ENVIRONMENTAL CONCERNS AND TRADE DISPUTES: AN OVERVIEW FROM THE GATT AND THE WTO DISPUTE SETTLEMENT SYSTEM

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A INTRODUCTION

The relationship between trade, development and environment has been one of the most complex issues that the multilateral trading system has faced during the last decade. The mere definition of 'environmental concerns' would be problematic since there are different stakeholders (governments, international organisations, NGOs, companies, consumers, citizens) with different priorities and even philosophical approaches to what is worthy to be considered as an environmental concern and therefore a legitimate goal to achieve even if it leads to trade restrictions affecting local and international producers.

The way in which an environmental concern would be defined and the links with International Conventions and instruments of *Soft Law* would be a legitimate way to identify the content and scope of such concept. Nonetheless, due to the ambiguity and the open texture that characterise provisions of International Law, referring to environmental goals and the broad idea of 'Sustainable Development' is insufficient, especially if we consider that the multiple issues that are classified as environmental concerns by NGOs and individual WTO Member States – as a matter of policy space – are deeply influenced by social values and ecological ethics. The question is neither meaningless nor trivial if we consider the potential implications for current or future trade and environment disputes at the WTO Dispute Settlement System and the challenges for the whole idea of policy space in a context of a decentralised regulatory regime as a relevant matter of global governance.

A BACKGROUND

It could be argued that environmental concerns may give the substance for many '*Preferences For Processes',*[1] *Production Methods*[2] (PPMs) and the *Non Physical Aspects Of Products* (NPAs) in environmental matters, in particular for consumers and other non state actors that are also relevant in the multilateral trading system and for the achievement of different environmental goals expressed in different international instruments of international environmental law.

The debate on trade and environment has been not only a matter of extensive negotiations in the framework of the multilateral trading system like in the case of the Doha Negotiations on Environmental Goods and Services, Agriculture and Non- Agricultural Market Access. Extensive discussions have been held at the Trade and Environment Committee and at the

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[1] See D A Kysar 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' (2004) 118 Harvard Law Review 525.

[2] Also called Process Related Measures. The concept generally refers to the importance given to non-physical aspects of the product, *inter alia* values associated to the way in which it was produced (eg environmentally friendly processes).

Technical Barriers to Trade Committee (TBT) in which multiple non-tariff barriers grounded on environmental concerns have been brought by concerned Member States. Nevertheless, one of the most visible scenarios to understand the tensions between trade and environmental concerns is perhaps the Dispute Settlement system of the WTO (and the GATT as its predecessor). Environment related disputes have been relatively constant during 50 years of the multilateral trading system and by their mere existence it is possible to intuit a current overlap between environmental concerns and trade obligations (or at least in the way that they have been pursued).

The classification of environmental concerns in this type of scenario is deducted from the alleged environmental objective of the trade restrictive measure usually framed on the conservation of exhaustible natural resources (GATT Article XX(g)) but also from the connections identified by the respondent with the objectives of protecting human, animal or plant life or health (GATT Article X(b)). Additional relevant provisions in other WTO covered agreements are often invoked by the parties (eg TBT Agreement) in order to defend or to challenge the measure at issue. In this sense, it is not always particularly easy to identify when the dispute is intrinsically linked with environmental concerns and when the objective has a closer link with human health and safety. In addition, a broad definition of environmental concerns based on issues covered by ecological ethics would theoretically set the defence of the challenged measure on the grounds of public morals (GATT Article XX(a)).

B ENVIRONMENTAL CHALLENGES OR ENVIRONMENTAL ETHICS?: THE IMPACT WHEN ASSESSING THE SCOPE OF ENVIRONMENTAL CONCERNS AS NON-TRADE ISSUES

It is noteworthy to mention that even if the environment as such is an epicentre of multidisciplinary studies, the 'ecological debate' and the analysis of the broad scope and texture of environmental concerns is commonly referred to as Environmental Ethics (also known as ecological ethics). This broad approach argues that environmental concerns are the 'consequence of human interaction with nature and its side effects.'[3] In this sense, the diminution of natural resources due to demographical factors such as overpopulation, destruction of habitats, reintroduction of extinct species and removal of exotic ones, wildlife, erosion, preservation of species and special habitats and in general terms the ecological imbalance that endangers the fragile habitats necessary for the preservation of species are the traditional grounds of environmental awareness.

Environmental Philosophy (in which the broad notion of environmental concern is grounded) covers specific ethical dimensions incorporated in environmental awareness. In this scenario, animal welfare, scientific ecology, environmentally friendly process and production methods, are therefore matters of environmental concern. Theoretical approaches to the definition of environmental concerns by including an ethical component can be found in Hargrove[4], Varner[5],

[3] R Attfield *The Ethics of Environmental Concern* (2nd edn University of Georgia Press 1991) 280.
[4] EC Hargrove *Foundations of Environmental Ethics* (Environmental Ethics Books 1996) 229.
[5] GE Varner *In Nature's Interests?: Interests, Animal Rights, and Environmental Ethics* (Oxford University Press Oxford 1998) 154.

Gottlieb[6], Minteer and Collins,[7] Junges and Selli[8], Pimentel, Shanks and Rylander[9]. As we will argue later, the impact of environmental ethics in the definition of the scope of environmental concerns would be relevant when analysing the insights and rationale of different trade restrictive measures of WTO Member States, eco-labelling schemes, environmental standards, and the preference for processes that may be environmentally efficient but also compatible with values related to the so called 'environmental ethics' or 'Biosphere Ethics',[10] arguably regarded as 'public morals' issues, and then covered by the exception of GATT Article XX(a) rather than XX(g) relating to the 'conservation of exhaustible natural resources'.

C THE SCOPE OF ENVIRONMENTAL CONCERNS FOR THE PURPOSES OF GATT ARTICLE XX

The following section aims to present an overview of the challenged environmental concerns in landmark and recent disputes related with trade in goods and environment, both under the GATT (1948 – 1994) regime and the WTO Dispute Settlement System. These disputes have facilitated the development of a preliminary interpretation framework for the legal debate on Product and Production Methods and non-physical aspects of products related with environmental concerns (including ecological ethics) both for the adjudicatory bodies and the doctrine. The summarised cases have been selected following their classification as 'environmental related disputes' by the WTO and the leading doctrine. As it was suggested, some of the challenged measures of Member States under the panel proceedings were not strictly related with environmental concerns as such but with human health related matters. Nonetheless, the WTO included those cases in the track of environment disputes.

This section also aims to identify the parties, measure at issue, the environmental concern (or associated value) for the respondent, and the conclusion of the WTO adjudicatory body (panel or Appellate Body) in terms of considering the challenged environmental measure consistent or inconsistent with the WTO covered agreements. This systematisation of GATT/WTO disputes would be useful for the initial purpose of identifying formally acknowledged environmental concerns in trade disputes. At this stage, the information provided is not intended to cover in depth all the legal arguments invoked by the parties in the dispute and the dicta of the adjudicatory body when assessing the compatibility of the challenged measure with the WTO covered agreements, in particular, the requirements of the *chapeau* and the necessity test in

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[6] RS Gottlieb *The Ecological Community: Environmental Challenges for Philosophy, Politics, and Morality* (Routledge 1997) 384.

[7] BA Minteer and JP Collins 'From Environmental to Ecological Ethics: Toward Practical Ethics for Ecologists and Conservationists' (2008) 14 Science and Engineering Ethics 483; BA Minteer and JP Collins 'Why We Need an "Ecological Ethics"' (2005) 3 Frontiers in Ecology and the Environment 332 , available at: http://www.esajournals.org/doi/abs/10.1890/1540-9295%282005%29003%5B0332%3AWWNAEE%5D2.0.CO%3B2 (12 March 2012).

[8] JR Junges and L Selli 'Bioethics and Environment: A Hermeneutic Approach' (2008) 19 Journal International De Bioéthique 105.

[9] D Pimentel, RE Shanks, and JC Rylander 'Bioethics of Fish Production: Energy and the Environment' (1996) 9 Journal of Agricultural and Environmental Ethics 144.

[10] See the Biosphere Ethics Initiative: http://www.iucn.org/about/union/members/resources/news/?4890/Biosphere-Ethics-Initiative (12 November 2011).

Article XX. It is provided to show a broad picture of the legal status of environmental concerns embedded in certain measures brought to the panel procedures or the Appellate Body (trade and environment in a contentious scenario) from 1982 to 2011.

In general terms it could be argued that the adjudicatory bodies have been favourable to the objective of environmental protection as a legitimate goal in which trade may be restricted (GATT Article XX) but the evidence suggest that the overwhelming majority of the challenged measures, embedding environmental concerns, have been found incompatible with WTO obligations. In particular, they have been found incompatible with the criteria provided in GATT Article XX: the *chapeau* and the necessity test. Moreover, it is possible to say based on the overall result from the trade and environment disputes, that the dicta provided in some important leading cases (eg *Shrimp-Turtle*) will acknowledge environmental concerns as a legitimate and even desirable objective to be pursued by Member States. However, in reality the existing rulings and especially the leading interpretation of the obligations under the *chapeau* and the necessity test act are a high threshold for the respondent to win the case. Hence, it may be argued that in theory, Member States can frame their environmental concerns under GATT Article XX with a relative high level of deference granted by WTO adjudicatory bodies[11] (in terms of scope). In practice, so far almost all of the challenged environmental measures have be found WTO incompatible, *inter alia* for their lack of necessity, flexibility, non-discrimination and presence of extraterritorial effects. The adjudicatory bodies have been rather prone to scrutinise if the challenged measure is an 'honest' environmental measure or in other words, they evaluate the sincerity of the measure[12] established by the Member State instead of questioning or second-guessing the legitimacy of its objective. The current picture shows at first sight that in more than 50 years of the multilateral trading system it has been almost impossible for the Member State to be successful when defending trade restrictive measures based on environmental concerns, *inter alia* highly polluting products (asbestos, cigarettes and gasoline) and the protection of endangered species (certain species of sea turtles and marine mammals).

Table1. GATT Environment Related Disputes

Year	Dispute	GATT consistency

[11] The rulings of *US — Gasoline*, *Brazil — Retreaded Tyres* and *US — Shrimp* are meaningful in this regard. WTO Member States have autonomy to determine their own environmental objectives.

[12] See Trachtman's comments about *Brazil –Tyres* in response to the note 'Brazil Tyres: The WTO as environmental watchdog' by Professor Joost Pauwelyn. This note basically argues that the WTO is becoming a sort of environmental treaty and the 'most powerful worldwide environmental' institution when adjudicatory bodies interpret the necessity test by de facto demanding sound environmental policies in Member States when they invoke environmental purposes to restrict trade, using measures that barely reach the proposed end. In his comments, Trachtman argues that in this case, the environmental component is just incidental:

> [T]he evaluation here is not for an environmental purpose, but to determine the 'suitability' or, if you will, the sincerity, of the purported environmental measure. It engages in a limited scrutiny to make sure that this is truly an environmental measure, by asking whether it is suitable to achieve its purported goal. A true environmental treaty would do much more.

J Pauwelyn, 'Brazil Tyres: The WTO as environmental watchdog' (*International Economic Law and Policy Blog*, 4 July 2007) http://worldtradelaw.typepad.com/ielpblog/2007/07/brazil-tyres-th.html (30 November 2011).

1994	United States – Taxes on Automobiles	*Inconsistent*
1994	United States – Restrictions on Imports of Tuna (son of Tuna Dolphin)	*Inconsistent*
1991	United States – Restrictions on Imports of Tuna	*Inconsistent*
1990	Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes	*Inconsistent*
1988	Canada – Measures Affecting Exports of Unprocessed Herring and Salmon	*Inconsistent*
1982	United States – Prohibition of Imports of Tuna and Tuna Products from Canada	*Inconsistent*

Table 2. WTO Environment Related Disputes

Year	**Dispute**	**WTO consistency**
2011	United states — measures concerning the importation, marketing and sale of tuna and tuna products	*Inconsistent*
2009	Brazil – measures affecting imports of retreaded tyres	*Inconsistent*
2000	European communities – measures affecting asbestos and asbestos-containing products	*Consistent*

1998	United states – import prohibition of certain shrimp and shrimp products	*Inconsistent*
1996	United states – standards for reformulated and conventional gasoline	*Inconsistent*

Year	**Dispute**	**Status**
2011	European communities - measures prohibiting the importation and marketing of seal products	*Panel established but not yet composed*
2011	European communities - measures prohibiting the importation and marketing of seal products	*Panel established but not yet composed*
2011	European communities - measures prohibiting the importation and marketing of seal products	*Panel established but not yet composed*
2011	Moldova – measures affecting the importation and internal sale of goods (environmental charge)	*Panel established but not yet composed*

D ENVIRONMENTAL CONCERNS AND DISPUTE RESOLUTION IN GATT (1948 – 1994)

Before the existence of the Dispute Settlement Understanding (DSU), the mechanism for settling disputes under the GATT agreement lacked fixed timetables, the reports were easy to block by Member States therefore many of the rulings were not adopted by the defendant. In fact, some reports relating to leading cases in trade and environment were not adopted, especially by the United States (eg *Tuna-Dolphin* in 1991). Even if the idea of global environmental concerns and social development emerged most formally during the 70s (1972 Stockholm Conference), it was in the time of GAT, in which not only concerns related with environmental protection but the impacts of environmental policy on trade obligations started to be an important focus of discussion among the Member States and prominent legal scholars such as Charnovitz,[13] Schoenbaum,[14] Weiss,[15] Cough[16] and Jackson[17]. The trade disputes from 1982 to 1994 covered different environmental concerns of some Member States embedded mostly in national environmental policies. The challenged measures relied on different environmental objectives with consequences on trade obligations: conservation of fuel (as an exhaustible natural resource), incidental serious injuries of ocean mammals (dolphin mortality), preservation of fish stocks, consequences of imported cigarettes on human health and the imminent danger and depletion of Yellowfin and Bluefin tuna. All of the measures related to those concerns were found incompatible with GATT relevant provisions by the panel or the Appellate Body.

The first case in which the United States had to defend an environmental measure was linked to the prohibition of imports of tuna and tuna products from Canada. Arguing the aim of natural resources conservation (imminent danger and depletion of Yellowfin and Bluefin tuna), the Member State was unable to persuade the panel of the legality of the measure under GATT Articles XI(1), XI(2) (general elimination of quantitative restrictions) and to justify the measure under the General Exception of GATT XX(g) related to 'the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'

In *United States – Taxes on Automobiles*, the panel found the Corporate Average Fuel Economy Regulation (CAFE) and the consequently applied 'luxury' and 'guzzler' taxes, incompatible with GATT Articles III(2),[18] XX(g) and XX(d).[19] The United States also failed to defend environmental measures in the two cases related to restrictions on imports of tuna

[13] S Charnovitz 'GATT and the Environment: Examining the Issues' (1992) 4 International Environmental Affairs 203.
[14] T Schoenbaum 'Free International Trade and Protection of the Environment' (1992) 86 American Journal of International Law 700.
[15] Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary' (1992) 86 American Journal of International Law 728.
[16] P Cough 'Trade-Environment Tensions: Options Exist for Reconciling Trade and Environment' (1993) 19(2) EPA Journal 28.
[17] J Jackson 'World Trade Rules and Environmental Policies: Congruence or Conflict?' 49 Washington and Lee Law Review 1227.
[18] National Treatment on Internal Taxation and Regulation
[19] This exception is related to the need 'to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices' GATT 1947 Article XX (d).

initiated by Mexico and the European Economic Communities. In the first *Tuna-Dolphin* case[20] the American measures were found incompatible with GATT Articles II,[21] III (4), XI and not justified under the General Exception of GATT XX (g) or XX (b). The panel was particularly concerned by the extraterritorial effects of the environmental measure. In the second *Tuna-Dolphin* case[22] the panel found that such measures would undermine the multilateral trading system and therefore the import bans were found in violation of GATT Articles II, III, and XI and not justified under the General Exception of GATT XX (g). The United States acted as the compliant for the other two environmental related disputes under GATT.

In the case related to *Measures Affecting Exports of Unprocessed Herring and Salmon,* the Canadian concern of preserving fish stocks expressed by imposing export restrictions as a part of a system of fishery resource management (Canadian Fisheries Act 1976) was found contrary to GATT Articles XI (1) and not justified by Articles XI (2)(b) and XX (g). Another case that is usually classified as an environmental related dispute is *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes.* In this dispute, the Thai concern was fundamentally linked to the harmful effects of American cigarettes on human health and therefore, the importation of cigarettes and other tobacco preparation was prohibited under the Tobacco Act 1996. The panel found that such import restrictions were inconsistent with GATT Articles XI (1) and not justified under Articles XI (2)(c) and XX (b). It is possible to argue that even if the case has been labelled by the WTO as one of the disputes related to trade and environment, the report covered the legal analysis of issues related with human, animal or plant life and health covered by GATT XX (b) and not XX (g) related to the conservation of exhaustible natural resources, which has been traditionally considered as the environmental exception *par excellence.*

E ENVIRONMENTAL CONCERNS AND DISPUTE RESOLUTION IN THE WTO (1996 – 2011)

During the almost two decades of widening and deepening of trade liberalisation by means of reducing tariffs and non-tariff barriers, conflicts between trade and environment have been not only increasing in terms of number of disputes but presenting new challenges for the consideration of the different insights and scopes of what should be understood as an environmental concern for the purposes of restricting trade. Environmental concerns are an important part of discussions and negotiations in a non-contentious scenario. National environmental policy, bilateral and regional agreements with environmental content, consumer demands, corporate social responsibility and green credentials, product and production processes, non-physical aspects of end products and the multiple new links of environmental concerns with objectives traditionally associated with human, animal and plant life and health, agriculture and environmental ethics could be considered as emerging insights that, in parallel with sustainable development, are having an important role when analysing the scope of environmental concerns for the purposes of GATT Article XX in trade disputes.

[20] DS21/R-39S/155
[21] Schedules of Concessions
[22] DS29/R

In trade and environment disputes, different insights and links of environmental/ecological concerns could be identified. The WTO Dispute Settlement System may be seen as an important observatory of non-trade related concerns, especially for those with environmental content. Five disputes have been a matter of panel procedures (including the appellation or implementation panel in some cases) whereas the other ones are still at the stage of consultations or composition for the panel. Following the pattern of GATT, some cases have been considered by the WTO or the doctrine as environmental related disputes (*Brazil Tyres, EC Asbestos*) in spite of their closer links with health concerns, possibly reaffirming the idea that environmental concerns are neither static nor definite.[23]

In *United States - Standards for Reformulated and Conventional Gasoline,* the environmental concern of the American government was to reduce pollution by introducing the 1990 amendment to the Clean Air Act. In this sense, the US Environmental Protection Agency (EPA) promulgated certain strict rules on the composition and emission effects of gasoline, especially in regard of the chemical composition of imported gasoline. The panel found those domestic regulations incompatible with GATT Article III and not justified under the exceptions (b), (d) or (g) of Article XX. Moreover, once again, the Appellate Body found that even if the gasoline rules fell within the terms of Article XX (g),[24] such measures failed to meet the requirements established in the introductory paragraph of this Article (the *chapeau* and the necessity test). A couple of years after this dispute, the United States would be part of one of the most paradigmatic cases on trade and environment.

In 1998 in *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* the main environmental concern was to protect certain species of sea turtles from incidental taking in the course of shrimp. Following this concern, the United States imposed a prohibition on the importation of certain shrimp and shrimp products following its domestic regulation (section 609 of Law 101-1625). Among different measures established by law and governing the import ban, the US established certification schemes that demanded the use of TEDs (Turtle Excluder Devices) in harvesting processes. In panel's procedures, those measures were found incompatible with GATT Article I, XI and not justified under Article XX, besides considering the negative effects of these kind of measures on a predictable and secure multilateral trading system. Likewise, the Appellate Body stressed the fact that the measures, even if provisionally framed on Article XX (g), also failed to meet the requirements of the *chapeau*. Even if the United States lost the case, this dispute has been traditionally considered as an important 'environmental triumph' since the Appellate Body reaffirmed that WTO Members States can and should pursue their environmental concerns. In this sense, it is a remarkable argument provided in Paragraph 185 when asserting:

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

[23] In a similar fashion, disputes like *EC – Hormones* or *EC – Measures Affecting the Approval and Marketing of Biotech Products* could also be analysed by identifying the nexus between biotechnology and risk assessment with environmental concerns.

[24] The Appellate Body reversed the panel's finding on Article XX (g).

> *the environment. Clearly, they should and do.* [25]

Nonetheless, in Paragraph 186 The Appellate Body emphasised its reasons for not finding US defence compatible with the requirements of Article XX by stating:

> [A]lthough the measure of the United States in dispute in this appeal serves an environmental objective that is recognised as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.

De novo, the respondent failed not to be able to justify the trade restrictive measure as a legitimate objective (environmental concern) but to meet the necessity test and the *chapeau.*[26] Nevertheless, it is worthy to note that at the implementation phase of this case (Article 21.5 DSU), the Panel ruled in favour of the United States[27] when assessing the compatibility of the implemented measure in the light of GATT Article XX (this was also confirmed by the Appellate Body when Malaysia appealed the decision of the Implementation Panel).

In 2000 the dispute *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, was considered as part of the saga of 'trade and environment cases'.[28] However, as argued before, the stronger arguments behind the EC defence dealt with issues related to concerns on human, animal or plant life or health. EC considered that the import ban on asbestos (Chrysotile asbestos) was necessary to protect human health due to its toxicity and risks of asbestosis, lung cancer and mesothelioma by prolonged and occasional exposure. In other words, regardless of the consideration of asbestos as a highly polluting material, the legal defence was strongly based on Article XX(b) and not the environmental exception provided in XX(g) related to conservation of exhaustible natural resources. The Panel and the Appellate Body rejected Canada's challenge to France's import ban on asbestos and asbestos-containing products and the ruling was in favour of the EC, stressing the idea that the 'WTO Agreements support members' ability to protect human health and safety at the level of protection they deem appropriate'.*[29]*

Brazil – Measures Affecting Imports of Retreaded Tyres could be considered as another case in which the connection between environmental concerns and arguments related to the protection

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[25] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products* WT/ DS58/AB/RW 22 October 2001 (emphasis added).

[26] It is suggested by Conrad that 'in addition to its application of the chapeau and important dicta, it overruled the panel's finding of *per se* inadmissibility of a certain type of unilateral trade measure, namely a PPM measure. That is what made the Appellate Body Report in Shrimp Turtle so important.' CR Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (CUP 2011) at 19.

[27] It was argued by the Panel that:

> [T]he protection of migratory species was best achieved through international cooperation. However, it found that whereas the Appellate Body had instructed the United States to negotiate an international agreement for the protection of sea turtles with the parties to the dispute, the obligation at issue was an obligation to negotiate, as opposed to an obligation to conclude an international agreement. It then found that the United States had indeed made serious "good faith" efforts to negotiate such an agreement.

'Environment: Disputes 8 India Etc Versus Us: "Shrimp-Turtle"' http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm (16 November 2011).

[28] 'Environment: Disputes 3 US Versus Thailand' http://www.wto.org/english/tratop_e/envir_e/edis03_e.htm (16 November 2011).

[29] 'Environment: Disputes 9 European Communities – Asbestos' http://www.wto.org/english/tratop_e/envir_e/edis09_e.htm (2 December 2011).

of public health seem to overlap. This is the first case in which a recycled waste product was a matter of dispute at the WTO. Brazil's concerns were based on the negative impacts on public health and environment caused by the importation of retreated and used tyres (eg un-disposed tyres facilitate breeding mosquitoes and are therefore hazards to human health). The links between the challenged measures and the protection of human health as a primary goal was deeply analysed and controverted in the panel procedures that seemed not to be equally focused on the consequences on fires, disposal limitations and animal and plant life and health. This long dispute was favourable to the EC (the claimant) since the Brazilian measures were found inconsistent with GATT Articles XI(1) and III(4), besides finding the respondent failing to meet the necessity test and the *chapeau* of Article XX and therefore to justify the measures under Paragraph (b).

In 2011, the WTO panel handed down a ruling in the dispute *Tuna-Dolphin*. This saga that started in GATT's time had its 'day in court' again, involving same parties of the old *Tuna-Dolphin I* (United States as defendant and Mexico as complainant), and the concern of protecting dolphins and accurate consumer information[30] (about environmental and certain issues linked to animal welfare standards).[31] The challenged regulatory measures of the United States were *inter alia* The Dolphin Protection Consumer Information Act, the dolphin-safe labelling standards and the dolphin-safe requirements for tuna harvested in the eastern tropical Pacific Ocean. Like in previous similar cases, the conclusion of the panel was unfavourable to the United States and in its findings, the adjudicatory body considered that the dolphin-safe labelling provisions partly address the legitimate environmental objective pursued by the American regulations. Additionally, the Panel considered that alternative and less restrictive measures were available in order to achieve the same level of protection (in accordance with the evidence that was presented by Mexico). Nonetheless, what is peculiar in this case is that the panel didn't consider arguments based on Article XX (not invoked by the United States)[32] but on the Agreement on Technical Barriers to Trade (TBT).

This dispute had enormous importance for future cases related to the use of labels, following in consequence under the TBT Agreement, especially due to the increasing use of non-mandatory labels to address environmental concerns like in the cases of bio trade, organic products and carbon-footprint. In particular since, in the view of the panel, requirements for a voluntary label can be potentially considered as a mandatory regulation and thus a matter of analysis under the WTO law. It is worthy to note that much of the discussion on this case was based on the public and private actions surrounding the eco labelling and different approaches when considering

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[30] The label has the purpose of ensuring that consumers are not mislead or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphin. In this context we can identify an environmental PPM. The negative impacts are not only related to dolphin mortality (conservation of natural resources) but also to animal welfare conditions.

[31] *Inter alia,* separation of dependent calves from their mothers, reduced reproductive success due to stress induced foetal mortality, acute cardiac and muscle damage. See *United States — Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products* WT/DS381/R 15 September 2011 [4.202].

[32] The US emphasised the non-mandatory nature of the measure but also stated:

> [E]ven if the US provisions were technical regulations, they fulfil a legitimate objective. Those objectives are ensuring consumers have accurate information about whether tuna products were caught in a manner that adversely affects dolphins, and ensuring that the US market is not used to encourage the setting on dolphins to catch tuna.

This will frame the major points of the legal defence on the grounds of the TBT Agreement. *United States — Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products* WT/DS381/R 15 September 2011 [4.209].

the voluntary label as related with the US government. The *Dolphin-Safe* label[33] was not a condition *per se* for the importation of the tuna since in accordance to the respondent defence:

Mexico can and does sell tuna in the US market that is not labelled dolphin-safe. Moreover, tuna caught by one-third of Mexican purse seine vessels that fish for tuna in the ETP is already eligible for the dolphin-safe label; yet Mexican processors do not to use it.[34]

It is argued by Wilke and Schloemann that:

> [I]n reality most of the processing and end-use market is closed for non-certified tuna as processors, wholesalers and retailers hedge against unlabelled products. Mexico, whose fleet predominantly uses purse-seine nets, says that this limitation de facto makes the label mandatory – and as such disciplined by the TBT Agreement's stricter rules on governmental technical regulations, as opposed to the less stringent rules on voluntary standards.[35]

The panel considered this specific claim on its analysis within the unfavourable ruling to US concerns. Nonetheless, a dissenting opinion in one of the members of the panel was expressed in the sense considering that it was the consumer preferences (private interests) which made the label necessary but not mandatory (as to fall within the scope of the TBT agreement) and therefore, the measure in itself should not be associated with the defendant. Discussed issues related to conservation, different approaches and methods to protect animal life, indirect aspects covering animal welfare concerns in the bycatch, flexibility and excessive trade restrictions when achieving environmental related goals, consumer information, suitability and necessity in the measures in order to achieve specific ends and a more opened scenario for the *amici* submissions were characteristics of this case that is still far off being closed since an appellation is expected.

F THE OUTGOING DISPUTES

Outgoing disputes also have a remarkable importance in identifying concerns related to environmental protection and ecological ethics overlapping trade obligations covered by WTO law. Those environment related concerns are often related to Process and Production Methods and Non-Physical characteristics of the end product, and in consequence, their main rationale could be arguably seen as broad and ambiguous in some cases due to different aims involved (issue linkages), that is to say, to create positive environmental externalities or just to pursue a specific value linked with the use of nature. Therefore, environmental protection may be the direct objective of the respondent or in given circumstances, a mere desirable indirect effect

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[33] The American voluntary labelling scheme was focused on informing consumers about the fishing method. The Dolphin Protection Consumer Information Act prevents the use of the Eco-label for tuna from the Eastern Tropical Pacific caught with purse seine nets (in which dolphins are usually encircled). American consumers were not only concerned about non-injuries (non-killing) on marine mammals but also on issues related with not so evident injuries that may lead to mortalities caused by stress in dolphins while been chased or caught and also in the case of dolphin caves, when they are separated from their mothers. These aspects are inherently close to animal welfare considerations embedded in this specific type of non-mandatory Eco-labelling. In consequence, different consumer protests and rulings from Federal Courts prevented the US Department of Commerce from changing this specific label. See Wilke and Schloemann, 'Not –so-voluntary labelling in the WTO tuna-dolphin dispute' (2011) 5(3) Bridges Trade BioRes Review, available at: http://ictsd.org/i/news/bioresreview/117757/ (2 December 2011).

[34] *United States — Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products* (n 31) [4.74].

[35] Wilke and Schloemann (n 33).

also incorporated in the measure, for instance in disputes related with human health and environment (risk of pollution). The complexity of identifying specific environmental concerns also lingers on the fact that there is a grey line between environment protection and ecological ethics, that may lead to establishing linkages between traditionally considered moral values associated with the use of animals, agriculture and biotechnology and the direct or indirect aims of the trade restrictive measure. This issue linkage aspect is therefore also in the heart of the trade and environment debate in a contentious scenario.

During 2011, another case was brought for consultations involving Ukraine as complainant and Moldova as respondent: *Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge).* Moldova's Law 'On Charge for Contamination of Environment' of 25 February 1998 is intended to address concerns related to environment contamination by imposing two types of charges on imported products that contaminate the environment: at 0.5-5 per cent of the customs value of imported products; and a charge on plastic or 'tetra-pack' packages that contain products (except for dairy produce) at MDL 0.80-3.00 per package. Ukraine's legal complaints are based on the alleged facts that like domestic products are not subject to the first type of charge, while packages containing domestically produced like products are not subject to the second type of charge. (Violation of GATT Article III(1), III(2) and III(4)).

In the same year, a request for the establishment of a panel in another very polemical set of cases involving biodiversity and environmental ethics, surprisingly didn't reach the panel stage until 2011 even if the trade concerns and the environmental sensibility (including animal rights insights) were worldwide known and the media and NGO's special attention made of this case one of the most emblematic crusades for protecting wildlife and associated values. After failing the consultations among the parties in the disputes the 'Seal Saga' is now composed of three cases related to *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (involving Iceland, Norway[36] and Canada as complainants). The case *EC Seal Products* I and II, relates to the challenge of the so called 'Seal Regime' composed of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, and subsequent related measures. Claimants also requested supplementary consultations on the EC implementing Measures, *inter alia* Commission Regulation (EU) No. 737/2010 (laying down rules for the implementation of Regulation (EC) No. 1007/2009); Omissions to adopt adequate procedures for establishing that seal products conforming to the relevant conditions in the EU seal regime may be placed on the EU market; and any other related implementing measures. The animal welfare issue

[36] In Norway's view, the EC seal regime prohibits the importation and sale of processed and unprocessed seal products, while containing certain exceptions that afford privileged access to the EU market to seal products originating in the EC and certain third countries, but not Norway. Additionally, Norway as the other complainants expressed that this specific regime also includes a discriminatory and trade restrictive system for certifying that seal products are in conformity with the relevant conditions for being placed on the EU market. It is worthy to note that the EU has already responded to some of the complaints raised by Norway in this specific case. The EU argues the WTO is not an appropriate forum to discuss Norway's concerns and added that the seal regulation fell within the scope of the European Economic Area agreement. The EU said that Norway provided no meaningful explanation regarding why the EU's measures were inconsistent with WTO rules. The EU said it was strongly convinced of the strength of its case and stood ready to defend its measures. See 'WTO establishes panel in seal case' (WTO: 2011 News Items, 21 April 2011) http://www.wto.org/english/news_e/news11_e/dsb_21apr11_e.htm (29 November 2011).

surrounding biodiversity concerns is at the heart of the dispute, since the measures at issue embed the awareness about the animal welfare aspects of the seal hunt.[37]

The three Seal disputes are substantially similar in terms of facts and measure at issue. As suggested previously, different issues and environmental related concerns are involved in the dispute and are still to be analysed in the panel procedures (the panel has been established but not composed yet). One of the most polemic issues is the animal welfare insight of this specific dispute (also indirectly present in *Tuna-Dolphin*). One relevant question would be if it were proper and accurate to consider animal welfare as an environment concern *per se* regardless of its ethical dimension. According to Nielsen:

> The principles for protecting animal welfare are fundamentally different from those seeking to preserve animals for environmental reasons. The latter approach is primarily guided by a scientific determination of the extent to which biodiversity depends on the survival of a species, while animal welfare concerns focus on the well-being of individual specimens of the species independently of whether or not they are endangered.[38]

Nonetheless, from the broad perspective of environmental or ecological ethics[39] the values involved would qualify as environmental issues. In addition, animal welfare is also considered as not merely an ethical concern but as a matter of animal science.[40] Its study and research is common in veterinary, agriculture and biology (animal behaviour or applied ethnology). Authors such as Webster, Carenzi and Verga analyse the concept form a scientific perspective. In their view the broadest scientific definition of animal welfare includes a comprehensive state of the organism, considering body and mind together along with everything that links them. In fact, the welfare of organisms depends on different factors linked to the environment where they live and to their biological role and position[41] (it includes its capacity to avoid suffering and sustain fitness).

Regardless of the different approaches to animal welfare as a matter of science or environmental ethics for the purposes of GATT Article XX, there is uncertainty about whether the ecological ethics qualify as public morals or as an environmental concern (linking conservation with welfare) due to the fact that there is not a precedent in the case law of the

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[37] Specific concerns address the methods used for hunting seals (shooting, netting and clubbing that can cause avoidable pain and distress). Additionally the Regulation foresees limited exemptions to respect the fundamental economic and social interests of Inuit and other indigenous communities. It also contains exceptions for goods derived from seals for personal and non-commercial use and for goods derived from seals hunted for the sole purpose of the sustainable management of marine resources on a not-for-profit basis and for non-commercial reasons. See European Commission – Environment – Trade in Seal Products http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm (29 November 2011).

[38] L Nielsen 'Emotional and Legal Stakes Are High in the Seals Dispute' (2010) 14(4) Bridges Review http://ictsd.org/i/news/bridges/98808/ (5 December 2011).

[39] This approach is possible to find in Hargrove; Varner; Gottlieb; Minteer and Collins; Junges and Selli; Pimentel; Shanks and Rylander.

[40] The World Organisation for Animal Health (OIE) was formerly the Office International des Epizooties and is recognised by the SPS Agreement. The OIE collaborates with the WTO in use of international standards in the context of the SPS Agreement. Animal welfare is one of the objectives of this organisation. See The OIE's Objectives And Achievements In Animal Welfare *http://www.oie.int/animal-welfare/animal-welfare-key-themes/* accessed 8 December 2011.

[41] Corrado Carenzi and Marina Verga, 'Animal Welfare: Review of the Scientific Concept and Definition' (2009) 8 Italian Journal of Animal Science 21, 28 and A J Webster, 'Farm Animal Welfare: The Five Freedoms and the Free Market' (2001) 161 Veterinary Journal 229.

WTO ruling on the issue. In the case of the European Union, these specific concerns about the seal hunt are addressed by the European Commission as a matter of environmental policy due to its immediate connection with nature and biodiversity.[42] Additionally, there is evidence that animal welfare concerns are directly or indirectly associated with sustainable practices such as organic farming as presented in the overview of issue linkages in environmental concerns for civil society and environmental *demandeurs* in the WTO.

Complainants and third parties involved in the dispute expressed their views during consultations and the request for procedures under the DSU. Canada argues that the seal hunt is performed in a 'humanely' way and also sustainable from an ecological perspective. Namibia, as a third party has also raised environmental concerns. Namibia's arguments lay on the impact of the seal hunt for its own development goals (employment and contribution to its GDP) besides stating that exploitation of seals along its coast dated back to the 17th century. Namibia said that there were 25 colonies of seals along its coast and that their harvest was done according to the Marine Resources Act of 2000 and in the presence of a fishery inspector. Additional concerns regarding the trade restrictions imposed by the EU measure have been brought by Iceland. In its view, the dispute is also related to the legitimate and sustainable utilisation of living marine resources and the right to market such products.[43]

The common legal claims of the complainants are *inter alia* Article 4.2 of the Agriculture Agreement, Article 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, 6.1, 6.2, 7.1, 7.4, 7.5, 8.1 and 8.2 of the TBT Agreement and GATT Articles I(1), III(4) and XI(1). Even if the legal defence of the EC for the panel procedures is still to be defined, and there is uncertainty about how the adjudicatory panel would analyse the case (particularly after *Tuna-Dolphin II*), different approaches by scholars and trade and environment 'think tanks' have been already exposed.[44] Like in different trade and environment disputes, regulatory autonomy, policy space, unilateralism v international agreements and cooperation when addressing non-trade concerns would play a pivotal role in the case. As argued by Lester:

> [A]long with the relationship between WTO law and domestic regulatory autonomy, the panel may also have to navigate the connection between WTO law and international law. For example, in support of arguments that the ban is not justified; the complainants may emphasise the role of international agreements in the protection of animal welfare. In the absence of such agreements on seal hunting, the claimants may argue that unilateral trade action is not permitted. Addressing such international law issues in GATT/WTO dispute settlement has been controversial in the past and is likely to be so here as well.

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[42] It is possible to see how in the European Commission website, the section concerning Environmental Policy refers *inter alia* to Nature and Biodiversity. In this specific policy the issue of animal welfare is contemplated. The EU Animal welfare commitment to biodiversity is expressed in the leghold trap regulation and the seal products regime (Council Directive 83/129/EEC and Regulation (EC) No 1007/2009) http://ec.europa.eu/environment/index_en.htm (29 November 2011).

[43] See 'WTO establishes panel in seal case' (n 36).

[44] The International Centre for Trade and Sustainable Development (ICTSD) has been particularly active in fallowing environmental related disputes and the Seal dispute is not an exception. See 'Seal Dispute Update' (2010) 14(4) Bridges Review and 'European Court Decision Reinstates EU Seal Ban' (2010) 10(20) Bridges Trade BioRes Review. WTO scholars such as Laura Nielsen and Simon Lester have been also contributing to the legal analysis of this case during the last few years.

It is noteworthy that in all the disputes related to biodiversity, specifically wildlife (tuna, turtles, seals), the concerns are based on PPMs and non-physical characteristics of the products[45] whereas in the other disputes, environmental concerns and linked issues of special interest for the respondent/defendant are based on the physical characteristics of end product or the protection of the specie *per se.*

G CONCLUDING REMARKS

Pursuing environment related goals by restricting trade is often a matter of dispute among WTO Member States. Domestic regulations, mandatory and non-mandatory labelling schemes for biodiversity products or potentially polluting products, import bans and environmental taxes among others, have been considered as non-tariff barriers that may undermine trade expectations of WTO Member States and therefore violate essential principles and provisions of the WTO covered agreements. The policy space and the right to regulate are intrinsically linked to state sovereignty and in consequence, GATT provides general exceptions (Article XX) for a Member State to defend its trade restrictive measure based on environmental concerns. A review on trade disputes is useful for identifying the compatibility or incompatibility of certain measures grounded on the protection of environment as a precondition for human health, conservation of natural resources by giving special attention to specific species and even the welfare conditions of certain individuals among the species.

The analysis of the case law is normally focused on the identification of the measure at issue, the legal claims and the arguments of the adjudicatory body when verifying the compatibility of the argued environmental goal with the *chapeau* and necessity test of Article XX or, if applicable, the criteria established on the TBT and SPS Agreements. Nonetheless, tracing the evolution of the debate between trade and environment within the multilateral trading system demands the consideration of different insights and issues that were virtually absent in the times of GATT but in the current scenario play an important role when considering this debate at the WTO as a matter of relevance for global environmental governance. Those issues are *inter alia* consumer concerns about environmental related values and the impact of product choices,[46] the imperative for the government to warn consumers about certain physical characteristics of the products, production methods and even non-physical aspects that could be matters of concern, the corporate environmental responsibility (green credentials) of the producer, environmental information and the enforcement of environmental laws at the domestic level etc.

The measure's architecture is consistently assessed by the adjudicatory bodies in order to verify levels of discrimination, domestic protection, unilateralism, relations with international standards and multilateral environmental agreements, risk assessment,[47] alternative measures

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[45] With the exception of *US – Measures Affecting Exports of Unprocessed Herring and Salmon* and *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (GATT Disputes).

[46] Genetically modified food and animal welfare standards are common grounds for consumer concerns and domestic regulation. Those issues are increasingly explored within the field of Environmental ethics.

[47] Howse and Tuerk argued that the Asbestos dispute:

> [R]aised few issues of high normative controversy — it was not a case that suggested or evoked a cultural or intellectual divide about the meaning of health or of science, or for example the appropriate limits of individual member state action to protect the environmental commons, or the balance between human

with less trade impacts etc. Nonetheless, that adjudicatory analysis is not intended to consider questions as to who defines what is an environmental goal. From which perspective or approach (economic, biological, ecological ethics) is it defined? How relevant is the issue for civil society or the stakeholders affected by the outcome?[48] Is the less restrictive alternative suitable to achieve the same environmental protection in the same way that is expected or encouraged by other non-state actors or levels of environmental governance? Has the Member State the freedom of selecting the means when the trade restrictive action is the consequence of domestic enforcement of environmental or consumer protection laws or just when it is derived from the competence of certain bodies or institutions of community law (division of powers) like in the case of the European Union? The questions are theoretical but nonetheless relevant to the trade and environment debate; they could debatably be considered outside the mandate of WTO negotiations, covered agreements but at some extent surrounding the framework of the disputes.

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rights as defined in the UN Covenants and trading rights as defined in the WTO. The AB wisely left it to others to speculate about the implications of its interpretive moves in Asbestos for such harder cases, giving itself ample room to craft a balance between internal and external legitimacy appropriate to the facts of those cases.

R Howse and E Tuerk 'The WTO Impact on Internal Regulations — A Case Study of the Canada – EC Asbestos Dispute' in G Bermann and P Mavroidis (eds) *Trade and Human Health and Safety* (Cambridge University Press Cambridge 2006).

[48]Shaffer is sceptical about this approach when saying that the:

> 'US and European environmental groups are, not surprisingly, frustrated. Although they speak of the need to create a more transparent WTO under a stakeholder model, they are primarily piqued by results, not processes.335 They have tried to intervene at the international level, in particular through lobbying delegates in Geneva, submitting amicus briefs on trade- environment disputes before WTO dispute settlement panels, and engaging in mass protests at WTO ministerial meetings. They have also tried to harness U.S. and EC economic and political power to modify WTO rules. Yet they have been thwarted because their interests conflict with those of U.S. and EC export-oriented businesses domestically, and those of businesses as well as other non-governmental constituents from developing and smaller developed countries. Malcontent U.S. and European environmental groups consequently critique the World Trade Organisation as an autonomous neoliberal institution. While their critiques are factually wrong, they are strategically adept.'

G Shaffer 'The World Trade Organisation under Challenge : Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters' (2001) 25 Harvard Environmental Law Review 1.