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# International Trade Law

## Legal Entanglement on the WTO's Own Terms

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### 8.1 Introduction

Ever since the inception of the contemporary globalized trade regime, environmental concerns found their way into the regulatory system framed by international trade law. The interaction (and tension) between trade and environmental interests further intensified with the development of international environmental law, and global trade was placed under the scrutiny of two overlapping regulatory regimes which are commonly perceived as having diverging aims and rationales. A pronounced outlet for this relationship was found within the World Trade Organization (WTO) system, particularly in trade disputes in which WTO rules interacted with public policies seeking to address environmental externalities. This chapter explores the way in which the relationship between international trade law and norms governing environmental protection are construed from within the WTO dispute settlement system. The findings shine a light on evolving forms of *legal entanglement* that challenge the dominant perception of the WTO as an insular regime *prima facie* hostile to international environmental law. Surprisingly, the analysis shows that even in controversial trade environment disputes (e.g. infamously *Tuna Dolphin I*), all parties to the dispute routinely refer to norms of international environmental law to make their respective claims. With respect to the Panels and the Appellate Body, the findings indicate that external environmental norms are allowed to penetrate WTO law more often than commonly assumed, although such linkages do not necessarily result in more 'environmentally friendly' interpretations/applications of trade law. Moreover, without centralized coordination, WTO judicial bodies tend to construe the relationship with outside norms in an ad hoc and discretionary way, relying on 'interface norms' to invoke external rules of international environmental law on a

case-by-case basis, while keeping them formally at bay. Although the mechanisms of relationing employed by the WTO judicial bodies may seem unprincipled at first glance, an analysis over time reveals how the Panels and the Appellate Body repeatedly emphasize certain attributes in their treatment of outside norms (such as multilateralism, inclusiveness and consensus), and have allowed for more progressive interpretations to evolve over time (through so-called irritative norm conflict).

## 8.2 Trade and Environment: Resetting the Stage for an Age-Old Debate

### 8.2.1 *Trade and Environment: Unresolved Tensions and Emerging Forms of Entanglement*

The General Agreement on Tariffs and Trade (GATT) was signed in 1947 on the cusp of what has been dubbed the ‘Great Acceleration’, a period of intensified human impact on the Earth that over the latter half of the twentieth century significantly contributed to the global environmental challenges we face today.<sup>1</sup> International environmental law was still in its ‘early glimmers’.<sup>2</sup> Nevertheless, the 1947 GATT already ‘recognized environmental concerns in its Article XX(b) and (g) exceptions’.<sup>3</sup> By 1994, and the founding of the WTO, the extent of human-wrought environmental degradation had become increasingly apparent, and international environmental law had developed and matured into its modern incarnation of a sprawling global governance complex. Two years prior, the United Nations Conference on Environment and Development had taken place in Rio de Janeiro, and produced a number of instruments, including the Rio Declaration, Agenda 21, the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biodiversity (CBD).

Notably, modern international environmental law evolved within an international legal environment in which international trade rules were already long established and could not be ignored. The drafters in Rio took these existing legal structures into account by explicitly integrating international trade norms into the new instruments. Principle 12 of the

<sup>1</sup> W. Steffen, W. Broadgate, L. Deutsch, O. Gaffney and C. Ludwig, ‘The Trajectory of the Anthropocene: The Great Acceleration’ (2015) 2 *The Anthropocene Review* 81–98.

<sup>2</sup> E. B. Weiss, ‘The Evolution of International Environmental Law’ (2011) 54 *Japanese Yearbook of International Law* 1–27, at 2.

<sup>3</sup> *Ibid.*, 12.

Rio Declaration, for example, emphasizes the importance of 'an open international economic system' and states that '[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade', which is almost a word-for-word copy of the *chapeau* of GATT Article XX.<sup>4</sup> Notably, the same wording is reproduced in Article 3(5) of the UNFCCC.<sup>5</sup> Thus, international environmental law was actively *entangled* with the body of norms that governs the multilateral trading system.

From within the trade law sphere, efforts at legal entanglement with international environmental law were more tentative. While a reference to sustainable development was included in the preamble to the Marrakesh Agreement establishing the WTO (1994), the 1947 GATT was incorporated wholesale into the new WTO Agreement, with no changes or additions to the environmental provisions of the original text indicating how WTO law should relate to international environmental law. This was problematic because a host of new multilateral environmental agreements (MEAs) had sprung up since 1947, some of which explicitly relied on potentially GATT-inconsistent trade measures for their implementation (e.g. the Basel Convention and the Montreal Protocol).<sup>6</sup> Further, the extent to which WTO rules restricted national environmental policy space also remained unclear, particularly in relation to environmental measures targeting processing and production methods (PPMs) and the applicability of the precautionary principle.<sup>7</sup>

The lack of relationing can be explained by GATT signatories' diverging interests with regard to trade and environment concerns at the time (and still prevailing today). While developed countries supported the integration of environmental standards into international trade policy to counter 'environmental dumping', developing countries resisted, fearing market access restrictions due to 'green protectionism'.<sup>8</sup> Thus, a meaningful debate for greater integration of environmental concerns *within* the trade regime was 'out of the question'. Politically, the

<sup>4</sup> United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' (New York, 1992), Principle 12.

<sup>5</sup> UNEP, 'United Nations Framework Convention on Climate Change (UNFCCC)' (1992).

<sup>6</sup> A. Tancredi, 'Trade and Inter-Legality', in J. Klabbers and G. Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press, 2019), pp. 158–87, at p. 159.

<sup>7</sup> T. Santarius, H. Dalkmann, M. Steigenberger and K. Vogelwohl, 'Balancing Trade and Environment: An Ecological Reform of the WTO', Wuppertal Papers (2004), p. 63.

<sup>8</sup> *Ibid.*, p. 10.

‘environmental critique [also] came at an awkward time for GATT signatories since the Uruguay Round entered a deep crisis in the early 1990s, and the agricultural dispute between the USA and the EU threatened to scupper talks’.<sup>9</sup> Thus, an opportunity for entanglement – or at least clarification – between the two bodies of norms was missed. This state of affairs was supposed to be remedied in the subsequent Doha Round of trade negotiations, which gave members a mandate to negotiate the relationship between WTO rules and specific trade obligations set out in MEAs.<sup>10</sup> The talks failed however (they were finally abandoned in 2015),<sup>11</sup> and thus a second opportunity for ‘enhancing mutual supportiveness’ was missed. Instead, it became incumbent upon the dispute settlement bodies to mediate the relationship between free trade and environmental protection (and, by extension, the ‘clash of interests’ between developed and developing countries).

### 8.2.2 *The Question of Insularity*

According to the provisions of the Dispute Settlement Understanding (DSU) the WTO dispute settlement mechanism ‘has exclusive [as well as compulsory and quasi-automatic] jurisdiction to resolve disputes arising from violations of the WTO covered agreements’.<sup>12</sup> The WTO Dispute Settlement Body (DSB) in particular has ‘the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements’.<sup>13</sup> Without a centralized mechanism for resolving international trade and environment conflicts, nor a specialized environmental court, the DSB has become central to coordinating the relationship between WTO law and international environmental law. The Panels’ and the Appellate Body’s (unanticipated and unofficial) role in mediating the

<sup>9</sup> *Ibid.*, p. 10.

<sup>10</sup> WTO, ‘WTO Ministerial Declaration Adopted on 14 November 2001’ (20 November 2001) WT/MIN(01)/DEC/1, para. 31.

<sup>11</sup> R. Howse, ‘The World Trade Organization 20 Years on: Global Governance by Judiciary’ (2016) 27 *European Journal of International Law* 9–77.

<sup>12</sup> G. Marceau, ‘The Primacy of the WTO Dispute Settlement Mechanism’ (2015) 23 *Questions of International Law* 3–13, at 4.

<sup>13</sup> Article 2(1) of the WTO DSU on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

relationship between WTO law and external norms raises the question of whether (and to what extent) international law not contained in the covered agreements is applicable in WTO dispute settlement.

While the majority of scholars maintain a restrictive view regarding the extent to which other norms of international law may influence the interpretation and application of WTO law,<sup>14</sup> others have pointed out that the DSU does not contain an explicit limitation with regard to the applicable law.<sup>15</sup> The distinction between the *jurisdiction* of the WTO DSB and *applicable law* in WTO dispute settlement is relevant here.<sup>16</sup> While the *jurisdiction* of the WTO DSB is restricted to *disputes arising out of the covered agreements*,<sup>17</sup> WTO law contains no explicit provision which identifies or restricts the *law that should apply* to the disputes.<sup>18</sup> Thus, international law from *all sources* is potentially applicable as WTO law. Such a reading seems to be supported by the Panel in *Korea-Government Procurement*, which held that 'Customary international law applies generally to the economic relations between the WTO Members [...] to the extent that the WTO treaty agreements do not "contract out" from it.'<sup>19</sup> The Panel saw no basis 'for arguing that the terms of reference [set out in the DSU] are meant to exclude reference to

<sup>14</sup> G. Z. Marceau, 'A Call for Coherence in International Law' (1999) 33 *Journal of World Trade* 87–152; J. P. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333–77; G. Z. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions, the Relationship between the WTO Agreement and Meas and Other Treaties' (2001) 35 *Journal of World Trade* 1081–131, at 1116.

<sup>15</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), p. 460. Pauwelyn argues that the applicable law before a WTO panel is limited only by four factors: the claims that can be brought to a WTO panel; the defences invoked by the defending party; the scope of the relevant rules *ratione materiae*, *ratione personae* and *ratione temporis*; and any conflict rules in the WTO treaty, general international law and other non-WTO treaties.

<sup>16</sup> *Ibid.*, p. 460.

<sup>17</sup> Articles 1(1), 3(2), 7(1) and 11 of the DSU.

<sup>18</sup> L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *Journal of World Trade* 499–519, at 504 *et seq.* Article 7 of the DSU, for example, has been used to justify both closed and open positions with regard to the applicable law in WTO dispute settlement procedures – although the provision itself is rather ambiguous. Indeed, while Article 7 requires Panels to examine disputes 'in light of' relevant provisions in the covered agreements, and to address relevant provisions in any covered agreement cited by the parties to the dispute, it does not prevent Panels from addressing other sources of law in the course of deciding the dispute.

<sup>19</sup> Korea – Measures Affecting Government Procurement (2000) WTO Doc. WT/DS163/R, para. 7.96.

the broader rules of customary international law'.<sup>20</sup> There is no reason to assume why the same logic should not also apply with regard to the external rules of treaty law (applicable between the parties).

The degree to which 'external' international law has a bearing on WTO law is thus largely up to the discretion of the WTO dispute settlement bodies. However, the Panels and the Appellate Body are viewed as having made insufficient use of this flexibility,<sup>21</sup> and have been criticized for creating 'a value hierarchy that [favours] trade over environmental concerns and [operates] as a barrier to the integration of environmental considerations into the law of the GATT/WTO'.<sup>22</sup> Thus, the dominant perception of international trade law is of a distinct legal system that is bounded, rigid and hostile to environmental norms and considerations. The following account of irritative norm conflict complicates this picture.

### 8.3 Irritative Norm Conflict and Contingent Forms of Entanglement over Time

The debate about whether trade liberalization and environmental protection are in conflict with one another is not new and does not need to be rehashed in detail here.<sup>23</sup> Suffice to say that many environmentalists and scholars have long criticized the legal framework established by the GATT and the WTO as 'inherently biased against environmental protection and towards economic growth'.<sup>24</sup> GATT jurisprudence, beginning with the *Tuna Dolphin I*, seemed to confirm the prioritization of international trade obligations vis-à-vis environmental protection.<sup>25</sup> However, a close reading of the trade and environment disputes *over time* reveals subtle shifts in the relationship between the WTO and environmental norms and a modicum of responsiveness of the GATT – and later the WTO – dispute settlement bodies towards evolving social context and external pressures, most prominently in *Shrimp-Turtle*.

<sup>20</sup> *Ibid.*, para. 7.101.

<sup>21</sup> Tancredi, 'Trade and Inter-Legality'.

<sup>22</sup> O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart Publishing, 2004), p. 51.

<sup>23</sup> Trachtman, 'The Domain of WTO Dispute Resolution'.

<sup>24</sup> M. Jeffery, 'Environmental Imperatives in a Globalized World: The Ecological Impact of Liberalizing Trade' (2007) 7 *Macquarie Law Journal* 25–52, at 29.

<sup>25</sup> J. P. Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58 *Harvard International Law Journal* 273–310.

Disputes brought before the WTO DSB constitute important historical 'flashpoints' for the study of legal entanglement, as they galvanize actors to formulate claims about the relationship between international trade law and other bodies of norms in legal terms.

### 8.3.1 *Tuna Dolphin I*

#### 8.3.1.1 Overview

*Tuna Dolphin I* was a highly controversial trade and environment case brought to the GATT dispute settlement mechanism by Mexico in 1991.<sup>26</sup> The dispute concerned US measures aimed at reducing dolphin mortality incidental to tuna fishing, a practice common in the Eastern Tropical Pacific (ETP) region. The measures comprised an embargo on yellowfin tuna caught with purse seine nets in the ETP, certification requirements for imported tuna and a prohibition on marking tuna products harvested in the ETP with purse seine nets as 'dolphin safe'. While the dispute became notorious for the Panel's hard-line position on environmental trade measures, it is notable from the perspective of legal entanglement as – contrary to expectations – both parties to the dispute referred to international environmental law to support their respective claims. *Tuna Dolphin I* was closely followed by the filing of a second dispute in 1992 – known as *Tuna Dolphin II* – in which the European Communities (EC) challenged the United States' secondary embargo against countries that re-exported tuna from countries under the primary embargo.<sup>27</sup>

#### 8.3.1.2 Legal Entanglement

Notably, both the United States and Mexico implicitly accepted the relevance of international environmental treaty law to the dispute at hand (in addition to relevant GATT provisions). The United States, invoking the Convention on International Trade in Endangered Species (CITES), argued that countries should not be forced to allow access to their markets as an incentive to depleting the populations of species that are vital components of the ecosystem.<sup>28</sup> Mexico countered by stating

<sup>26</sup> United States – Restrictions on Imports of Tuna – Report of the GATT Panel, (3 September 1991) DS21/R (unadopted) ('Tuna Dolphin I').

<sup>27</sup> United States – Restrictions on Imports of Tuna – Report of the GATT Panel, (16 June 1994), DS29/R (unadopted) ('Tuna Dolphin II').

<sup>28</sup> *Tuna Dolphin I* Panel report, para. 3.49.

that CITES 'did not include in its Appendix I list of species in danger of extinction any of the species of dolphins which the United States was claiming to protect'.<sup>29</sup>

The Panel, finding a violation of the GATT's substantive provisions (relating to quantitative restrictions and non-discrimination), turned to the environmental exceptions contained in GATT Article XX. In a fateful decision, the Panel interpreted a purely domestic scope to Article XX and ruled that its exceptions could not be invoked to justify extraterritorial measures.<sup>30</sup> Trade restrictions in response to other countries' environmental policies or practices were per se inconsistent with the GATT.<sup>31</sup> However, the Panel proceeded to argue that even if the GATT permitted extraterritorial protection of life and health, the United States had to first exhaust all GATT-consistent measures available to it, in particular through the negotiation of international cooperative agreements.<sup>32</sup> This reasoning already hints at a general (though still implicit) understanding that environmental measures should be based on multilateral consensus in order to be taken into account by the WTO DSB/within the GATT framework, a notion that was further developed in subsequent case law.

Ultimately, the Panel ruled in favour of Mexico, concluding that the US trade embargo was inconsistent with the GATT and not justified under Article XX. Crucially, the Panel also set up the 'infamous product/process distinction' – prompting a debate that continues to this day – by ruling that the US was not allowed to embargo tuna products from Mexico based on the way tuna was *produced*.<sup>33</sup> The Panel took a more environmentally favourable stance with regard to the 'dolphin-safe' label, ruling that it did not violate the GATT 'because the labelling regulations governing the tuna caught in the ETP [...] applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries'.<sup>34</sup> Notably, this measure became subject to a subsequent

<sup>29</sup> *Ibid.*, para. 3.44.

<sup>30</sup> *Tuna Dolphin I* Panel report, para. 5.28.

<sup>31</sup> Howse, 'The World Trade Organization 20 Years On', 36. The rulings in *Tuna Dolphin I* and *II* are widely regarded as having no textual basis in the GATT but to have been informed instead by 'some intuitive notion that allowing trade measures to address global environmental externalities was somehow countenancing the slippery slope towards unconstrained green protectionism'.

<sup>32</sup> *Tuna Dolphin I* Panel report, para. 5.28.

<sup>33</sup> *Ibid.*, para. 5.12 – 5.15. Also see Howse, 'The World Trade Organization 20 Years On', 37.

<sup>34</sup> *Tuna Dolphin I* Panel report, para. 5.43–5.44.



dispute brought by Mexico in 2008, in *US-Tuna II*. The Panel reports in *Tuna Dolphin I (1991)* and *II (1994)* were never adopted due to the consensus requirement under old GATT dispute settlement rules.<sup>35</sup>

### 8.3.1.3 Aftermath

Although the report remained unadopted, the Panel's reasoning in *Tuna Dolphin I* generated widespread 'controversy over the capacity of the multilateral trading system to accommodate legitimate environmental concerns'.<sup>36</sup> The United States, arguably one of the most powerful 'shapers' of the GATT/WTO legal regime, threatened to push for amendments to the GATT in light of international environmental objectives.<sup>37</sup> Proposals made towards this endeavour included a new 'Environmental Code' as a side agreement to the GATT and establishing an international tradeable pollution allowance system (similar to what was later instituted in the Kyoto Protocol) under the auspices of the GATT.<sup>38</sup> Although neither of the *Tuna Dolphin I and II* Panels' reports were ever adopted and they retained little to no legal value following subsequent Appellate Body rulings, they significantly contributed to the perception of WTO insularity in relation to global environmental concerns.<sup>39</sup>

## 8.3.2 *Shrimp-Turtle*

### 8.3.2.1 Overview

The legal outcome of the *Shrimp-Turtle* dispute was seen by many environmentalists as a breakthrough in the trade environment debate, indicating a more environmentally friendly interpretation of WTO law

<sup>35</sup> The new WTO dispute settlement mechanism instituted a reverse consensus rule, making the adoption of post 1994 panel reports virtually automatic.

<sup>36</sup> World Trade Organization, *CITES and the WTO: Enhancing Cooperation for Sustainable Development* (WTO, 2015) p. 3.

<sup>37</sup> T. E. Skilton, 'GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy' (1993) 26 *Cornell International Law Journal* 455–94. The US House of Representatives promptly passed a resolution mandating the US representative to actively seek GATT reform in order to make international trade rules more amenable to national and international environmental laws and to secure a working party on trade and environment within the GATT as soon as possible.

<sup>38</sup> *Ibid.*, 192.

<sup>39</sup> G. M. Duran, 'NTBs and the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures Following US – Tuna II and EC – Seal Products' (2015) 6 *European Yearbook of International Economic Law* 87–136, at 109.

by the DSB. The dispute was brought jointly by India, Malaysia, Pakistan and Thailand, challenging a US environmental measure prohibiting the import of shrimp harvested without the use of Turtle Excluder Devices (TEDs). Not using TEDs during shrimp harvesting was linked to a high number of deaths of endangered species of sea turtles. The measures in *Shrimp-Turtle* 'were thus closely analogous' to those in *Tuna Dolphin* with the crucial difference that sea turtles were listed as endangered species in CITES.<sup>40</sup>

### 8.3.2.2 Legal Entanglement

Like in *Tuna Dolphin I*, both the complainants and the defendant state invoked outside environmental norms – especially treaty law – to support their respective claims. The United States referred to the CITES Appendix I, implying that CITES provided a legal basis for its environmental trade measure.<sup>41</sup> The USA further claimed that the use of TEDs had evolved into an international standard, invoking Agenda 21<sup>42</sup> as well as the UN Fish Stocks Agreement to support its claim.<sup>43</sup> The complainants, on the other hand, argued that the US measure was not only in violation of the GATT but also inconsistent with CITES: while CITES did prohibit trade in sea turtles, it did not sanction restrictions on *shrimp* imports as shrimp were not an endangered species listed in any of CITES's annexes.<sup>44</sup>

The reference to sustainable development in the Preamble of the WTO Agreement significantly altered the 'backdrop' against which substantive WTO obligations were to be interpreted. The USA noted that the WTO Agreement was the first multilateral trade agreement concluded after the Rio Conference, and argued that trade rules should now operate 'in a manner that [respected] the principle of sustainable development and [protected] and [preserved] the environment'.<sup>45</sup> The complainants,

<sup>40</sup> Howse, 'The World Trade Organization 20 Years On', 37.

<sup>41</sup> United States – Import prohibition of certain shrimp and shrimp products – Panel Report (15 May 1998) WT/DS58/R (*Shrimp-Turtle*), para. 3.94. Additionally, the USA also invoked the UN Convention on the Law of the Sea (UNCLOS) Articles 61(2), (4) and 119(1)(b), and Agenda 21 in support of this claim.

<sup>42</sup> *Shrimp-Turtle* Panel report, para. 7.57. Specifically, the USA referred to paragraph 17.46 (c) of Agenda 21, which promotes 'the development and use of selective fishing gear and practices that minimize [...] the bycatch of non-target species' as a 'multilateral environmental standard to minimize bycatch'.

<sup>43</sup> *Shrimp-Turtle* Panel report, para. 3.95.

<sup>44</sup> *Ibid.*, paras 3.5 and 3.98 (India); para. 3.221 (Malaysia).

<sup>45</sup> *Ibid.*, para. 3.146.

however, were quick to qualify of the reference to sustainable development by reading it in light of the principle of sovereignty and the special rights of developing countries under the WTO framework.<sup>46</sup>

The dispute forced the Panel to revisit the question of extraterritoriality in relation to Article XX of the GATT. Although both the United States and the complainants had put forward arguments relating to how Article XX should be interpreted in light of outside norms (inter alia UNCLOS<sup>47</sup> and general principles of international law<sup>48</sup>), the Panel restricted itself to interpreting Article XX within the object and purpose of WTO law and relevant jurisprudence. Echoing the GATT Panel's reasoning in *Tuna Dolphin I*, it found that Article XX could not justify measures conditioning market access upon the adoption of certain environmental policies by exporting members as that would threaten the security and predictability of the multilateral framework for trade.<sup>49</sup>

The Panel did not completely ignore international environmental law, however. It drew on the Rio Declaration to interpret the reference to sustainable development in the WTO Agreement, but used it to emphasize the right of each state to design its own environmental policies on the basis of its particular environmental and developmental situations.<sup>50</sup> The Panel further emphasized the principle of international cooperation by reference to inter alia Article 5 of the CBD (despite the USA not being a party to the CBD).<sup>51</sup> The Panel found that instead of resorting to unilateral measures the USA should have entered into negotiations to develop internationally accepted conservation methods.<sup>52</sup>

The Panel proceeded to examine whether international environmental law provided a justification for the WTO-inconsistent measure.<sup>53</sup>

<sup>46</sup> Pakistan, for example, referred to the concept of sustainable development as an environmental norm to be taken into consideration *while Pakistan exercises its sovereignty to decide on the conservation measures to be taken within its jurisdiction* (*ibid.*, para. 3.54). Pakistan also noted that the preamble required members to enhance their means for protecting and preserving the environment *in a manner consistent with the member's respective needs and concerns at different levels of economic development* (para. 3.85).

<sup>47</sup> *Ibid.*, para. 3.95; para. 3.41; and para. 3.157.

<sup>48</sup> *Ibid.*, para. 3.274.

<sup>49</sup> *Ibid.*, para. 7.45.

<sup>50</sup> *Shrimp-Turtle* Panel report, para. 7.52.

<sup>51</sup> Article 5 of the CBD promotes the principle of international cooperation when it comes to matters of mutual interest for the conservation and sustainable use of biological diversity.

<sup>52</sup> *Shrimp-Turtle* Panel report, para. 7.53.

<sup>53</sup> *Ibid.*, para. 7.58 et seq.

The Panel concluded that CITES ‘neither authorized nor prohibited’ the US import prohibition as it was directed at shrimp and not listed species of sea turtles.<sup>54</sup> Furthermore, while acknowledging that UNCLOS and Agenda 21 addressed the objective of limiting by-catches of non-target species in trawling operations, the Panel noted that these instruments do not require the application of specific methods.<sup>55</sup>

Even though the Panel’s finding in *Shrimp-Turtle* is generally regarded as an environmental setback (primarily due to its restrictive interpretation of Article XX), it is remarkable from the standpoint of legal entanglement as all parties involved in the dispute *frequently and directly* referred to external environmental norms/instruments to support their claims. Notably, international environmental law was invoked both to support a flexible (i.e. environmentally friendly) as well as a more restrictive (i.e. trade-friendly) interpretation of GATT Article XX.

### 8.3.2.3 Appeal

On appeal, the Appellate Body acknowledged the right of WTO members to legislate for the protection of natural resources extraterritorially, overruling the Panel’s finding.<sup>56</sup> Accordingly, Article XX *could* justify measures conditioning market access on the adoption of certain conservation policies by exporting members.<sup>57</sup> Contrary to the Panel, the Appellate Body proceeded to take full advantage of the reference to sustainable development in the WTO Agreement in order to interpret the environmental exceptions of Article XX. It noted that the preamble gives ‘colour, texture and shading’ to the substantive obligations in the WTO agreements.<sup>58</sup> In particular, the Appellate Body held that because migratory sea turtles were listed under CITES as being in danger of extinction, they constituted ‘exhaustible natural resources’ within the

<sup>54</sup> *Ibid.*, para. 7.58.

<sup>55</sup> *Ibid.*, para. 7.59.

<sup>56</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products – Appellate Body Report (12 October 1998) WT/DS58/AB/R, paras 121–2.

<sup>57</sup> Duran, ‘NTBs and the WTO Agreement on Technical Barriers to Trade’, 110. See also *Shrimp-Turtle* Appellate Body Report, para. 121: ‘It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.’

<sup>58</sup> D. A. Wirth, ‘Some Reflections on Turtles, Tuna, Dolphin, and Shrimp’ (1998) 9 *Yearbook of International Environmental Law* 40–7, at 42.

meaning of Article XX(g) of the GATT.<sup>59</sup> The Appellate Body further stated that '[t]he words of Article XX(g) "exhaustible natural resources" [...] must be read by a treaty interpreter in the light of *contemporary concerns of the community of nations* about the protection and conservation of the environment [...]. From the perspective embodied in the Preamble of the WTO Agreement, the generic term of "natural resources" in Article XX(g) is not "static" in its content or reference but is rather, "by definition evolutionary".'<sup>60</sup>

Ultimately, however, the Appellate Body found that while 'the overall approach of the US shrimp ban was acceptable under the WTO', the USA had failed to do justice to the requirements of the *chapeau* of Article XX.<sup>61</sup> The Appellate Body held that in its application, the US measure had 'intended an actual coercive effect on the specific policy decisions made by foreign governments' since the application of the measure required other WTO members to demonstrate that a regulatory scheme was in place, which was essentially the same as in the USA.<sup>62</sup> In addition, the Appellate Body also faulted the United States for having negotiated seriously with some but not other members about arrangements for sea turtle protection (as an alternative to the embargo), which had a discriminatory effect.<sup>63</sup> To determine whether the discrimination was also 'unjustifiable' in relation to the stated objective of protecting sea turtles, the Appellate Body turned to international environmental law.<sup>64</sup> Invoking the Rio Declaration (Principle 12), Agenda 21 and the CBD (Article 5), the Appellate Body found that the protection and conservation of highly migratory species of sea turtles demanded 'concerted and co-operative efforts',<sup>65</sup> and that, in general, transboundary/global environmental problems should be dealt with through cooperation and consensus to the greatest extent possible.<sup>66</sup>

<sup>59</sup> *Shrimp-Turtle* Appellate Body Report, paras 128–31.

<sup>60</sup> *Shrimp-Turtle* Appellate Body Report, paras 129–30.

<sup>61</sup> Howse, 'The World Trade Organization 20 Years On', 42.

<sup>62</sup> M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2010), p. 664.

<sup>63</sup> P. Sands, J. Peel and R. MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 2012), p. 970.

<sup>64</sup> R. Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491–521, at 506.

<sup>65</sup> *Shrimp-Turtle* Appellate Body Report, para. 168.

<sup>66</sup> Sands, Peel and MacKenzie, *Principles of International Environmental Law*, p. 970.

### 8.3.2.4 Aftermath

Following the Appellate Body's ruling, which concerned the discriminatory *application* of the US measure, the United States made modifications in order comply with the ruling. Nevertheless, one of the original complainants, Malaysia, brought a compliance action under Article 21.5 of the DSU, 'where it sought to reintroduce arguments about the *per se* unacceptability of trade measures to target other countries' environmental policy'.<sup>67</sup> However, the Appellate Body 'held its ground', '[pronouncing] itself fully satisfied that the USA had addressed its concerns under the chapeau', while '[expressing] surprise that Malaysia would, in effect, challenge the authority of the Appellate Body's original ruling with arguments apparently inconsistent with it'.<sup>68</sup> The rulings in *Shrimp-Turtle* and the subsequent compliance proceedings thus represent a significant departure from the way the *Tuna Dolphin* cases had been handled by the GATT Panels. The Appellate Body corrected previous rulings with regard to PPM-based measures and extraterritorial environmental trade measures, while signalling a larger degree of deference towards members' environmental objectives.

## 8.3.3 *EC-Hormones*

### 8.3.3.1 Overview

The *EC-Hormones* dispute before the WTO illustrates how the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) operates in relation to international standards and in relation to other norms of international law, specifically the precautionary principle.<sup>69</sup> Like the Agreement on Technical Barriers to Trade (TBT Agreement) (see *US-Tuna II*), the SPS Agreement goes beyond the non-discrimination principles enshrined in the GATT by promoting 'global regulatory harmonization through the application of international standards'.<sup>70</sup> By requiring WTO members to base their measures on either international standards or on science and risk assessment (Articles 3.1

<sup>67</sup> Howse, 'The World Trade Organization 20 Years On', 41.

<sup>68</sup> *Ibid.*, 42.

<sup>69</sup> European Communities – Measures Concerning Meat and Meat Products (Hormones) (Canada) – Panel report (19 August 1997) WT/DS48/R/CAN; European Communities – Measures Concerning Meat and Meat Products (Hormones) (US) – Panel report, (18 August 1997) WT/DS26/R/USA ('EC Hormones').

<sup>70</sup> Tancredi, 'Trade and Inter-Legality', p. 171.

and 3.2), the SPS Agreement actively encourages legal entanglement in the area of sanitary and phytosanitary measures. The SPS Agreement explicitly recognizes specific international standardizing bodies as points of reference for compliance, including the Codex Alimentarius Commission (CAC).<sup>71</sup> Conformity with Codex standards implies conformity with WTO law,<sup>72</sup> whereas a member's decision to set standards higher than Codex standards is subject to a higher burden of proof to defend its own measures.

From the perspective of legal entanglement, the implications of this active coupling mechanism between the SPS Agreement and international standards versus the way WTO law relates to other norms of international law is significant. The WTO's contrasting approaches to entanglement are best demonstrated in the *EC-Hormones* case. In the 1990s, following widespread public concern, the European Council introduced a set of measures prohibiting the placing on the market of hormone-injected meat. In 1996, the United States challenged these measures and brought the dispute before the WTO alleging violations of inter alia the SPS Agreement.<sup>73</sup>

### 8.3.3.2 Legal Entanglement

The CAC had already developed standards for some of the hormonal substances concerned. The USA therefore contested the EC's measures on the grounds that they *were not based on the relevant international standards, guidelines or recommendations* and that this departure from international standards could not be scientifically justified. The EC countered that WTO members had the right to choose their own levels of protection, which may be higher than those recommended by international standards, invoking the *precautionary principle* as a justification for a higher protection level.<sup>74</sup> While the SPS Agreement requires

<sup>71</sup> Annex A.3 SPS.

<sup>72</sup> Article 3.2 SPS.

<sup>73</sup> *EC Hormones* Panel Report (US), para. 3.2 With regard to the SPS Agreement, the USA claimed inter alia that the measures were not based on an assessment of risk and therefore inconsistent with Article 5.1, that they lacked sufficient scientific evidence in contravention of Article 2.2, that they were not justified as a provisional measure under Article 5.7 and that they were not based on scientific principles thereby breaching Articles 2.2 and 5.6, that they were applied beyond the extent necessary to protect human life or health, and that they were more trade restrictive than required to achieve the appropriate level of sanitary protection.

<sup>74</sup> *Ibid.*, para. 4.203.

members to base their measures on risk assessments and available scientific data, the precautionary principle allows countries to take measures in the face of scientific uncertainty. Notably, the EC did not invoke Article 5.7 of the SPS Agreement which permits members to take *interim measures* in the face of insufficient scientific evidence and is generally viewed as reflecting the precautionary principle in the context of the SPS Agreement. The EC reasoned that this decision was deliberate because the measures were considered definitive and not provisional.<sup>75</sup> The EC also pointed out that the Codex standards had been adopted by a very slim margin in what was ordinarily a consensus-based system. By questioning the level of support for the Codex standards the EC expressed expectations about the *substantive dimensions of the interface norm contained in the SPS Agreement*: international standards should only be taken into account if they are considered legitimate, as indicated by widespread to universal acceptance during adoption.<sup>76</sup> The Panel rejected the need to consider by what margin any relevant standard was adopted,<sup>77</sup> and found that the EC measure violated the SPS Agreement by deviating from the relevant international standard (in the sense that it afforded a higher level of protection) without sufficient justification.<sup>78</sup> Further, the Panel found that the precautionary principle (to the extent that it could be considered as part of customary international law) ‘would not override the explicit wording’ of SPS provisions relating to risk assessment techniques (and scientific evidence), ‘in particular since the precautionary principle [had] been incorporated and given specific meaning in Article 5.7 of the SPS Agreement’.<sup>79</sup> The harmonization logic of the SPS Agreement thus contributed to lowering a member’s chosen protection threshold – in accordance with international standards adopted with only tenuous international support – while a

<sup>75</sup> *EC Hormones Panel Report (US)*, para. 4.239.

<sup>76</sup> P. Delimatsis, *The Law, Economics and Politics of International Standardisation* (Cambridge University Press, 2015), p. 90. The EU and other countries have repeatedly expressed this claim that the Codex should respect consensus-based decision-making as one of the fundamental principles of the organisation; see a recent example: Codex Alimentarius Commission (35th Session) Rome, 2–7 July 2012, EU Statement on ractopamine ‘for standards to be universally applicable, they also need to be universally accepted’.

<sup>77</sup> *EC Hormones Panel Report (US)*, para. 8.69.

<sup>78</sup> *Ibid.*, paras 8.75–8.77.

<sup>79</sup> *Ibid.*, para. 8.157.



relevant norm of *international law* (the precautionary principle) was dismissed in the process.

### 8.3.3.3 Appeal

The EC appealed the ruling, arguing that the precautionary principle's applicability extended beyond Article 5.7 to influence risk assessment (and risk management) under Article 5.1 of the SPS Agreement, and thus operated to justify higher protection thresholds.<sup>80</sup> Notably the EC did not refer to the precautionary principle in the context of international *environmental law* but in the context of *general and customary international law*. The Appellate Body, siding with the Panel, found that while the precautionary principle may have crystallized in the field of international *environmental law*, its status as *customary international law* or a *general principle* of law was less certain. By relegating the principle to the confines of international environmental law, the Appellate Body downplayed its relevance for the dispute at hand. Further, the Appellate Body stated that 'the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement'.<sup>81</sup> In effect, the Appellate Body communicated that *whatever* the state of the precautionary principle in international law was, 'the principle could not override the explicit obligations contained in the SPS Agreement and it could not be used to justify measures otherwise inconsistent with the SPS Agreement'.<sup>82</sup> The EC ultimately 'lost' the case as its measures were found not to have been based on appropriate risk assessment: the EC could neither prove 'laboratory scientific evidence' nor 'real-world risk' (misuse in the administration of hormones to animals).<sup>83</sup> This ruling flies in the face of the precautionary principle (as codified for example in Principle 15 of the Rio Declaration), the purpose of which is precisely to empower governments in the face of scientific *uncertainty*.

<sup>80</sup> European Communities – Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body (16 January 1998), WT/DS26/AB/R and WT/DS48/AB/R, para. 16.

<sup>81</sup> *EC Hormones* Appellate Body Report, paras 124–5.

<sup>82</sup> M. L. Maier and C. Gerstetter, 'Risk Regulation, Trade and International Law: Debating the Precautionary Principle in and around the WTO', TranState working papers (2005), 12.

<sup>83</sup> Howse, 'The World Trade Organization 20 Years On', 58.

Nevertheless, the Appellate Body did point out that ‘a panel charged with determining for instance, whether “sufficient scientific evidence” exists to warrant the maintenance by a Member of a particular SPS measure may [...] bear in mind that responsible, representative governments commonly act from the perspectives of prudence and precaution where risks of irreversible, e.g., life-terminating, damage to human health are concerned’.<sup>84</sup> This statement implies a greater degree of flexibility where the future application of Article 5 is concerned; the implication is that in cases of grave potential damage, Panels are to content themselves with a lower evidentiary standard for assessing a measure’s SPS consistency.<sup>85</sup>

#### 8.3.3.4 Aftermath

Following the *EC-Hormones* disputes, the EC made a concerted push for strengthening the precautionary principle in international law. After having unsuccessfully advocated for a renegotiation of relevant provisions within the SPS Agreement, the EC turned its attention to multilateral fora outside the WTO.<sup>86</sup> In 2000, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the ‘Biosafety Protocol’) was agreed upon, which regulates risks associated with the transboundary movement of living modified organisms. The Biosafety Protocol ‘[reaffirms] the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development’<sup>87</sup> and grants importing states the right to make decisions that would avoid or reduce potential adverse effects in the face of scientific uncertainty.<sup>88</sup> The Biosafety Protocol thus ‘*multilateralizes* the EU regulatory approach’ towards sanitary measures, opening the door to other countries to adopt restrictive, EU-style market access rules.<sup>89</sup> Unsurprisingly, one of the

<sup>84</sup> *EC Hormones* Appellate Body Report, para. 172.

<sup>85</sup> Maier and Gerstetter, ‘Risk Regulation, Trade and International Law’, 16.

<sup>86</sup> Santarius et al., ‘Balancing Trade and Environment’. Notably, environmental organizations/groups – such as the Forum Umwelt und Entwicklung – and states had long been pushing for the precautionary principle to be incorporated into WTO law in more unrestricted form.

<sup>87</sup> UNEP, Preamble, ‘Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the Biosafety Protocol)’ (2000).

<sup>88</sup> This is in the context of the ‘advanced informed agreement’ procedure which applies to the first transboundary movement of a living modified organism that is intended to be released into the environment of an importing party.

<sup>89</sup> G. E. Isaac and W. A. Kerr, ‘The Biosafety Protocol and the WTO: Concert or Conflict?’, in R. Falkner (ed.), *The International Politics of Genetically Modified Food: Diplomacy, Trade and Law* (Palgrave Macmillan, 2006), pp. 195–212, at p. 196.

most contentious issues during the negotiation process was the Protocol's relationship with international trade law.<sup>90</sup> In this regard, the preamble '[recognizes] that trade and environment agreements should be mutually supportive with a view to achieving sustainable development' and '[emphasizes] that [the] Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements' (while also 'understanding that the above recital [was] not intended to *subordinate* [the] Protocol to other international agreements'). The EC also successfully campaigned for the inclusion of the precautionary principle in the risk assessment techniques developed by the Codex Alimentarius Commission.<sup>91</sup> As a result, two newly negotiated documents, the 2003 and 2007 Working Principles for Risk Analysis for Food Safety for Application by Governments, recognize precaution as an inherent element of risk assessment.<sup>92</sup>

After several years of keeping its genetically modified organism (GMO) measures in place while accepting the punitive tariffs imposed by the USA and Canada in return, the EC was able to produce scientific evidence to prove risk from synthetic growth hormones. The EC subsequently amended its law to bring them into compliance with the Appellate Body's ruling.<sup>93</sup> Nevertheless, the USA and Canada continued to retaliate, prompting the EC to challenge the legality of continued retaliatory measures in 2005. This 'follow-up dispute' *Canada/US – Continued Suspension (2008)*, gave the Appellate Body the opportunity to revisit its previous ruling (in light of the new normative developments that had occurred outside the WTO). In *Canada/US – Continued Suspension*, the Appellate Body developed the concepts of 'risk assessment' and 'sufficiency of scientific evidence' as 'relational concepts' implying that issues such as 'the appropriate level of protection' chosen by a government could shape the methodology and questions studied in

<sup>90</sup> P. E. Hagen and J. B. Weiner, 'The Cartagena Protocol on Biosafety: New Rules for International Trade in Living Modified Organisms' (2000) 12 *The Georgetown International Environmental Law Review* 697–717, at 702.

<sup>91</sup> Maier and Gerstetter, 'Risk Regulation, Trade and International Law'.

<sup>92</sup> FAO, Principle 11, 'Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius' (Risk Analysis Principles Applied by the Codex Committee on Food Additives and Contaminants) (2003); FAO, Principle 12, 'Working Principles for Risk Analysis for Food Safety for Application by Governments (CAC/GL 62–2007)' (2007).

<sup>93</sup> Delimatsis, *The Law, Economics and Politics of International Standardisation*, p. 97.

risk assessment.<sup>94</sup> The Appellate Body also *relativized* the centrality of international standards and conceded that scientific evidence could be sufficient for one member but not for another.<sup>95</sup> This more deferential approach towards members' right to regulate on the basis of precaution significantly departed from the Appellate Body's initial reasoning in *EC-Hormones*.<sup>96</sup>

### 8.3.4 *EC-Biotech*

#### 8.3.4.1 Overview

The *EC-Biotech* dispute represents another deliberation on the extent to which the precautionary principle is applicable in relation to the SPS Agreement. In 2003, three exporters of agricultural products containing GMOs – the United States, Canada and Argentina – challenged the EC on some of its measures relating to GMOs. The EC had instituted a moratorium on the approval of GMOs during the period of October 1998 and August 2003 and, in addition, some EC member states had put in place national restrictions on GMOs and genetically modified foods. Notably, the EC's regulatory regime for GMOs was (and is) significantly informed by the precautionary principle.

The dispute came on the heels of the adoption of the Biosafety Protocol, which was not only substantively relevant to the dispute at hand (namely GMO-related measures) but also incorporated a more robust version of the precautionary principle than the SPS Agreement.<sup>97</sup> Indeed, the complaint has been viewed as implicitly targeting the Biosafety Protocol in order to weaken its relevance for the SPS Agreement.<sup>98</sup> With regard to the trade–environment interface, the Panel's reasoning in *EC-Biotech* is widely viewed as a setback for a mutually supportive relationship as the Panel *prima facie* dismissed the relevance of the Biosafety Protocol to the dispute.

<sup>94</sup> *Ibid.*, p. 97 *et seq.*

<sup>95</sup> *Ibid.*, p. 98.

<sup>96</sup> Howse, 'The World Trade Organization 20 Years On', 58.

<sup>97</sup> J. Zhao, 'The Role of International Organizations in Preventing Conflicts between the SPS Agreement and the Cartagena Protocol on Biosafety' (2020) 29(2) *Review of European, Comparative & International Environmental Law* 1–11.

<sup>98</sup> Isaac and Kerr, 'The Biosafety Protocol and the WTO', p. 196.

### 8.3.4.2 Legal Entanglement

The EC justified some of the EC members' national bans by invoking the precautionary principle as codified in the Biosafety Protocol. The EC argued that the SPS Agreement and the Biosafety Protocol were 'so closely connected that they should be interpreted and applied consistently with each other, to the extent that is possible'; the two agreements were 'complimentary' and therefore 'the Protocol's provisions on precaution and risk assessment inform the meaning and effect of the relevant provisions of the WTO agreements'.<sup>99</sup> The complainants were not parties to the Protocol and rejected its application to the dispute. They argued that the Protocol did not constitute a 'relevant rule of international law applicable in the relations between the parties' and should therefore not be taken into account in the interpretation of the obligations under the WTO Agreement.<sup>100</sup>

An *amicus curiae* brief is of note in the context of *EC-Biotech* as it makes additional claims about how the interface between trade law and environmental concerns/precaution should be managed. In its submission, the Centre for International Environmental Law (CIEL) noted that the Appellate Body had emphasized the importance, in certain circumstances, of interpreting terms in the WTO agreements in light of 'the contemporary concerns of the community of nations' (see *Shrimp-Turtle*).<sup>101</sup> CIEL argued that 'interpreting bodies' consequently had a responsibility 'to take into account [external treaties not ratified by all parties to the treaty being interpreted], especially when they address issues of global concern where the interests of the international community were involved'.<sup>102</sup>

### 8.3.4.3 Aftermath

The EC decided not to appeal the ruling of the Panel and instead pursued a 'Mutually Agreed Solution', decided between Canada and the EU in 2009, which established 'a bilateral dialogue on agricultural biotech

<sup>99</sup> European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Panel report (29 September 2006) WT/DS291/292/293/R ('EC-Biotech'), para. 7.55.

<sup>100</sup> *EC-Biotech* Panel report, para. 4.600.

<sup>101</sup> CIEL, 'EC-Biotech: Overview and Analysis of the Panel's Interim Report' (Mach 2006), p. 46.

<sup>102</sup> *Ibid.*, p. 49.

market access issues of mutual interest'.<sup>103</sup> This cooperation agreement was subsequently reaffirmed in the EU–Canada Comprehensive Economic and Trade Agreement (CETA), which largely reproduced the text of the Mutually Agreed Solution in Article 25.2(1). Thus, CETA institutionalizes international cooperation on biotech market access and *inter alia* sets out the shared objective of promoting 'efficient *science-based* approval processes for biotechnology products [emphasis added]'. This provision was criticized as running counter to the EC's strict regulation of GMOs as informed by the precautionary approach and has generated concerns around the weakening of GMO protections in the EU.<sup>104</sup> Arcuri points out that while 'international cooperation' may sound innocuous and indeterminate, the fact that an international body of norms on low-level presence of GMOs already exists (the Global Low-Level Presence Initiative) and given that *most state members of this framework are GMO producers with a clear interest in lowering GMO protections*, the requirement of international cooperation may in fact further skew international standards on GMO protections, to the detriment of the EC's precautionary 'zero tolerance' approach.<sup>105</sup> At the same time, however, the preamble of the Joint Interpretative Instrument on the CETA 'reaffirms the commitments made with respect to precaution that [the European Union and its members states and Canada] have undertaken in international agreements', hence relativizing the provisions requiring science-based evaluations. Reading the relevant CETA provisions in the context of the 2003 and 2007 Codex Working Principles for Risk Analysis – which recognize precaution as an inherent element of risk analysis – further neutralizes their potential to weaken the precautionary principle.

### 8.3.5 US-Tuna II

#### 8.3.5.1 Overview

Following the GATT Panels' rulings in *Tuna Dolphin I and II*, 'the United States eventually allowed all tuna, no matter how it had been

<sup>103</sup> European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Mutually Agreed Solution between Canada and the European Communities (15 July 2009) WT/DS292/40, G/L/628/Add.1.

<sup>104</sup> A. Arcuri, 'Is CETA Keeping up with the Promise? Interpreting Certain Provisions Relating to Biotechnology' (2017) 41 *Questions of International Law, Zoom-Out* 35–58.

<sup>105</sup> *Ibid.*, 47 *et seq.*

harvested, to be sold in its market' while reserving the 'dolphin-safe' label for tuna harvested in a particular manner.<sup>106</sup> In 2008, Mexico requested consultations with the United States with regard to its 'dolphin-safe' labelling requirements, initiating the next phase of the long-running tuna dolphin dispute. This section will focus primarily on how the Appellate Body in *US-Tuna II (Mexico)* (not to be confused with *Tuna Dolphin II*, the 1994 dispute initiated by the EC against the USA concerning its secondary embargo against re-exported tuna) shed light on how the relationship between the TBT Agreement and international standards should be construed. Like the SPS Agreement, the TBT Agreement requires the harmonization of national regulations on the basis of international standards (Article 2.4). However, unlike the SPS Agreement, which provides a list of international standard-setting organizations (such as the Codex Alimentarius Commission), the TBT Agreement does not list any institutional/authoritative *sources* of international standards. The question of what counts as an international standardizing body is important as such a classification automatically triggers the harmonization obligation (i.e. pressure for entanglement) established in Article 2.4 of the TBT.<sup>107</sup>

Mexico challenged the 'dolphin-safe' labelling requirements as inconsistent with inter alia the TBT Agreement.<sup>108</sup> Notably, the (state-administered) *voluntary* labelling scheme was considered to be a *mandatory* technical regulation, thus falling within the remit of the TBT Agreement.<sup>109</sup> As such, Mexico claimed that the US measure should have been based on the relevant international standard (according to Article 2.4), specifically the labelling scheme established under the Agreement on the International Dolphin Conservation Program (AIDCP). Notably, the AIDCP is only a regional organization to which only a subset of WTO members adheres. The Panel and the Appellate Body were tasked with determining whether the AIDCP labelling scheme

<sup>106</sup> P. C. Mavroidis, 'Last Mile for Tuna (to a Safe Harbour): What Is the TBT Agreement All About?' (2019) 30 *European Journal of International Law* 279–301, at 280.

<sup>107</sup> TBT 2.4 requires national technical regulations, standards and conformity assessments to be based on relevant international standards except where such standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.

<sup>108</sup> M. A. Crowley and R. Howse, 'Tuna–Dolphin II: A Legal and Economic Analysis of the Appellate Body Report' (2014) 13 *World Trade Review* 321–55, at 321.

<sup>109</sup> Both the Panel and the Appellate Body in *Tuna Dolphin II* found that the US measure constituted a mandatory technical regulation because it *prescribed by law* minimum requirements for accessing the 'dolphin-safe' labelling scheme in the USA.

constituted an international standard within the meaning of the TBT Agreement. Section 8.3.5.2 focuses on the Appellate Body's rulings as the Panel's findings are of little relevance to the question of legal entanglement.

### 8.3.5.2 Legal Entanglement/Appeal

For the purposes of the TBT Agreement, 'international standards are those adopted by international standardizing bodies, meaning those with *recognized activities* in standardization that are *open* on a non-discriminatory basis to relevant bodies of at least all WTO Members'.<sup>110</sup> While the Panel agreed with Mexico that the AIDCP was an international standardizing body,<sup>111</sup> the Appellate Body found that it did not fulfil the requirement of 'openness' because countries could only accede to the AIDCP by invitation.<sup>112</sup> As a result, the 'AIDCP dolphin-safe definition and certification' scheme did not constitute an international standard within the meaning of the TBT Agreement, and the USA was not required to base its domestic 'dolphin-safe' regulation upon it.

However, the Appellate Body did not stop there, clarifying further the meaning of 'recognized' activities in standardization. Considering that the resulting standards would apply to all WTO members, the Appellate Body found that recognition of international standardization activities had to go beyond the subset of WTO members participating in the standard-setting process, therefore 'the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardization are "recognized"'.<sup>113</sup> Moreover, '[e]vidence of a body's compliance with procedural and substantive safeguards formulated by WTO Members would be relevant for the question of whether its standardizing activities are "recognized" for the purposes of the TBT Agreement'.<sup>114</sup> In this context, the Appellate Body referred to a TBT Committee Decision from the

<sup>110</sup> P. V. den Bossche and D. Prévost, *Essentials of WTO Law* (Cambridge University Press, 2016), p. 190.

<sup>111</sup> United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Panel report (15 September 2011) WT/DS381/R ('US-Tuna II'), para. 7.691.

<sup>112</sup> United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report by Appellate Body (16 May 2012) WT/DS381/AB/R, para. 399.

<sup>113</sup> *US-Tuna II* Appellate Body Report, para. 390.

<sup>114</sup> *Ibid.*, para. 377.



year 2000 ('the Decision'), which sets out guiding principles and procedures that standardizing bodies should observe when developing international standards, inter alia *transparency, openness, impartiality and consensus*.<sup>115</sup> The Decision is significant as it spells these principles out in some detail, thus defining a relatively precise guidance for the entanglement of WTO law with standards from other sources. In an early case under the TBT Agreement, *EC-Sardines*, the Panel had dismissed the Decision as 'a [mere] *policy statement of preference* and not the controlling provision in interpreting the expression "relevant international standard" as set out in Article 2.4 of the TBT Agreement'.<sup>116</sup> In *Tuna Dolphin II*, the Appellate Body reversed this finding, stating that the Decision constituted a *subsequent agreement of the parties* in the meaning of Article 31(3)(a) VCLT and should be read together with the TBT.<sup>117</sup>

The weight that the Appellate Body gave to the Decision is significant because it directly clarifies several points of contention with regard to interpreting the TBT and how it relates to international standards. Principle three, for example, explicitly emphasizes *consensus* as a requirement for international standards in the TBT Agreement, even though an explanatory note to TBT Annex I.2 states that the TBT also covers documents not based on consensus. Notably, the Appellate Body in *EC-Sardines* had rejected the consensus requirement.<sup>118</sup> The Appellate Body's ruling in *EC-Sardines* had also implied a large measure of regulatory harmonization and 'a very close fit or relationship between any technical regulation and the international standard, providing very little flexibility for regulatory diversity'.<sup>119</sup> By contrast, the Appellate Body in *US-Tuna II* resisted 'demands for regulatory harmonization through Article 2.4' by emphasizing the criteria contained in the Decision relating to transparency and meaningful participation.<sup>120</sup> Thus, the Appellate Body effectively transformed the Decision into 'a code of administrative

<sup>115</sup> TBT Committee, 'Decision on Principles for the Development of International Standards, Guides and Recommendations' (13 November 2000) G/TBT/9, Annex 4.

<sup>116</sup> European Communities – Trade Description of Sardines – Panel report (29 May 2002) WT/DS231/R, para. 7.91.

<sup>117</sup> *US-Tuna II* Appellate Body Report, para. 372.

<sup>118</sup> European Communities – Trade Description of Sardines – Report by Appellate Body (26 September 2002) WT/DS231/AB/R, para. 224.

<sup>119</sup> Howse, 'The World Trade Organization 20 Years On', 56.

<sup>120</sup> *Ibid.*, 56.

procedure and practice for international standardization' in the vein of global administrative law.<sup>121</sup>

Ultimately, the Appellate Body found that while the 'dolphin-safe' labelling provisions did not violate Article 2.4 of the TBT, they were inconsistent with Article 2.1 of the TBT because of a lack of even-handedness in the manner in which risks from different fishing techniques in different areas of the ocean were addressed.

### 8.3.5.3 Aftermath

In response to the Panel and the Appellate Body reports, the United States modified its dolphin-safe labelling requirements to comply with the Appellate Body's ruling. However, the US measure continued to impose different certification and tracking and verification requirements depending on the fishery where the tuna was caught, with more burdensome requirements for tuna caught in the ETP. After several rounds of compliance proceedings, in which Mexico continued to challenge the United States' measure due to discriminatory effects and with both parties repeatedly appealing, the Panel found that the US measure was not discriminatory and exonerated the USA from responsibility, a finding that the Appellate Body confirmed. The distinctions made in the United States' measure (i.e. its discriminatory elements) were found to be calibrated to the different levels of risk posed by the practice of 'setting' on dolphins vis-à-vis other fishing methods. Thus, the detrimental impact caused by the US measure stemmed exclusively from a legitimate regulatory distinction and did not result in 'treatment less favourable than that accorded to like products from the United States and other countries' (consistency with Article 2.1 as well as with the chapeau of GATT Article XX).<sup>122</sup> The final compliance report (with no finding of non-compliance) was circulated to members in December 2018, and adopted in January 2019, thereby concluding a dispute that had run on for almost thirty years.

<sup>121</sup> Crowley and Howse, 'Tuna-Dolphin II', 342.

<sup>122</sup> United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States; United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico, Report by Appellate Body (14 December 2018) WT/DS381/AB/RW/USA; WT/DS381/AB/RW2, paras 7.1–7.14.

## 8.4 Main Findings

### 8.4.1 Irritative Norm Conflict Over Time

The unadopted Panel report in *Tuna Dolphin I* set the stage for an antagonistic relationship between the GATT-based multilateral trading system and environmental trade measures for the achievement of global environmental objectives. Through repeated 'irritations' of trade law by environmental norms (through litigation in the WTO combined with external pressure), subsequent rulings by Panels and the WTO Appellate Body significantly corrected/recalibrated controversial aspects of the trade and environment interface, a process that is referred to here as *irritative norm conflict over time*.<sup>123</sup>

The 'Tuna Dolphin saga' (in which *Shrimp-Turtle* constitutes a crucial building block) illustrates how irritative norm conflict over a period of almost thirty years allowed WTO judicial bodies to adjust elements of previous jurisprudence that had 'gone too far' in asserting trade objectives over members' right to regulate. Although *Tuna Dolphin I* had found unilateral environmental trade measures with extraterritorial effects prima facie incapable of justification under the GATT, the Appellate Body in *Shrimp-Turtle* reversed this finding and clarified that GATT Article XX could, in fact, justify measures conditioning market access on environmental policies/PPMs abroad – as long as the measures do not amount to arbitrary or unjustifiable discrimination.<sup>124</sup> As a result, the ruling of the Appellate Body in *Shrimp-Turtle* was widely perceived as 'a bold attempt to construct a broader societal vision of the WTO [...] more sensitive to environmental concerns'.<sup>125</sup> Both the *Shrimp-Turtle* import requirements and the *Tuna Dolphin/US-Tuna II* labelling provisions were ultimately found to be consistent with WTO law; however, this was only after the United States had been subjected to several (costly) rounds of litigation and revisions of the law. Thus, while environmental norms have gained clout in the WTO, the fundamental objective of the WTO system – an open international economic system – is preserved through the meticulous enforcement of non-discrimination principles.

<sup>123</sup> On irritative norm conflicts, see N. Krisch, F. Corradini and L. L. Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time' (2020) 9 *Global Constitutionalism* 343–63.

<sup>124</sup> J. Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 *European Journal of International Law* 575–92.

<sup>125</sup> Perez, *Ecological Sensitivity and Global Legal Pluralism*, p. 65.

In *EC-Hormones*, *EC-Biotech*, and *Canada/US-Continued Suspension* – a series of distinct but interrelated disputes – what was being negotiated was inter alia the scope/applicability of the precautionary principle in the WTO context. Repeated irritations of international trade rules (and pressure from both within and outside of the WTO) led to a shift in the Appellate Body’s construction of precaution in the WTO and SPS context (*Canada/US-Continued Suspension*). While the tension between the precautionary principle (as codified in international environmental law) and the emphasis on scientific evidence and risk assessment in the SPS Agreement is not completely resolved, the role of precaution has been significantly strengthened (both in WTO law and outside of it – e.g. in the Codex Alimentarius Commission and in the Biosafety Protocol). The compromise around the role of precaution versus scientific risk assessment in CETA shows how WTO dispute settlement is not the only arena in which actors negotiate and navigate irritative norm conflict.

Finally, it is of note that the appeals mechanism in the WTO serves to process – and to accelerate – irritative norm conflict, allowing the Appellate Body to make (rapid) adjustments in the wake of contentious Panel findings, member state pressure and public protest. ‘Follow-up’ disputes prompted by issues around compliance or continued retaliation also provide the opportunity for rebalancing or ‘fine-tuning’ previous findings (e.g. *Canada/US-Continued Suspension*).

#### 8.4.2 *Legal Entanglement (and Mechanisms of Distancing)*

The narrative of competing objectives between international trade law and international environmental law obscures the way in which the two bodies of norms are already *entangled*, going as far back as *Tuna Dolphin I* (in which both parties made legal claims relating to international environmental law). All participants in the GATT/WTO dispute settlement system regularly invoke outside bodies of norms to justify their claims. The judicial bodies themselves have on several occasions inquired into possible legal bases/defences for WTO-inconsistent measures, grounded in international environmental law (e.g. the Panel in *Shrimp-Turtle*), and routinely draw on international environmental norms in their legal reasoning. Notably, this is not always done to advance ‘trade-friendly’ arguments. WTO disciplines on non-discrimination are often brought into relation with international environmental norms that emphasize international cooperation (e.g. the Panel and Appellate Body in *Shrimp-Turtle*). Consequently, a closer relationship between

international trade law and international environmental law will not necessarily result in more 'environmentally friendly' rulings. In this vein, some of the foundational critiques directed at the multilateral trading system can also be levelled against the international environmental regime, which has incorporated into its body of norms a bias against unilateral trade measures and has embraced the objective of liberalized trade (e.g. Principle 12 of the Rio Declaration). The two bodies of norms have always been more entangled (and mutually reinforcing) than generally assumed.

The reference to sustainable development in the Preamble of the WTO Agreement plays a central 'entangling' function at the interface between trade and environment, opening the door for outside environmental norms to enter WTO law through GATT Article XX (e.g. in *Shrimp-Turtle*). However, such forms of relationing between international trade law and outside bodies of norms are tenuous and remain contingent on the Panels' and Appellate Body's willingness to take outside norms into consideration on a case-by-case basis – essentially at their discretion. For instance, while the Appellate Body in *Shrimp-Turtle* had referred to outside treaty law not binding on all the disputing parties (the CBD), the Panel in *EC-Biotech* rejected the applicability of the Biosafety Protocol because the United States was not a party to it, and it could therefore not be considered 'applicable' in the relations between the parties according to Article 31(3)(c) of the Vienna Convention.

Resistance to *legal entanglement* comes in the form of strategies for *distancing*. In *EC-Hormones*, various techniques for creating *distancing* between the precautionary principle and obligations under the SPS Agreement were employed by the disputants, the Panel and the Appellate Body, including (1) relegating the precautionary principle to the realm of international environmental law while calling into question the status of the precautionary principle as a general principle of international law or a rule of customary international law; (2) restricting the applicability of the precautionary principle to its (partial) reflection in the SPS Agreement (Article 5.7) but rejecting its general applicability with regard to other provisions (namely Articles 5.1 and 5.2); and (3) pointing to the absence of a 'clear textual directive' that would allow an external norm to affect the interpretation of a provision in a WTO Agreement. Article 3.2 of the DSU requires treaty interpreters to refer to any relevant rules of international law applicable in the relations between the parties (according to Article 31(3)(c) of the Vienna Convention). As customary

and general international law is always applicable between all parties to a dispute, relevant customary norms or general principles of international law will more likely be brought into relation with WTO law than external treaty norms which may not have been ratified by all WTO members/parties in a given dispute. It is therefore unsurprising that emphasizing the customary or general international law nature of an external norm *or lack thereof* is a dominant mechanism for creating either entanglement or distancing between WTO law and other bodies of norms.

#### 8.4.3 *Interface Norms in the GATT/WTO Context*

Although the relationship between WTO law and international environmental law is not centrally regulated, both bodies of norms contain ‘interface norms’ that guide forms of relationing to the other ‘from the inside out’. In the WTO context, Article XX of the GATT can be viewed as a *reception norm*, allowing external norms to enter into GATT law. The specific environmental terms mentioned in GATT Article XX serve as ‘docking points’ for environmental norms to connect to. Once made, such linkages endure even as external legal orders change over time, in turn influencing the interpretation of ‘coupled’ WTO norms. Notably, the *chapeau* of GATT Article XX sets out *substantive criteria* for the *application of environmental measures* by conditioning ‘entry’ on non-discrimination/even-handedness and multilateralism/international consensus (see [Section 8.4.4](#)).

Not all reception norms are textually explicit, however. The concept of ‘legitimate regulatory distinction’ to justify discriminatory treatment was read into Article 2.1 of the TBT Agreement by the Appellate Body through successive case law (including *US-Tuna II*). It allows for balancing TBT non-discrimination objectives/obligations with legitimate regulatory interventions (such as for environmental protection) and thus fulfils the same purpose as GATT Article XX, including – conceivably – as a reception norm. Similarly, even though Article 5.7 of the SPS Agreement does not mention the term ‘precaution’ as such, the provision is generally viewed as a reflection of the precautionary principle and thus allows for external bodies of norms related to the precautionary principle to enter into WTO law.

The reference to sustainable development in the Preamble of the WTO Agreement *connects* trade rules to the vast body of international environmental law (and the emerging field of ‘international sustainable development law’). As a *connecting norm*, somewhat akin to the multi-sourced

equivalent norms identified by some,<sup>126</sup> the reference to sustainable development provides a linkage function and enhances the discretion of Panels and the Appellate Body to interpret the environmental exceptions of Article XX expansively (e.g. the Appellate Body in *Shrimp-Turtle* construed a close relationship between WTO rules and international environmental norms according to preambular directive). In this way, interface norms can be mutually supportive.

While the WTO, on the whole, keeps substantive norms from other areas of *international law* at bay, it actively seeks entanglement with *international standards*. International standards attract linkages with WTO law more readily due to the WTO's inherent harmonization dynamic. This is done through the TBT and SPS Agreements, which coordinate the relationship between international standards and WTO harmonization obligations through Articles 2.4 and 3.1 respectively. The contrasting approaches to entanglement are best illustrated in *EC-Hormones*, where the Panel and the Appellate Body interpreted the SPS Agreement in a way as to promote entanglement with Codex norms, while creating *distancing* with an external substantive norm originally developed in the context of international environmental law, namely the precautionary principle.

#### 8.4.4 Substantive Dimensions for Interface Norms

An important factor influencing the porosity of WTO law is whether the external norm is of multilateral origin or constitutes an international standard. Environmental measures based on multilateral consensus have a higher likelihood of being taken into account in the WTO context than unilateral measures with little international support (although this is not guaranteed, see the Panel's dismissal of the Biosafety Protocol in *EC-Biotech*). This way of reasoning is in line with the notion that the interface between international trade law and other norms of international law is governed primarily by the customary rules on treaty interpretation (as codified in the Vienna Convention) that require any relevant rules of international law applicable in the relations between the parties to be taken into account together with context. As opposed to external treaty norms, customary international law binds all states and will always be binding on parties in a given trade dispute (no matter the

<sup>126</sup> See T. Broude and Y. Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Bloomsbury Publishing, 2011).

constellation). It follows that linkages with external norms are more easily produced if the latter are considered general or customary international law (see [Section 8.4.2](#)), as well as when there are ‘docking norms’ in the text that can provide the Panel or the Appellate Body with a ‘textual directive’ – that is, a mandate – for linkage.

Further, entanglement between WTO law and international standards is explicitly encouraged through the TBT Agreement and the SPS Agreement, which promote the harmonization of national regulations on the basis of *international standards*. The substantive dimensions of entanglement between WTO law and international standards is gradually being ‘fleshed out’ with additional (still contested) criteria such as the level of international support for the adoption of the norm in question (consensus, broad membership, inclusiveness/participation). For example, in *EC-Hormones* the EC did not recognize a specific set of Codex standards as being ‘international standards’ due to the narrow margin by which it was adopted. The EC thus expressed expectations about the *substantive dimensions* of the interface norm contained in the SPS Agreement: international standards should only be taken into account if they are considered legitimate, as indicated by broad acceptance during adoption (see [Section 8.3.3.2](#)). While the Panel in *EC-Hormones* rejected the EC’s reasoning, the Appellate Body in *US-Tuna II* gave significant weight to a 2000 TBT Committee Decision, which contains a set of substantive criteria that qualify the appropriateness of international standards from the perspective of the WTO (specifically the TBT Agreement), including transparency, openness, consensus and effectiveness. In this regard, the Appellate Body also indicated that the number of countries participating in a standard-setting process relative to the total number of WTO members is relevant for the entry of international standards into WTO law via TBT Article 2.4.

## 8.5 Conclusion

This chapter addressed horizontal ways of relating between international trade law and international environmental law, and explored how these different legalities respond to each other and manage tensions without subordination. The findings show how repeated ‘irritations’ of trade law through environmental norms, expressed in WTO dispute settlement and combined with external political pressure (including by building and harnessing pressure in other multilateral fora), can prompt ‘recalibrations’ at the interface of WTO law and encourage the



clarification of the relationship over time. What emerges from this analysis is a kind of modified 'island' view of the WTO in relation to other bodies of norms. Interface norms allow for the contingent adaptation of 'foreign' rules into WTO law while broader systemic connections are resisted through mechanisms of distancing. Thereby new developments in international law can be reflected in jurisprudential interpretations without compromising the stated objective of ensuring the 'security and predictability of the multilateral framework for trade'. To this end, the WTO regime actively *encourages* legal entanglement with international standards because harmonization helps facilitate trade. Ultimately, this chapter demonstrates how the WTO has successfully negotiated legal entanglement *on its own terms* and in service to the regime's overarching goal of free trade.