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Trade and the Environment: Greening of the WTO

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I Introduction

The World Trade Organisation has often been demonised for its negative effect on the environment. Environmentalists have chastised the WTO for a failure to protect the environment against the impact of globalised trade. In December 1999 activists marched the Ministerial Conference in Seattle to protest what they saw as the WTO's preference for free trade at the expense of the environment. They blocked the entrances to the WTO meeting and prevented delegates from attending discussions, ultimately killing the Round of negotiations.¹

Still today the WTO is notorious in environmental circles and has 'become a watchword for injustice and environmental ignorance.'² One of the, if not the, main reason for this opposition to the WTO is the WTO's, and the General Agreement on Tariffs and Trade's,³ past treatment of trade-environment cases. The *Tuna-Dolphin* and *Shrimp-Turtle* cases drew the attention of environmental activists around the world,⁴ who saw the decisions of the dispute settlement bodies, which ruled against environmental trade measures, as evidence that the WTO and GATT desire ever-liberalised trade *at any cost*.

The purpose of this paper is to reveal how the WTO has in fact greened over time, and that those who continue to condemn the WTO without reservation have failed to recognise changes in the WTO which signal that the door has been opened to environmental trade measures. This paper does not purport to claim that the GATT has always been an environmentally friendly institution, but rather that significant changes have occurred which warrant a shift in public attitude. The purpose of encouraging that change in public perception is not simply to relieve the WTO of criticism. Rather, the goal of

¹Carrie Wofford "A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT" (2000) 24 Harv. Envtl. L Rev. 563, at [563].

² James Watson *The WTO and the Environment: Development of competence beyond trade* (Taylor & Francis Ltd Routledge, London, UK, 2012), at [5].

³ General Agreement on Tariffs and Trade 55 UNTS 194 (opened for signature 30 October 1947, entered into force 1 January 1948) [hereinafter GATT].

⁴ *United States – Restrictions on Imports of Tuna* DS29/R, 16 June 1994, (Report of the Panel, not adopted); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body, adopted 6 November 1998).

this paper rests on the idea that only once the international community has acknowledged the greening of the WTO, will Member states truly be able to implement trade-related environmental measures that do not contravene the GATT and therefore are left un-contested and free to achieve their environmental aims. If better attention is given to the current jurisprudence, Member states could follow carefully laid out criteria to create effective and acceptable trade-related environmental measures.

Part II of this paper provides important background information about the environment-trade debate, the WTO, trade-liberalisation and the significant relationship between trade and the environment. Part III then sets the scene by describing some of the predictions that were made about the potential treatment of the environment by the WTO. Part IV will then describe the key trading principles of the GATT and the environmental exceptions to those principles. Part V highlights several institutional and organization developments which have occurred and which signify a greening of the GATT/WTO arena. Most importantly, Part VI outlines several significant developments in WTO jurisprudence to demonstrate its new sophistication and the resultant greening of the dispute settlement process. Finally Part VII discusses the greening of the WTO in the setting of an environmentally conscious world.

II Background

A The Environment – Trade Debate

The global trade agenda and environmental protection principles have a long history, especially in intellectual and philosophical schools of thought, dating back hundreds of years.⁵ For the specific purposes of this paper it can be said that the debate about trade and the environment, in an international and legal setting, began about 80 years ago and can be summarised briefly. The debate as we know it originated in the 1920s during the preparatory period for the first

⁵ James Watson, above n 2, at [3]. See H Ritvo “Fighting for Thirlmere – The Root of Environmentalism” *Science Magazine* (Vol 300, No 5625, 6 June 2003); JB Flippen “A Fresh Perspective on the Roots of Environmentalism” *Reviews in American History* (Vol 35, No 1, John Hopkins Press, 1 March 2007); GF LaFreniere “Rousseau and the European Roots of Environmentalism” *Environmental History Review* (Vol 14, No 4, 1990), as cited in James Watson above n 2, at [3].

multilateral trade law instrument,⁶ the Convention for the Abolition of Import and Export Prohibitions and Restrictions.⁷ That first convention contained an exception for trade restrictions imposed for the protection of public health and the protection of animals and plants against diseases and extinction.⁸ Twenty years later the debate was renewed in the drafting of the Charter of the International Trade Organisation (ITO) and the General Agreement on Tariffs and Trade (GATT).⁹ While the ITO ultimately floundered, the GATT remained as the principal instrument for international trade negotiations and regulation.¹⁰ The GATT, like the first Convention, included from its inception general exceptions relating to the environment,¹¹ which this paper will discuss in more detail in Part IV.

B A Multilateral Trading System and the Environmental Intersect

1 Trade liberalisation and the birth of the WTO

A basic understanding of the principles upon which GATT and the WTO are founded is essential to analysing the impact on the environment of the multilateral trading system.¹² At the very foundation of the GATT and the WTO are trade liberalization, and the central aim of reducing and removing barriers to trade. Gaining the benefits associated with comparative advantage - an economic theory holding that the world economy can achieve greater economic efficiency through trade liberalization - is considered to be the cornerstone of the WTO/GATT ideology.¹³ Simply put, ‘comparative

⁶ Steve Charnovitz “The WTO’s Environmental Progress” (2007) 10 JIEL 685, at [685].

⁷ Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 League of Nations Treaty Series 391, not in force.

⁸ At [Art 4].

⁹ Havana Charter for an International Trade Organisation (ITO Charter), 24 March 1948, <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> not in force; and GATT above note 3.

¹⁰ Richard Skeen “Will the WTO Turn Green? The Implications of Injecting Environmental Issues into the Multilateral Trading System” (2004) 17 Georgetown Int’l Env’tl. L. Rev. 161, at [165].

¹¹ Article XX GATT, above note 3.

¹² Richard Skeen, above note 10 at [165].

¹³ Alimpan Chatterjee, Deya Battacharya and Sonali Banerjee “Guised in Green: Uncloaking the Myth of World Trade Organisation’s Trade-Environment Harmony” (2009) 1 Am. J of Economics and Business Administration 243, at [245]. See generally World Trade Organisation, *Understanding the WTO*, (5th ed, WTO, Geneva, July 2011) for a simple

advantage’ says “countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.”¹⁴

Globalisation of the world economy and liberalized freer trade meant an increase in international transactions to what, at the time the GATT was created, would have been an incomprehensible level. By the mid 1980s there was a clear need for a stronger international body not only to facilitate but also to *govern* international trade.¹⁵ The most significant achievement of the Uruguay Round of negotiations was the formation of the WTO,¹⁶ providing an institutional global body to administer the GATT, and other WTO Agreements.¹⁷ The WTO came into being in 1995, and possesses much wider powers and an increased mandate,¹⁸ compared to the administration of its GATT predecessor.

The underlying aim of the Uruguay Round was trade liberalization through the removal of the remaining barriers to free and fair trade, and it is this central aim which still, and always will, lie at the heart of the WTO. Importantly, “trade liberalization, per se, is not necessarily linked to either environmental degradation or environmental preservation and remediation. Rather, it is the process and mechanisms by which trade is liberalized that can have environmental implications.”¹⁹ However, it should be kept in mind that trade barriers are, strictly speaking, the anathema of trade liberalisation.²⁰ Because such trade barriers are often the measures used for environmental

discussion on the principles of the GATT/WTO multilateral trading system and a brief outline of the case for open trade. For a more in depth discussion of free trade see Jagdish Bhagwati *Free Trade Today* (Princeton University Press, Princeton and Oxford, 2002) and see Douglas A. Irwin *Free Trade Under Fire* (Princeton University Press, Princeton and Oxford, 2002).

¹⁴ World Trade Organisation, *Understanding the WTO*, above note 13 at [14].

¹⁵ Jennifer Schultz “The GATT/WTO Committee on Trade and the Environment – Toward Environment Reform” (1995) 89 *The American J. of Int’l L.* 423, at [425].

¹⁶ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organisation, 15 April 1989, GATT Doc. MTN/FA [hereinafter Final Act].

¹⁷ For a list of the WTO’s agreements, often called the Final Act of the 1986-1994 Uruguay Round of trade negotiations, see WTO “Legal texts: the WTO agreements” (2013) WTO <http://www.wto.org/english/docs_e/legal_e/final_e.htm>

¹⁸ Jennifer Schultz, above note 15 at [425].

¹⁹ At [424].

²⁰ Alimpan Chatterjee, Deya Battacharya and Sonali Banerjee, above note 13 at [245].

protection, those processes and mechanisms become very important to ensuring any balance, some of these will be discussed at Part V and VI.

2 *How the environment and trade are so significantly intertwined*

The intersection between trade and other societal issues is virtually limitless,²¹ however when it comes to trade and the environment the relationship is *significantly* intertwined.

Trade measures are undeniably an effective and coercive measure, which can be used to influence countries' behavior. Assuming nation states desire international peace, trade measures are one of the only tools at their disposal that can immediately, and measurably, influence the behaviors and decisions of other countries. Yet, trade measures are not only important for their effectiveness; they also have an additional importance in the environmental arena. This is because liberalised trade *itself* impacts upon the environment.²²

Liberalised trade means increased trade, on a global scale. As we know, the WTO's central objective is to remove trade barriers and promote freer trade.²³ More trade inevitably means increased production and thus increased use of the world's resources, a matter explicitly recognised by the WTO when it introduced the concept of sustainable development into its Charter.²⁴ In this way, trade itself can be damaging to the environment, especially if that trade is not conducted in a sustainable, environmentally conscious manner. In this setting, it becomes apparent how important it is that nation states are able to use trade-related environmental measures to curb environmental degradation.

The particular importance of trade measures to environmental protection has two notable components:

- 1) Trade itself can damage the environment, thus a trade measure which requires trade to be conducted in an environmentally friendly manner actually contributes to the solution itself, it does not simply sanction bad

²¹ Philip M Nichols "Corruption in the World Trade Organisation: Discerning the Limits of the World Trade Organisation's Authority" (1988) 28 NYU Journal of International Policy 711 at [9].

²² For a brief yet informative discussion on the effects of trade on the environment see Chris Wold "Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements" (2009) 28 Saint Louis University Public Law Review 201, at [222]-[226].

²³ See World Trade Organisation, *Understanding the WTO*, above note 13 at [9] and generally.

²⁴ Final Act above note 16, Charter of the World Trade Organisation at [preamble].

behavior, but rather encourages and promotes a domino effect of sustainable and green practices;

- 2) Trade measures influence and coerce countries into adopting progressive policies in order to gain access to lucrative markets, meaning ‘green practices’ are adopted on a global scale, an essential aspect of environmental protection which often concern the global commons.

It is upon this consideration of the importance and effectiveness of trade-related environmental measures that this paper is set. As trade measures can have a significant impact for the environmental movement, it is essential that members are free to implement and use such measures.

III Predictions of Tragedy

In order to put this paper into context this part briefly outlines some of the predictions of tragedy that many had hypothesized of the inevitable devastating environmental impact of the multilateral trading system, especially after the *Tuna/Dolphin* dispute. As Sanford Gaines describes, after *Tuna/Dolphin* “ardent environmentalists portrayed the world trade system as “GATTzilla,” a monster at the service of unbridled multinational corporations stomping on national environmental laws and bent on ever-expanding production and consumption that would destroy the environment.”²⁵ Many campaigners saw the GATT as a “regime dedicated to the triumph of free trade over all other human concerns,”²⁶ or ‘trade uber alles.’²⁷ The *Tuna/Dolphin* decision provoked a firestorm of protest and left much of the environmental movement “permanently aligned against the free trade regime.”²⁸ The GATT Secretariat

²⁵ Sanford Gaines “The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restrictions on Environmental Measures” (2001) 22 U. Pa. J. Int’l Econ. L. 739, at [752]; see also International Centre for Trade and Sustainable Development “GATT-Zilla vs. Flippa revisited? The tuna-dolphin dispute’s second round” (2011) 5 BioRes Review 8.

²⁶ Robert Howse “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate” (2002) 27 Colum. J. Envtl. L. 491, at [494].

²⁷ Nichols above note 21 at [10]; and see Alberto Berhabe-Riefkohl ““To Dream the Impossible Dream”: Globalisation and Harmonization of Environmental Laws” (1995) 20 NC Journal of International Law and Commerce 205, at [224].

²⁸ Nichols above note 21 at [51].

Report of 1992 on “Trade and Environment” did not help to deter this public opinion when it proclaimed that; ‘In principle, it is not possible under GATT’s rules to make access to one’s own market dependent on the domestic environmental policies or practices of the exporting country.’”²⁹

It is easy to criticise the WTO for its lack of environmental pursuits, especially in the context of old disputes and old jurisprudence. An organisation set up to liberalise trade is a well-suited scapegoat where trade liberalisation means increased trade, increased production, consumption and therefore increased depletion of the world’s resources. However, important changes have occurred within the WTO institution, especially in WTO dispute settlement jurisprudence, which signal that some of the predictions of tragedy have, thankfully, not come to fruition, and the trade uber alles fear can be let go. Member states can follow the criteria outlined by the Appellate Body through its refined approach, and introduce trade-related environmental measures which will not only succeed under GATT scrutiny, but will also be effective in achieving their policy goals.

IV The General Agreement on Tariffs and Trade

A Principles of GATT

To understand the importance of the environmental exceptions upon which trade-related environmental measures are justified, and the way in which they are tested by dispute settlement bodies, one must first appreciate the principles of nondiscrimination that underpin the GATT/WTO framework.

The key trading principles of the GATT are; most-favoured-nation treatment (MFN), national treatment, and nondiscrimination in the administration of quantitative restrictions. The MFN provision is found in Article I of GATT and requires members to ensure foreign products are treated no less favourably than like products of any other member.³⁰ National treatment, found in Article III, requires members treat imported goods the same as nationally produced goods.³¹ Finally Article XIII deals with qualitative restrictions, and demands that no restrictions or prohibitions be applied to the importation of any product

²⁹ GATT Secretariat, *International Trade* 90-91, Vol 1 1992, 19-43 at [23] as cited in Steve Charnovitz above note at [686]

³⁰ GATT above note 3 at article [I].

³¹ GATT, article [III].

unless the importation of like products from all other members are similarly restricted or prohibited.³²

These core principles are what members have relied on when challenging trade-related environmental measures employed by their co-members. Take for example the *Tuna/Dolphin* dispute, which involved a trade measure by the United States banning importation of yellowfin tuna caught using pure seine nets in a manner that kills and injures dolphins. This measure undeniably breached all three principles of non-discrimination. However, the GATT has, as previously mentioned, always included a set of broad exceptions to ensure sovereign freedom in those areas considered important by the drafters. One of those areas is environment protection and conservation. It is these exceptions that countries seek to rely upon, as the United States did in the *Tuna/Dolphin* dispute, when justifying their discriminatory trade-related environmental measures.

B The Exceptions – Article XX

The exceptions to the nondiscrimination provisions in GATT relevant to the environment are found in Article XX, specifically XX(b) and XX(g). These exceptions allow members to implement national measures that violate one or more of the above trading principles. In order to satisfy XX, the trade measure must not only comply with the specific provision but also the introductory paragraph to Article XX, also known as the chapeau. Article XX provides:³³

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...(b) necessary to protect human, animal or plant life or health;

...(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...

A plain reading of the above provision indicates that the original drafters recognised the importance of environmental protection and meant to allow for members to adopt measures necessary to conserve and protect it.³⁴ However, as

³² GATT, article [XIII].

³³ GATT, article [XX, chapeau (b) and (g)].

³⁴ Carrie Wofford, above note 1 at [567].

a scholar observed thirty years ago, “Article XX may be the exception to the general principles of GATT that is most troublesome and most subject to abuse.”³⁵ The meanings of many terms in the provision are unclear, and the wording does not concretely prescribe an approach for any given dispute panel to take. Thus the ultimate scope of the exceptions and the formula for a successful trade-related environmental measure must necessarily be found in the case law and dispute body reports. Analysis of those reports reveal what legal standards are actually applied and whether the GATT/WTO truly allows members to use discriminatory trade-related environment measures.

This paper looks at the approach to Article XX adopted in the environmental GATT/WTO cases in Part VI.

V Institutional and Organisational Developments

The birth of the WTO was accompanied by several institutional developments which directly relate to the trade-environment intersect. Other institutional changes, such as the revamped Dispute Settlement Understanding (DSU),³⁶ have had an indirect impact on the trade-environment relationship that have also contributed to the greening of the WTO.

A Preambular Statement

Early on in negotiations of the Uruguay Round no serious commitments appeared in the text of the WTO that showed any enhanced commitment to the protection of the environment to accompany the increased trade mandate.³⁷ However, as negotiations approached their close, several improvements came to light. Of note is the inclusion of the preambular statement, which, for the first time, recognized sustainable development as a central WTO objective.³⁸

³⁵ See John H. Jackson, *World Trade and the Law of GATT* 741 (1969); *as cited in* Mike Meier “GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?” (1997) 8 *Colo. J. Int’l Envtl. L & Pol’y* 241, at [244].

³⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 33 ILM 1125 [hereinafter DSU].

³⁷ Jennifer Schultz, above note 15 at [425].

³⁸ Final Act, above note 16 at [Preamble] (emphasis added).

... allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to *protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development.

Initially critics voiced doubt as to the possibility of any real positive effect of this addition to the preamble. However, it has often been referred to by governments, WTO adjudicators, and member states as justification for a stronger environmental dimension in the WTO.³⁹ It was even relied upon by the Appellate Body in their decision in *US – Shrimp*.⁴⁰ When interpreting the environmental exceptions of Article XX, the Appellate Body in *Shrimp/Turtle* held that the preambular statement shows directly that the WTO negotiators “decided to qualify the original objectives of the GATT 1947” and demonstrates a recognition by the WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development.⁴¹

Despite the Appellate Body's unmitigated reference to the importance of the addition to the preamble, it is still argued by critics as a nominal or trivial matter with limited substantive effect. It is not surprising that some do not view the preambular statement as a significant step for the environment, given that such a statement does not itself provide any instantly tangible environmental outcomes, such as an additional environmental exception. However, to the contrary, the inclusion of sustainable development and environmental protection aims in the preamble of the WTO has significant impact.

It is an essential feature of jurisprudence that an adjudicator cannot simply pull a meaning or interpretation out of thin air, they cannot draw on any matters they choose to colour the words or application of a legal text. Any determination or judgment as to the approach of a dispute settlement body must necessarily be rooted in the words of the legal instrument. In light of this

³⁹ Steve Charnovitz, above note 6 at [687].

⁴⁰ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body, adopted 6 November 1998), [hereinafter *Shrimp/Turtle* Appellate Body], for example at [paras 152-153]; see also John H Jackson ‘Justice Feliciano and the WTO Environmental Cases: Laying the Foundations of a “Constitutional Jurisprudence” with Implications for Developing Countries’ in Steve Charnovitz, Debra P Steger and Peter van den Bossche (eds) *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano* (Cambridge: Cambridge University Press, 2005) 29-43, at [40] as cited in Charnovitz, above note 6, at [688].

⁴¹ *Shrimp/Turtle* Appellate Body, above note 40 at [152]-[153].

acknowledgment, it becomes evident truly how important the preambular statement is. Under the Vienna Convention,⁴² and the rules it provides about treaty interpretation it is clear that a preambular statement can be pivotal in an assessment of the purpose and object of a treaty, and thus an interpretation of the specific text.

The thesis of this paper is that the real progress in terms of WTO greening has occurred through WTO jurisprudence. In light of that, any developments which are, and can in the future be, tools for dispute settlement bodies to use and draw on when interpreting the GATT and testing environmental trade measures is a significant matter.

B Committee on Trade and Environment

The increased recognition of the links between trade and the environment during the 1990s also led to the new WTO establishing a Committee on Trade and Environment (CTE) in 1995.⁴³ Unfortunately the CTE's demonstrable achievements have been modest, each annual report has averaged less than two pages, and no substantive changes have been implemented in the WTO as a result of any one Report.⁴⁴ A criticism often levied against the CTE is that its greatest accomplishments are "an agreement on members' disagreement on the relevant issues"⁴⁵ and stating that 'more work is needed by the CTE here.'⁴⁶

However, the very creation of the CTE demonstrated a significant acknowledgment by the WTO of both the relationship between trade and the environment, and the impact of the global economy on environmental matters. Moreover, the CTE is a symbol of the institutionalization of environmental issues into WTO processes,⁴⁷ and that step should not be underestimated. Most fruitful, has been the CTE's influence on transparency and cooperation. The CTE has stressed the importance of Multilateral Environmental Agreement

⁴² Vienna Convention on the Law of Treaties, 23 May 1969, 1115 UNTS 331, 8 ILM 679 (entered into force 27 January 1980), in particular Articles 31, 32 (and less importantly for the purposes of this paper, article 33) which set out the rules of treaty interpretation.

⁴³ Final Act above note 16, Trade and Environment, Ministerial Decision of 14 April 1994, 33 ILM 1267 (1994).

⁴⁴ Steve Charnovitz, above note 6 at [690], and Richard Skeen, above note 10 at [173].

⁴⁵ Eric Neumayer "The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak" (2004) *Global Environmental Politics* 1, at [6]

⁴⁶ Steve Charnovitz "A Critical Guide to the WTO's Report on Trade and Environment" (1997) 14 *Ariz. J. Int'l & Comp. L.* 341, for example at [353].

⁴⁷ Steve Charnovitz, above note 6 at [690].

(MEA) and Non Government Organisation (NGO) participation, often granting observer status to interested institutions, which provide valuable input, and enhance the “accuracy and richness of public debate.”⁴⁸

The Report’s of the CTE inform of an increasing participation of MEA secretariats and representatives of other interested institutions, those representatives often giving briefings of their specialised knowledge and progress which aid the ability of the CTE to propose practical solutions to problems that arise in the trade-environment intersect.⁴⁹ Additionally, the 2009 Report in particular, provides evidence that the meetings of the CTE have facilitated cooperation between Members, providing a forum for Members to share their experiences, technology, and information to help others adopt more sophisticated environmentally friendly trade practices and regulation.⁵⁰

C Dispute Settlement Understanding

Under the current dispute settlement process when a member brings a complaint under the GATT they first call for negotiations. If the parties fail to reach a solution, any party may request a hearing by a dispute settlement body, the panel.⁵¹ Once the panel has concluded their work, any party to a dispute may appeal any legal issues decided by the panel to the Appellate Body. At the conclusion of the appeal process the losing party must amend their practice to conform to the ruling or face trade sanctions.

The Appellate Body was introduced through the Uruguay Round, as was the Dispute Settlement Understanding which provides for a much more judicial approach to dispute settlement, and a general professionalisation of the GATT dispute settlement process.⁵² Those changes moved GATT dispute settlement

⁴⁸ Richard Skeen, above note 10 at [174].

⁴⁹ See *Report (2005) of the Committee on Trade and Environment*, WTO Doc, WT/CTE/12, 14 October 2005 (Report of the CTE); and see *Report (2007) of the Committee on Trade and Environment*, WTO Doc, WT/CTE/14, 4 December 2007 (report of the CTE); and see *Report (2009) of the Committee on Trade and Environment*, WTO Doc, WT/CTE/16, 30 October 2009 (Report of the CTE); and see *Report (2011) of the Committee on Trade and Environment*, WTO Doc, WT/CTE/18, 21 November 2011 (Report of the CTE).

⁵⁰ *Report (2009) of the Committee on Trade and Environment*, above n 49.

⁵¹ Carrie Wofford, above note 1 at [567].

⁵² DSU, above note 36. For an in depth comprehensive discussion on the judicialisation (described in the text as a professionalisation) of the WTO dispute settlement see James Watson above note 2.

away from political negotiation to a rule-oriented system that has led to a refined, textualist approach of the Appellate Body.⁵³

Under the pre-WTO framework the realist politics of power governed dispute settlement.⁵⁴ Decisions were founded upon diplomacy rather than adjudication and a legalist approach.⁵⁵ The effects of this style of dispute resolution can be seen in the *Tuna/Dolphin* panel report and its failure to adhere to the specific text of the treaty.⁵⁶ However with the WTO came the Dispute Settlement Understanding, which provided more structure, equality and formality to the procedure.⁵⁷

The new rules provide extensive detail on procedure and practice, giving guidance to panels and ensuring certainty and consistency. Moreover, a panel must be established once it is requested, whereas pre-1994 their establishment could be blocked by powerful nations, undermining the ability of smaller nations to complain. Panels and the Appellate Body must also now adhere to the Vienna Convention and must interpret provisions according to their ordinary meaning.⁵⁸ Importantly, panelists themselves must bring more legal training and experience.⁵⁹ It will no longer suffice that a panelist is a trade expert; rather they must have ‘sufficiently diverse’ backgrounds.⁶⁰ Selection of Appellate Body members is even more stringent, ensuring their competence and expertise in trade, law, and the GATT generally.⁶¹ Furthermore, the Appellate Body has developed, of its own accord, a collegial policy where all members

⁵³ Carrie Wofford, above note 1, at [564], and generally.

⁵⁴ See Michael K Young “Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats” (1995) 29 Int’l Law 389, as cited in Carrie Wofford, above note 1 at [568].

⁵⁵ Ibid.

⁵⁶ *Tuna/Dolphin II* above note 4. And see generally Mike Meier above note 35; and Howard F. Chang “Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case” (2000) 74 S. Cal. L. Rev. 31.

⁵⁷ While this paper lists some of the changes that underlie the professionalisation and sophistication of the dispute settlement process, for a more comprehensive discussion see Carrie Wofford above note 1 at [567]-[573]; and see generally John H Jackson “Introduction and Overview: Symposium on the First Three Years of the WTO Dispute Settlement System” (1998) 32 Int’l Law 613; and Miquel Montana I Mora “A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes (1993) 31 Columbia Journal of Transnational Law 103, at [144]-[145].

⁵⁸ DSU above note 36, at article [3.2].

⁵⁹ DSU, at article [8.1].

⁶⁰ DSU, at article [8.2].

⁶¹ DSU, at article [17.3].

must meet to discuss each case and reach some form of agreement, despite only three of the seven members formally adjudicating each case.⁶² This collaborative process ensures consistency, and therefore certainty, a fundamental element of the rule of law.

This professionalisation has been argued by some as the primary reason for an incontrovertible greening of the GATT.⁶³ Cumulatively, these changes have led to an improvement in GATT jurisprudence. The changes themselves signify a sophistication of the dispute settlement process, but more importantly, it is upon that sophistication that the judicial and legalist approach of the Appellate Body to treaty interpretation rests. In this way, the DSU has laid foundation for the Appellate Body to, through a more literal and textual interpretation, “let the environmentally progressive text of Article XX to shine through – in contrast to previous GATT panels which imposed artificial hurdles that environmental policies inevitably could not surmount.”⁶⁴

D WTO and the Environment – outside the GATT

There are several other specific agreements in the post-WTO framework, which supervise trade-related environmental measures, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),⁶⁵ and the Technical Barriers to Trade Agreement (TBT).⁶⁶ To discuss these agreements and the cases brought under their terms is beyond the scope of this paper, however a few brief comments are important. While those agreements relate to the trade-environment intersect, they do not both contain environmental exceptions similar to those in Article XX of the GATT.

The SPS Agreement concerns the application of food safety and animal and plant regulations and, at the risk of oversimplification, allows Members to set their own standards and create trade barriers so long as those regulations are based on science. The TBT on the other hand, is less protection focused and arguably less friendly to the environment, thus its failure to include Article XX-like exceptions is more alarming. Interestingly the case is being made that

⁶² Carrie Wofford, above note 1 at [571]; and *Working Procedures for Appellate Review* WT/AB/WP/1, article 4, (15 February 1996) 35 ILM 501, 504 (1996).

⁶³ Carrie Wofford, above note 1 at [564], and see generally Howard F. Chang, above note 56; and Dukgeun Ahn “Environmental Disputes in the GATT/WTO: Before and After *US-Shrimp* Case” (1999) 20 Mich. J. Int’l L. 819.

⁶⁴ Carrie Wofford, above note 1 at [572].

⁶⁵ Final Act, above note 16, Agreement on Sanitary and Phytosanitary Measures.

⁶⁶ Final Act, above note 16, Agreement on Technical Barriers to Trade.

where a measure is contested as contravening the TBT, for example, the defending Member may be able to invoke the GATT Article XX exceptions to justify their trade measures.⁶⁷ While the allowance for this invocation would be limited, it further cements the importance of the interpretation and application of the GATT exceptions as their relevance may be increasingly widened where other agreements are seen to fall short.

The next part of this paper will discuss some of the old arbitrary tests the GATT and early WTO panels added to the text of the treaty, which ‘threatened to render the environmental exceptions unusable.’⁶⁸ It will highlight the new approaches of the more refined Appellate Body and demonstrate how the jurisprudence of the WTO has evolved and greened.

VI Dispute Settlement – Environment Cases of the WTO

A The Cases and the Public

Nine Article XX environmental disputes have been adjudicated through formal GATT dispute settlement,⁶⁹ only four of which have been since the inception of the more sophisticated WTO Dispute Settlement Understanding: *US-Gasoline*,⁷⁰ *US-Shrimp*,⁷¹ *EC-Asbestos*⁷² and *Brazil-Tyres*.⁷³ Despite such a low caseload, the disputes have received great media attention, often due to

⁶⁷ See Danielle Spiegel Feld and Stephanie Switzer “Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After *China-Raw Materials* (2012) 38 Yale Journal of International Law Online 16. And see *China – Measures Related to the Exportation of Various Raw Materials* WT/DS394/AB/R (30 January 2012) (report of the Appellate Body, adopted on 23 March 2012) [hereinafter *Raw Materials*].

⁶⁸ Steve Charnovitz, above note 6 at [695].

⁶⁹ There have of course been other cases which relate to the environment under several of the other WTO Agreements that have been brought to the dispute settlement bodies, however the focus of this paper are the exceptions contained in Article XX of the GATT and the jurisprudence developed pertaining to those exceptions.

⁷⁰ *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 29 April 1996 (Report of the Appellate Body, adopted 20 May 1996) [hereinafter *US-Gasoline*].

⁷¹ *Shrimp/Turtle* above note 40.

⁷² *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products* WT/DS135/AB/R 12 March 2001 (Report of the Appellate Body, adopted 5 April 2001), [hereinafter *EC-Asbestos*].

⁷³ *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, 3 December 2007 (report of the Appellate Body, adopted 17 December 2007).

environmental organizations' campaigns and protests. For example, the *Shrimp/Turtle* dispute received extensive media coverage resulting in sea turtles becoming something of a *cause célèbre*,⁷⁴ and protestors often dressing in turtle costume as part of their campaigns.⁷⁵ Unfortunately in all of the disputes brought before GATT and WTO panels the trade-related environmental measures were found to contravene the GATT and were also not justified under the exceptions.

The ultimate holding against the trade-related environmental measures were, however, the most similar common denominator of all the cases, aside from that final result, the reports themselves and the approach of the dispute settlement bodies reveal marked and progressive changes. It is unfortunate however that the final decision was allowed to overshadow what have been monumental developments for the environmental cause, as Robert Howse has explained:⁷⁶

[The Appellate Body's subtle language in *Shrimp/Turtle*] and the fact that the ruling went against the United States' application of its environmental scheme blunted the impact the decision could have had. [F]ew people fully appreciate that the AB was fundamentally changing the *Tuna/Dolphin* approach on the consistency of environmental trade measures with the multilateral legal framework for liberalized trade.

The failure to recognise the progress of WTO jurisprudence extends further still; not only do the decisions which appear anti-environmental receive great media coverage, while the more subtle elements reflecting important developments are overlooked, but decisions actually upholding environmental trade-related measures go largely unpublicized. The second *Shrimp/Turtle* dispute brought by Malaysia some three years later,⁷⁷ concerning the same US turtle protection law received almost no media attention. As DeSombre and Barkin succinctly put it:⁷⁸

⁷⁴ Elizabeth R. DeSombre and J. Samuel Barkin "Turtles and Trade: WTO's Acceptance of Environmental Trade Restrictions" (2002) 2 Global Environmental Politics 12, at [12].

⁷⁵ Ibid.

⁷⁶ Robert Howse, above note 26 at [494].

⁷⁷ *Shrimp/Turtle* Appellate Body, above note 40.

⁷⁸ Elizabeth R. DeSombre and J. Samuel Barkin, above note 76 at [13].

It was almost as though those campaigning against the WTO's record on trade and environment were loathe to admit that the organization could come up with a positive ruling.

Even today, some ten years later, the WTO is hardly portrayed around the world as a beacon of hope for mother earth.⁷⁹

B The Jurisprudential Change – an Introduction

While environmentalists may be yet to come around to the idea that the WTO has taken giant green steps since its 'trade uber alles' past, the thesis of this paper is that through analysing WTO jurisprudence over time one can see the stark and important changes that have occurred in the interpretation and application of the GATT and its exceptions by the dispute settlement bodies.

In order to appreciate the move toward a more liberal treatment of environmental trade measures, an understanding of pre-WTO GATT jurisprudence is essential. The most famous case here is the aforementioned *Tuna/Dolphin* or *US-Tuna* duo.⁸⁰

There is no denying that the *Tuna/Dolphin* case was a great defeat for the environmental cause. Not necessarily because the measure itself was a good example of an even handed and effective environmental trade measure, but rather because the approach of the GATT panel almost slammed the door against environmental trade measure entirely through the creation of arbitrary judicial tests. As Steve Charnovitz has described of the approach of the lower panels:⁸¹

With the ostensible intention of saving the trading system, a series of panes had fabricated illogical reasons as to why Article XX could not be used. Far from saving the GATT/WTO, these holdings threatened the trading system by triggering worries as to its hostile attitude toward the broader public interest.

⁷⁹ See for example; "Global Movement to Turn Around the WTO" (2013) Global Citizen <<http://www.citizen.org/Page.aspx?pid=5629>>; "Top Reasons to Oppose the WTO" (2011) Global Exchange <<http://www.globalexchange.org/resources/wto/oppose>>; "Movements for Global Justice" (2013) Cultural Politics <http://culturalpolitics.net/social_movements/global>.

⁸⁰ *United States – Restrictions on the Import of Tuna* 39th Supp GATT BISD 155, DS21/R, 3 September 1991 (Report of the Panel, not adopted) [*hereinafter Tuna/Dolphin I*]; and *United States – Restrictions on Imports of Tuna* DS29/R, 16 June 1994, (Report of the Panel) [*hereinafter Tuna/Dolphin II*].

⁸¹ Steve Charnovitz, above note 6 at [695].

However since then, the Appellate Body has cast aside some of the GATT and early WTO panel holdings.⁸² By reversing the *US-Gasoline*, *US-Shrimp* and *EC-Asbestos* panels, the Appellate Body ‘not only corrected errant holdings, but sent a clear signal to the public that the era of runaway panels on environmental matters was over.’⁸³ The paper will now turn to a deeper look at some of those errant holdings.

C Unilateral Environmental Measures

Most importantly, the panels in *Tuna/Dolphin I* and *II* held that a member could not use a unilateral measure to control other countries, and to force them to comply with the member’s national policy. This reasoning provided an insurmountable hurdle for members attempting to justify environmental trade measure under Article XX. It effectively meant no measure that conditioned market access on an environmental standard made effective through national policies could qualify under XX. Countries could not set their own environmental standards and ban products from countries which failed to live up to that standard because, as the panel unexplainably asserted, that would amount to a violation of the GATT.⁸⁴ The GATT panel held that ‘measures taken so as to force other countries to change their policies, could not be primarily aimed at conservation,⁸⁵ and were a priori unjustifiable under XX. The assumption that unilateral measures were, as a general matter of principle, unjustifiable was present years later in the *Shrimp/Turtle* panel decision.⁸⁶ However, the Appellate Body rejected the exclusion as an error of law. Of note are the strong words used, considering international dispute bodies usually use courteous and politicized phrasing, the language is worth quoting at some length :⁸⁷

In the present case, the Panel found that the US measure fell within that class of excluded measures because ... it conditions access ... on the adoption of certain conservation policies prescribed by the US. It appears to us, however, that conditioning access to a Member’s domestic market on whether exporting

⁸² Steve Charnovitz, at [695]; and Carrie Wofford, above note 1 at [573].

⁸³ Steve Charnovitz, above note 6 at [696].

⁸⁴ *Tuna/Dolphin I*, above note 82, at [5.27].

⁸⁵ *Tuna/Dolphin II*, above note 82, at [894].

⁸⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R, 15 May 1998 (Report of the Panel) [hereinafter *Shrimp/Turtle* Panel] and see *Shrimp/Turtle* Appellate Body above note 40 at [121].

⁸⁷ *Shrimp/Turtle* Appellate Body above note 40 at [121] (emphasis added).

Members comply with, or adopt, a policy or policies unilaterally prescribed by the Importing Member may ... be a *common aspect of measures falling within the scope of ... the exceptions* in Article XX ...

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

In order to come to this (much more logical) conclusion, the Appellate Body looked to the actual text of the GATT and found nothing to suggest that unilateral measures were a priori excluded. Rather, in complying with the rules of interpretation they were bound by the DSU to apply, the Appellate Body considered that the earlier interpretation was absurd and produced an absurd and *abhorrent* result. Refined, ‘rules based jurisprudence’ here resulted in an undeniable greening of the GATT.⁸⁸ By quashing the extrajudicial tests such as the ‘unilateral measures per se exclusion’ added to the words of Article XX,⁸⁹ the Appellate Body has opened the door to environmental trade-related measures. It has allowed the environmentally progressive words of the original drafters to shine through, and practically, it allows members to condition access to their markets on others’ adoption of environmental policy.

D “Primarily Aimed At”

Another artificial test created by older panels is the requirement that policies be ‘primarily aimed at’ the conservation of natural resources in order to qualify for an exception under Article XX(g).⁹⁰ In creating this test the panels transformed the words “relating to” of Article XX(g) to new heights. In *Tuna/Dolphin II* the panel concluded that because the US measure required other countries to change their fishing practices it “could only be said to be “primarily aimed at” *controlling* other countries, rather than “primarily aimed at” conserving the environment.”⁹¹

This test made any effective environmental trade measure self-defeating. It asserted that a measure could only *relate* to the environment (within the

⁸⁸ Robert Howse, above note 26 at [500].

⁸⁹ Robert Howse, at [498].

⁹⁰ Steve Charnovitz, above note 6 at [701].

⁹¹ Carrie Wofford, above note 1, at [579]; *Tuna/Dolphin II* above note 82 at [para 16.20].

exception of XX(g)) if it did not rely on and require other nations to comply,⁹² in which case it could hardly be an effective trade measure. Trade measures are useful and effective tools for environmental protection because they allow Members to protect the environment without ruining their domestic industry (by ensuring other nationals live up to the standards, and thus incur the same costs). Furthermore they actually influence other Members to introduce environmentally friendly practices in their production as well. Besides having no foundation in the text of XX(g), the ‘primarily aimed at’ test deprived trade-related environmental measures of their usefulness by removing their application to trade on an international scale.

Again, the Appellate Body, through their textualist approach, opened the door to environmental measures by abandoning this test. In *US-Gasoline* the Appellate Body, applying the rules of the Vienna Convention, noted that the phrase “primarily aimed at” is nowhere to be found in Article XX.⁹³ Nonetheless, as the parties had already consented to the test, the Appellate Body went on to interpret it and in doing so actively narrowed its scope. It held that the ‘primarily aimed at’ test required only that the measure not be ‘merely incidental or inadvertently aimed at’ the environmental goal.⁹⁴

In *Shrimp/Turtle* the Appellate Body dropped the test completely and instead required only that the means of a measure be in principle reasonably related to the ends.⁹⁵

E “Necessary” under XX(b)

The XX(b) exception allows measures that are *necessary* to protect human, animal or plant life or health. That requirement of ‘necessary’ has been described by some as the biggest challenge for measures to pass.⁹⁶ Again in earlier GATT jurisprudence additional tests were added to the ‘necessary’ inquiry: ‘a measure could only pass muster if it used the least restrictive means to achieve its end.’⁹⁷ In *Brazil-Tyres* the Appellate Body clarified the inquiry under ‘necessary’ and, adhering to a literal interpretation, lowered the

⁹² Carrie Wofford, above note 1 at [579].

⁹³ *US-Gasoline*, above note 72 at [622-623].

⁹⁴ At [623].

⁹⁵ Carrie Wofford, above note 1 at [579]; and *Shrimp/Turtle* Appellate Body, above note 40 at [141], notably the Body found that the means were related to the ends and failed the US measure only when considering the chapeau of XX; see Steve Charnovitz above note 6 at [701].

⁹⁶ Steve Charnovitz, above note 6 at [697].

⁹⁷ Robert Howse above note 26 at [501] and see *Tuna/Dolphin I* above note 82 at [5.28].

threshold. The Appellate Body asked only that the measure ‘contribute’ to the achievement of its objective;⁹⁸ that there be ‘a genuine relationship of ends and means between the objective pursued and the measure at issue.’⁹⁹

The analysis admittedly still involved a weighing of the trade restrictiveness of the measure against its contribution, however the Appellate Body emphasised panels must always “take into account the importance of the interests and values underling the objective pursued.”¹⁰⁰ In line with that emphasis the Appellate Body rejected the European Communities argument in *Brazil-Tyres* that a Member must quantify the contribution of the measure to prove it was necessary.¹⁰¹ Rather the Appellate Body considered both qualitative and quantitative assessments sufficient and that results not ‘immediately observable’ can and must still be taken into account.¹⁰²

This is not a trivial matter. Frequently in the context of environmental protection the world is faced with problems that cannot be measured and pointed to with absolute scientific certainty. It would be devastating for efforts to protect the environment were measures held to only be ‘necessary’ and therefore acceptable under XX(b) when their effects are immediately, accurately and precisely quantifiable. More often than not such a requirement would lead to measures failing to pass the muster of the GATT exceptions until extreme environmental degradation had already occurred.

Notably, the Appellate Body made several important statements as to the assessment of ‘necessary’ and the inquiry into the contribution of a measure for future environmental issues and trade measures. It held:¹⁰³

In the short term, it may prove difficult to isolate the contribution to environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change ... that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time.

⁹⁸ *Brazil-Tyres*, above note 75 at [210].

⁹⁹ *Brazil-Tyres*, at [210].

¹⁰⁰ At [210].

¹⁰¹ Marie Wilkie “Litigating Environmental Protection and Public Health at the WTO: The *Brazil-Retreaded Tyres* Case”(September 2011) 1 Information Note, Institutional Centre for Trade and Sustainable Development 1, at [5].

¹⁰² *Brazil-Tyres*, above note 75 at [151].

¹⁰³ *Brazil-Tyres* at [156].

F The Chapeau

Since the inauguration of the WTO and the sophisticated DSU the Appellate Body has also strived to lay out the correct approach to the interpretation and application of the chapeau of Article XX. It has again clarified its meaning, quashed old arbitrary tests and established a sensible sequence for analyzing the provision.

1 Sequencing of analysis

In *US-Gasoline* the Appellate Body corrected past rulings and set out the proper approach to Article XX, which was to *first* consider whether the measure could be justified under one of the specific exceptions of Article XX, and, if the measure was justified, only then to move to a an examination of compliance with the chapeau.¹⁰⁴ The identification of this two-step test and sequencing of analysis was not merely a jurisprudential art form, rather, it was directly related to the Appellate Body's understanding of the chapeau – as an overarching check to prevent a Member abusing their rights under Article XX.¹⁰⁵ To launch straight into an examination of compliance with the chapeau, would mean assessing whether a Member has abused their rights before determining what those rights are; that approach led to several panels rejecting measures before conducting an appropriate analysis.¹⁰⁶ The Appellate Body in *Shrimp/Turtle* affirmed the sequencing of Article XX, and castigated the panel of the same proceeding for failing to follow the approach laid out by the Appellate Body in *US-Gasoline*.¹⁰⁷ Years later the panel in *Brazil-Tyres* followed the correct sequencing and so it seems the determination of the Appellate Body to establish the correct approach is working.

2 The focus of the chapeau tests

A final guideline (final for the purposes of this paper) provided by the Appellate Body pertains to the 'fundamentally limited ambit of the chapeau.'¹⁰⁸ The Appellate Body stressed that the chapeau is *only* concerned with how a measure is *applied* and should not be used to assess whether the substance of the measure is justified, that enquiry is the role of the specific exceptions ((b)

¹⁰⁴ Robert Howse, above note 26 at [499]; and *US-Gasoline* above note 72.

¹⁰⁵ Robert Howse, above note 26 at [499].

¹⁰⁶ See table of WTO environmental disputes in Carrie Wofford above note 1 at [565].

¹⁰⁷ *Shrimp/Turtle* Appellate Body at [112].

¹⁰⁸ Robert Howse, above note 26 at [499].

and (g)).¹⁰⁹ The Appellate Body in *US-Gasoline* provided that “The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.”¹¹⁰ When the panel in *Shrimp/Turtle* failed to follow that interpretation the Appellate Body quoted itself and stressed the importance of the limits of the chapeau.¹¹¹ In this way, the jurisprudence ensures that the measure in question is no longer subject to double assessment,¹¹² and its substance is not questioned on the basis of the requirements of the chapeau as well as the specific provision. Here, the Appellate Body has greened the Article XX inquiry by ensuring the general design of any measure is not tested for arbitrary or unjustifiable discrimination or disguised restrictions on trade, but rather whether the *application* of the measure fails those tests.

VII Relativity

The final Part of this paper looks at the greening of the GATT in the context of a world that has experienced palpable greening in most areas.

It is all very well and good to demonstrate that the GATT/WTO arena has greened over the past two-to-three decades, considering there are few institutions, especially of such prominence, that have not done so.

The environment and environmental protection have experienced rapid acceleration to the forefront of policy agendas nationally, and internationally, the world over. This fact is undeniable. The escalating increase in concern for, and active protection of, the environment, over recent decades is incontrovertible. It is not within the scope of this paper to conduct a comprehensive analysis into the rise of environmental consciousness, however it is important to point to some excellent indicators.

Universities now offer courses in environmental studies and environmental management, almost all governments have an environmental department, and over 500 international environmental agreements have been concluded since 1972, when the United Nations Environment Programme was

¹⁰⁹ Howard F. Chang, above note 56 at [39].

¹¹⁰ *US-Gasoline* above note 72.

¹¹¹ *Shrimp/Turtle* Appellate Body above note 40 at [115]-[116].

¹¹² *Shrimp/Turtle* Appellate Body at [115]-[116].

first established.¹¹³ In light of such considerations, one cannot escape the criticism that demonstrating that the WTO has greened is not a ground breaking revelation, or even indicative of a positive step. If other organisations have made significant and even gigantic environmental progress, can a slight greening of the WTO and WTO jurisprudence provide hope for environmentalists?

This paper argues that indeed it can. That the particular greening of the WTO that this paper demonstrates is an important development, which is instrumental for the furtherance of global environmental protection. By opening the door to environmental trade measures, the jurisprudence of the DSBs has made an important move, which makes room for *real* action in favour of the environment.

UNEP importantly identified that it is unwise to measure the world's response to environmental challenges by the number of treaties and agreements that have been adopted, even if such measures are landmark conventions.¹¹⁴ UNEP has reported that while there are an impressive number of legal texts concerning the environment reflecting efforts and desires to achieve sustainable development, "many aims and goals of these policy instruments have fallen far short of their original ambition and intentions."¹¹⁵ What *is* instructive, is to measure real progress in solving environmental challenges, real actions, and practical measures.¹¹⁶

The greening of the WTO and WTO jurisprudence is fundamental to the environmental movement and a great leap for many practical and effective actions to solve environmental challenges. Under the reformed WTO jurisprudence Members have much more room to implement environmental protective policies without fear of damaging their domestic industries and economies. A reality of the global economy and the free trade movement is that nation states are loathe to take steps, even in the name of the environment, which may put them at a comparative disadvantage. If the international community believes any trade-related environmental measure will be quashed in dispute settlement proceedings its tendency to adopt those measures will be considerably stifled. In turn, so will its attempts to improve its own industries'

¹¹³ UNEP *Measuring Progress: Environmental Goals & Gaps* United Nations Environment Programme Report (GEO-5) (UNEP, Nairobi, June 2012).

¹¹⁴ UNEP above note 113 at [ii].

¹¹⁵ UNEP, above note 113 at [ii].

¹¹⁶ Ibid

practices. The thesis of this paper is that the new jurisprudence and treatment of Article XX exceptions removes the fear that no measure can succeed, and allows Members to pursue environmentally friendly trade practices.

Most importantly, is the understanding that global free trade is inescapably intertwined with the environment. Increased trade itself, which the WTO promotes, can, as mentioned above, actually increase environmental degradation. Only through the implementation of environmentally friendly trade practices and processes can *that aspect* of environmental harm be cured. By opening the door to trade-related environmental measures, especially unilateral ones, the Appellate Body has provided a setting where countries can adopt such practices and processes and in so doing can influence other Members to live up to the same progressive standard.

Indeed, the particular approach of the Appellate Body to the *chapeau* of Article XX, in requiring measures are not *applied* in a way that is unacceptably discriminatory or a disguised restriction on trade, actually renders two important outcomes for the environment: (1) it ensures that environmental measures are effective in applying to *all* members even-handedly and thus ensuring that those measures will influence *all* members to conform to the standards (if they wish to access the particular market in question) rendering large-scale environmental protection; and (2) it precludes members from misusing the Article XX exceptions to protect their domestic markets and thus prevents the development of an international mistrust and condemnation of trade-related environmental measures generally.

VIII Always Room For Reform

Of course, there will always be room for reform, especially in a setting where the relationship between trade and the environment is so strong. For example, while the TBT recognises the protection of the environment as a legitimate objective, it does not contain an environmental exception similar to article XX.¹¹⁷ Moreover, the DSU requires that when panels are adjudicating disputes under the General Agreement on Trade in Services that regard ‘prudential issues and other financial matters’ panelists must have the necessary expertise to the specific financial service under dispute.¹¹⁸ The DSU unfortunately lacks

¹¹⁷ TBT above note 66.

¹¹⁸ General Agreement on Trade in Services 14 April 1994, article 14 WTO Agreement, Annex 1B Legal Instruments – results of the Uruguay Round, 33 ILM 1168.

an analogous requirement that panelists be experts in the relevant fields in environmental disputes. The Committee on Trade and Environment also has significant room for improvement. The environment and the international community generally would benefit greatly from its coming to agreement more quickly and dedication to affecting actual changes in the WTO.

Nonetheless, the progress made as a result of institutional developments and sophisticated jurisprudence should not be underestimated or undervalued.

IX Conclusion

The desire to liberalise and expand trade and the desire to protect the environment can and do conflict. The WTO/GATT framework has been consistently targeted by environmental organisations as failing to protect the environment during its pursuit of ever-freer trade. This paper does not deny the impact of trade on the environment, nor the fact that the GATT has been less than environmentally conscious in the past. However, it asserts that there has been a progressive greening of the WTO. Through the introduction of the CTE the WTO has institutionally *acknowledged* the importance of the environment, and provided a forum for debate and hopefully change. The overhaul of the DSU provides not only a reliable mechanism for the resolving of disputes, but also for a more rule-oriented and juristic approach to interpretation and application of GATT provisions, thus ensuring the protections afforded by the original drafters are given practical effect. As the Appellate Body quashed each of the tests of prior panels they have opened the door wider and wider for trade-related environmental measures. Not only have they rid the approach to Article XX of arbitrary trade-biased interpretation, but in doing so they have articulated criteria for future measures. In so doing the Appellate Body has prescribed a formula for Member states to follow to ensure their future trade-related environmental measures are both effective and acceptable. This development is instrumental for future environmental protection given the intertwined relationship between trade and the environment. The greening of the WTO is of the utmost importance, especially when one considers the trade measures that will be needed in future years to protect against climate change and ozone depletion.

X Bibliography

A Cases

International – GATT

In Re Canada's Landing Requirements for Salmon and Herring 12 ITRD 1026, 16 October 1989 (Report of the Panel).

United States – Restrictions on the Import of Tuna 39th Supp GATT BISD 155, DS21/R, 3 September 1991 (Report of the Panel, not adopted).

United States – Restrictions on Imports of Tuna DS29/R, 16 June 1994, (Report of the Panel, not adopted).

International – WTO

Brazil – Measures Affecting Imports of Retreaded Tyres WT/DS332/R, 12 June 2007 (Report of the Panel).

Brazil – Measures Affecting Imports of Retreaded Tyres WT/DS332/AB/R, 3 December 2007 (report of the Appellate Body, adopted 17 December 2007).

China – Measures Related to the Exportation of Various Raw Materials WT/DS394/AB/R (30 January 2012) (report of the Appellate Body, adopted on 23 March 2012)

EC Measures Concerning Meat and Meat Products (Hormones) WT/DS26/R, 18 August 1997 (Report of the Panel).

EC Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R, 16 January 1998 (Report of the Appellate Body, adopted 13 February 1998).

European Communities – Measures Affecting Asbestos and Asbestos – Containing Products WT/DS135/R, 18 September 2000 (Report of the Panel).

European Communities – Measures Affecting Asbestos and Asbestos – Containing Products WT/DS135/AB/R 12 March 2001 (Report of the Appellate Body, adopted 5 April 2001).

United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/R, 15 May 1998 (Report of the Panel).

United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body, adopted 6 November 1998).

United States – Import Prohibitions of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 October, 2001 (Report of the Appellate Body, adopted 21 November 2001).

United States – Standards for Reformulated and Conventional Gasoline WT/DS2/R, 29 January 1996 (Report of the Panel).

United States – Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R, 29 April 1996 (Report of the Appellate Body, adopted 20 May 1996).

B Legislation

Sea Turtle Conservation Amendments to the Endangered Species Act, Public Law 101-162, *in particular* section 609, 103 Stat 988, 1037 (November 21 1989) (amending 16 USC section 1537 (1994))

C Treaties

Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 League of Nations Treaty Series 391, Art 4, not in force.

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organisation, 15 April 1989, GATT Doc. MTN/FA, reprinted in 33 ILM 1125, 1144 (1994).

General Agreement on Tariffs and Trade 55 UNTS 194 (opened for signature 30 October 1947, entered into force 1 January 1948).

General Agreement on Trade in Services 14 April 1994, article 14 WTO Agreement, Annex 1B Legal Instruments – results of the Uruguay Round, 33 ILM 1168.

Havana Charter for an International Trade Organisation (ITO Charter), 24 March 1948, <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> not in force.

North American Free Trade Agreements, US-Can-Mex December 17 1992 32 ILM 296 (1993) 32 ILM 605 (1993) *reprinted in* International legal Materials 32:296, 32:605 (1993) [hereinafter NAFTA]. NAFTA was implemented in the United States through Pub L No 103-182, 107 Stat 2057 (1993).

Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 33 ILM 1125.

Vienna Convention on the Law of Treaties, 23 May 1969, 1115 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).

D International Organisation Reports and Declarations

Doha WTO Ministerial Declaration (2001) WT/MIN(01)/DEC/1, 20 November 2001, (Ministerial Declaration).

Report (1996) of the Committee on Trade and Environment, WTO Doc, WT/CTE/W/40, 7 November 1996 (Report of the CTE).

Report (2003) of the Committee on Trade and Environment, WTO Doc, WT/CTE/10, 29 October 2003 (report of the CTE)

Report (2005) of the Committee on Trade and Environment, WTO Doc, WT/CTE/12, 14 October 2005 (Report of the CTE).

Report (2007) of the Committee on Trade and Environment, WTO Doc, WT/CTE/14, 4 December 2007 (report of the CTE).

Report (2009) of the Committee on Trade and Environment, WTO Doc, WT/CTE/16, 30 October 2009 (Report of the CTE).

Report (2011) of the Committee on Trade and Environment, WTO Doc, WT/CTE/18, 21 November 2011 (Report of the CTE).

UNEP *Measuring Progress: Environmental Goals & Gaps* United Nations Environment Programme Report (GEO-5) (UNEP, Nairobi, June 2012).

Working Procedures for Appellate Review WT/AB/WP/1, article 4, (15 February 1996) 35 ILM 501, 504 (1996).

World Trade Organisation, *Understanding the WTO*, (5th ed, WTO, Geneva, July 2011).

E Texts

Jagdish Bhagwati *Free Trade Today* (Princeton University Press, Princeton and Oxford, 2002)

Edward Goldsmith “Global Trade and the Environment” in Michael Russo (ed) *Environmental Management: Readings and Cases* (Houghton Mifflin Company, Boston MA, 1999) 133.

Douglas A. Irwin *Free Trade Under Fire* (Princeton University Press, Princeton and Oxford, 2002).

Jerry Mander and Edmard Goldsmith (eds) *The Case Against the Global Economy: And for a Turn toward the Local* (Sierra Club Books, San Francisco CA, 1997).

James Watson *The WTO and the Environment: Development of competence beyond trade* (Taylor & Francis Ltd Routledge, London, UK, 2012).

F Journal Articles

Dukgeun Ahn “Environmental Disputes in the GATT/WTO: Before and After *US-Shrimp* Case” (1999) 20 Mich. J. Int’l L. 819.

Alberto Berhabe-Riefkohl ““To Dream the Impossible Dream”: Globalisation and Harmonization of Environmental Laws” (1995) 20 NC Journal of International Law and Commerce 205, at [224].

Joseph Robert Berger “Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough For the GATT In the WTO Sea Turtle Case” (1999) 24 Columbia Journal of Environmental Law 355.

Daniel P Blank “Target-Based Environmental Trade Measures: A Proposal For the New WTO Committee on Trade and Environment” (1996) 15 Stanford Environmental Law journal 61.

Dominique M Calapai “International Trade and Environmental Impact: The WTO Reformulated Gasoline Case” (1997) 3 Environmental Lawyer 209.

Howard F. Chang “Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case” (2000) 74 S. Cal. L. Rev. 31.

Steve Charnovitz “A Critical Guide to the WTO’s Report on Trade and Environment” (1997) 14 Ariz. J. Int’l & Comp. L. 341.

Steve Charnovitz “The WTO’s Environmental Progress” (2007) 10 JIEL 685

Alimpan Chatterjee, Deya Battacharya and Sonali Banerjee “Guised in Green: Uncloaking the Myth of World Trade Organisation’s Trade-Environment Harmony” (2009) 1 Am. J of Economics and Business Administration 243.

Elizabeth R. DeSombre and J. Samuel Barkin “Turtles and Trade: WTO’s Acceptance of Environmental Trade Restrictions” (2002) 2 Global Environmental Politics 12.

Sara Dillon “Trade and the Environment: A Challenge to the GATT/ATO Principle of “Ever-Freer Trade”” (1996) 11 Journal of Civil Rights and Economic Development 351.

Danielle Spiegel Feld and Stephanie Switzer “Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After *China-Raw Materials* (2012) 38 Yale Journal of International Law Online 16.

Sean T Fox “Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere” (1996) 84 Georgetown Law Journal 2499.

Sanford Gaines “The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restrictions on Environmental Measures” (2001) 22 U. Pa. J. Int’l Econ. L. 739.

Robert Howse “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate” (2002) 27 Colum. J. Envtl. L. 491.

Layla Hughes “Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision” (1998) 10 *Geo. Int’l Env’tl. L. Rev.* 915.

John H Jackson “Introduction and Overview: Symposium on the First Three Years of the WTO Dispute Settlement System” (1998) 32 *Int’l Law* 613

Abigail R Jahiel “China, the WTO, and the implications for the environment” (2006) 15 *Environmental Politics* 310.

Daniel Krause “Environmental Consciousness: An Empirical Study” (1993) 25 126.

Nikolaos Lavranos “The Brazilian Tyres Case: Trade Supersedes Health” (2009) 1 *Trade Law & Development* 230.

Rachel McCormick “A Qualitative Analysis of the WTO’s Role on Trade and Environment Issues” (2006) 6 *Global Environmental Politics* 102.

Mike Meier “GATT, WTO, and the Environment: To What Extent Do GATT?WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?” (1997) 8 *Colo. J. Int’l Env’tl. L. & Pol’y* 241.

Miquel Montana I Mora “A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes (1993) 31 *Columbia Journal of Transnational Law* 103

Eric Neumayer “The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak” (2004) *Global Environmental Politics* 1.

Philip M Nichols “Corruption in the World Trade Organisation: Discerning the Limits of the World Trade Organisation’s Authority” (1988) 28 *NYU Journal of International Policy* 711.

Varamon Ramangkura “Thai Shrimp, Sea Turtles, Mangrove Forests and the WTO: Innovative Environmental Protection Under the International Trade Regime” (2003) 15 *Georgetown Int’l Env’tl. Law Review* 677.

Jennifer Schultz “The GATT/WTO Committee on Trade and the Environment – Toward Environment Reform” (1995) 89 *The American J. of Int’l L.* 423.

Gregory Shaffer “The World Trade Organisation under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters” (2001) 25 *Harv. Env’tl. L. Rev.* 1.

Steven Shrybman “Trading Away The Environment” (1991) 9 *World Policy Journal* 93.

Richard Skeen “Will the WTO Turn Green? The Implications of Injecting Environmental Issues into the Multilateral Trading System” (2004) 17 *Georgetown Int’l Env’t. L. Rev.* 161.

Christopher Tran “Using GATT, Art XX to justify climate change measures in claims under the WTO Agreements” (2010) 27 *EPLJ* 346.

Carrie Wofford “A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT” (2000) 24 *Harv. Env’t. L. Rev.* 563.

Chris Wold “Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements” (2009) 28 *Saint Louis University Public Law Review* 201.

Yuhong Zhao “Trade and Environment: Challenges After China’s WTO Accession” (2007) 32 *Columbia Journal of Environmental Law* 41.

G *Journal Articles – Institutional Authors*

International Centre for Trade and Sustainable Development “GATT-Zilla vs. Flipper revisited? The tuna-dolphin dispute’s second round” (2011) 5 *BioRes Review* 8.

Marie Wilkie “Litigating Environmental Protection and Public Health at the WTO: The *Brazil-Retreaded Tyres Case*”(September 2011) 1 *Information Note Institutional Centre for Trade and Sustainable Development* 1.

H *Unpublished Texts*

Sonia Gabiatti “Trade-Related Environmental Measures Under GATT Article XX(b) and (g)” (LLM Dissertation in Intentional and Environmental Law, University of Iceland, 2009)

I *Internet Resources*

““GATT-Zilla vs. Flipper” Dolphin Case Demonstrates How Trade Agreements Undermine Domestic Environmental, Public Interest Policies” (11 April 2003) *Public Citizen* < http://www.citizen.org/trade/article_redirect.cfm?ID=9298>

Greenpeace UK “Greenpeace acts against “Environmental Trade Off” at Doha” (November 2001) *Greenpeace* <<http://www.greenpeace.org.uk/about/greenpeace-acts-against-environmental-trade-off-at-doha>>

MEPA “Rise In Awareness on Environmental Issues” (July 2010) *Malta Environment & Planning Authority* < <https://www.mepa.org.mt/outlook4-article17>>

OECD (2013) < <http://www.oecd.org/environment/>>

Rob Pigue “Environmental Consciousness: Human Motivation for Thinking Ecologically”
(22 December 2010) Fordham University

<http://www.fordham.edu/images/academics/programs/environmental_studies/studentessay_pigue-del.pdf>

Steven Shrybman “An Environment Guide to the World Trade Organisation” (May 1997)
Sierra Club < <http://www.sierraclub.ca/national/programs/sustainable-economy/trade-environment/env-guide-wto.html>>

UNEP (2013) < <http://www.unep.org/About/>>

WTO “Legal texts: the WTO agreements” (2013) WTO
< http://www.wto.org/english/docs_e/legal_e/final_e.htm>

World Trade Organisation (2013) < <http://www.wto.org/>>.