued that to legitimate such standards, a risk assessment or scientific justification was required.<sup>92</sup> The requirement to maintain higher levels of protection than the international standard is stated in Article 3(3) of SPS. Therefore, it could be argued that even though international standards can give certainty to DSB rulings in favour of environmental measures, some MS can impose higher standards that need to be justified. By permitting such high standards, the DSB retains the discretion to determine which environmental measures are justified to violate GAAT principle.

##### A. Transparency

The lack of transparency of the DSB can be considered one of the main obstacles facing the WTO in promoting environmentally sustainable development. For example, the DSB's meetings are closed, contrary to the majority of international dispute settlements like the International Court of Justice, where the procedures are public. The need for transparency can be observed in the importance of the DSB in challenges to national laws and sovereignty over environmental issues. One could argue that national law has typically been developed for many years in open society with input from all sectors. Under the DSB, however, this law can be challenged or even overturned in a closed process with nothing but hearings from governments.<sup>93</sup> This lack of transparency can insufficiently connect the process to environmental stakeholders, who cannot contribute their views and expertise to the process.<sup>94</sup> The involvement of environmental stakeholders and experts is very important to ensure the adequate promotion of environmentally sustainable development by the WTO. Moreover, the increasing level of transparency in the Asbestos case can be considered an important factor that contributed to WTO support for environmental protection. This can be noted from accepting friend of the courts briefs and issuing instruction to that effect.

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<sup>86</sup> Ibid

<sup>87</sup> Barry Castleman, 'WTO Confidential: The Case of Asbestos' (2002) 32(3) International Journal of Health Services 489, 501

<sup>88</sup> Carneiro (n 76)

<sup>89</sup> Ibid

<sup>90</sup> Schultz, (n 41) 10

<sup>91</sup> EC Measures Concerning Meat and Meat Products, Appellate Body Report (16 January 1998) WT/DS26/AB/R

<sup>92</sup> Hughes, (n 21) 919

<sup>93</sup> Castleman, (n 87) 501

<sup>94</sup> Tarasofsky (n 14) 10

### B. The High Cost

There is a major concern that expanding economic and trade growth has no guarantee that it will not affect the environment. In 'Trade and Environment Special Report', the WTO itself acknowledges that expanding trade can affect natural resources and create pollution where appropriate environmental measures are absent.<sup>95</sup> The high cost of environmental-friendly technology, however, can be an obstacle facing fewer wealthy countries considering environmental issues.

It can be argued, however, that free trade is capable of promoting higher environmental standards; as such liberalization can increase financial capacities. As a result, more expensive environmental-friendly technology could be afforded and implemented. This assumption might be true, as environmental protection requirements need wealth to be improved. It might be difficult, however, for developing and less developed countries to reach such requirements without getting financial assistance. For example, in the Tuna-Dolphin case, the required expensive fishing technology was hard for Mexican firms to adopt, but much easier for US firms.<sup>96</sup> The trade of developing countries can be negatively affected by such measures when they cannot meet the developed countries' requirements.<sup>97</sup> Therefore, the WTO should play a role in financing poor countries so they can meet the environmental standards imposed by importing countries. As a consequence, such financial support could eliminate the conflict between environment and trade.

The lack of financial capacity that the developing countries claim it prevent them from afford expensive environmentally friendly technology does not prevent them from filing disputes before the DSB, which are also expensive. It has been argued that WTO disputes are not cheap and might be unaffordable for developing governments.<sup>98</sup> In previous GAAT dispute cases, developing countries accounted for 44 of 229 complaints.<sup>99</sup> Since 2000 this situation has changed, however, and claims from developing countries have dramatically increased.<sup>100</sup> For instance, in 2001, 71% of the disputes filed came from developing countries.<sup>101</sup> Developing countries have become the major users of the DSB system and seem to effectively settle their disputes there.<sup>102</sup> In fact, it could be argued that the losses from restricting the exportation of certain products because of environmental measures could be higher than the cost of filing a dispute in the WTO.

## V. POSSIBLE SOLUTIONS TOWARD THE IMPROVEMENT OF WTO PROMOTION OF ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT

### A. Alternatives Bodies

The environmentalist movement has a consensus that international cooperation is the best strategy to protect the global environment.<sup>103</sup> It can be argued, however, that:

In a world where bargaining imposes transaction costs, cooperative solutions will be affected by background legal rules that establish rights or entitlements on which the parties can rely in the absence of negotiated agreement.<sup>104</sup>

Protecting the environment through unilateral trade measures can exacerbate holdout problems and lead to strategic behaviour, thereby increasing transaction costs and reducing the possibility of cooperative solutions to international environmental issues.<sup>105</sup>

<sup>95</sup> Esty, (n 26) 114

<sup>96</sup> Arthur Oesterle, 'Just Say I Don't Know: A Recommendation for WTO Panels Dealing with Environmental Regulations' (2001) 3(1) Environmental Law Review 113, 117

<sup>97</sup> Fahmida Khatun, 'Environment Related Trade Barriers and the WTO' (2009) Conference Paper No. 77. Centre for Policy Dialogue (CPD) < <http://ideas.repec.org/p/pdb/opaper/77.html> > accessed 23 June 2019

<sup>98</sup> Iida, (n 72) 216

<sup>99</sup> Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993) 295

<sup>100</sup> Iida (n98) 217

<sup>101</sup> ibid

<sup>102</sup> Davey (n 50) 42

<sup>103</sup> Howse (n 36) 491

<sup>104</sup> Ronald Coase, 'The Problem of Social Cost' (1960) 3(1) Journal of Law & Economics 1, 9

<sup>105</sup> Howard Chang, 'Carrots, Sticks, and International Externalities' (1997) 17(3) International Review of Law and Economics 309, 316



Since the DSB has been subject to a number of criticisms, such as having no experience in environmental issues, a number of scholars have called for a new adjudicatory institution, particularly a new Environmental International Court.<sup>106</sup> Although the proposal deserves close attention, it is unlikely that such a court will form in the near future, as only a few constituencies wish to see it.<sup>107</sup> In order to achieve such an initiative, it must be proposed by political leaders, as the court might threaten their freedom to manoeuvre.<sup>108</sup> In practice, however, the suggestion has been rejected by different countries, for example, when it was taken off of the agenda in Rio de Janeiro in 1992.<sup>109</sup> This rejection might be due to the considerable effort and time that would be needed to establish the court.<sup>110</sup> In addition, there is uncertainty regarding whether this proposed court would be effective in solving environmental disputes.<sup>111</sup> As has been demonstrated above, however, the possibility of establishing such a specialist court is low. This rise in concern regarding the possibility of continued development of environmental matters and thus more cases will be decided in the future by the DSB.<sup>112</sup> Therefore, there is an urgent need to know the actual ability of the WTO 'to charge itself with the burden of hearing cases involving global environmental problems and to provide a satisfying and appropriate forum for the settlement of disputes related thereto'.<sup>113</sup>

### B. Amend Article XX

A number of trade/environment cases presented to GAAT/WTO panels have failed, such as Shrimp/Turtle. The failure of these cases was based on the wording of Article XX of the GAAT and its strict interpretation.<sup>114</sup> Article XX has a general exception, referred to Article III and I. One suggestion to amend Article XX could be to delete the chapeau, as that might broaden the scope of environmental measures. For instance, deleting the most-favoured-nation principle from the chapeau could increase compliance with environmental standards. Such a deletion could be justified by the fact that there are differences between rich and poor countries. The former has the wealth to meet certain standards, while the latter need assistance. In other words, the deletion would give assistance to developing countries (exporters) to meet environmental standards that ban certain products in importing countries. Although such an amendment could be considered to contravene MFN principles, it might be seen as a significant advantage in promoting environmentally sustainable development.

Other amendments have been suggested, such as expanding Article XX to add a new provision that would permit imposing trade measures to protect the environment whether within or outside the jurisdiction of the country.<sup>115</sup> The amendment proposals seem likely to be rejected by the GAAT's institutional and political realities, however, as two-thirds of the contracting parties need to accept the amendment.<sup>116</sup> It has also been argued that it is not possible to add such a new article.

## VI. CONCLUSION

Although, it has been argued that there is no inconsistency between WTO rules and environmental obligations, and that trade rules can help in achieving environmental objectives. The conflict between trade and environmental measures, which have been witnessed in many cases, must be given more consideration if we are to adopt an adequate approach in balancing them.

<sup>106</sup> Durwood Zaelke and James Cameron, 'Global Warming and Climate Change: An Overview of the International Legal Process' (1989) 5(1) *American University Journal of International Law and Policy* 249, 258. Jon Martin Trollalden, *International Environmental Conflict Resolution: The Role of the United Nations*, (Washington, World Foundation for Environment and Development 1992) 214

<sup>107</sup> Jeffrey Dunoff, 'Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes' (1993) 15 (7) *Michigan Journal of International Law* 1043, 1062

<sup>108</sup> Christopher D. Stone, *The Gnat Is Older Than Man: Global Environment and Human Agenda*, (Princeton University Press 1993) 60

<sup>109</sup> Duncan Brack, Fanny Calder and Muge Dolun, "From Rio to Johannesburg The Earth Summit and Rio 10" (2001) Briefing Paper No. 19

<<http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/rio+10.pdf>> accessed 24 June 2019

<sup>110</sup> Trollalden (n106) 214

<sup>111</sup> Dunoff (n107) 73

<sup>112</sup> Schiano (n17) 276

<sup>113</sup> Schiano (n 17) 276

<sup>114</sup> *ibid* 272

<sup>115</sup> Eric Christensen, and Samantha Geffin 'GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System' (1991) 3(1) *The University of Miami Inter-American Law Review* 569, 608-609

<sup>116</sup> Christensen and Geffin (n 115) 609

By examining WTO and previous GAAT cases, the different conclusions in the cases can be noted. For instance, the Tuna-Dolphin and the Gasoline cases strengthened the perception that the WTO is unfriendly to the environment, while the Shrimp/Turtle and Asbestos cases have been seen as a development in employing trade measures to meet environmental obligations such that those measures are consistent with WTO rules.

Although the most recent cases, like the Asbestos case, are important in improving WTO jurisprudence to be more environmentally friendly, to improve transparency and to base its decisions on scientific justification, there are demands and proposals to increase to increase its environmental commitment even more.

Differences in environmental standards, lack of transparency and high costs are obstacles facing the WTO in adequately promoting environmentally sustainable development. Harmonisation of international environmental standards, improvements to transparency and financial assistance to poor countries could contribute to overcoming these obstacles.

Thus far, the WTO has not adequately promoted environmentally sustainable development, and that while it is made some progress, it won't be adequate until certain suggestions are taken into account.

Finally, adequate environmentally sustainable development can be reached by some proposed suggestions. These suggestions are to establish an international environmental court and to make amendments to Article XX. Unfortunately, these suggestions have not been accepted to date. Thus, in order to improve environmentally sustainable development in the WTO, political leaders should support the proposed suggestions, and the WTO AB should put more weight on environmental expertise and scientific advice.

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