

Catching the Tasmanian Salmon Laws: How a Decade of Changing World Trade Law has Tackled Environmental Protection*

ANDREW FIELD*

Within the last eighteen months the World Trade Organisation ('WTO') has achieved a rare 'double'. Although rarely the focus of the attention of the popular press, within the space of three months, it managed to find two theatres of its activities being closely scrutinised by the Australian media. The first matter to attract such attention was, of course, the failure against all expectations¹ of the Seattle Conference in the first week of December 1999 to trigger another round of global trade negotiations. That this event gained such attention was, of course, not surprising; the accompanying video-taped exploits of a rioting mob rampaging down the streets to face a phalanx of armed riot police in a western city was guaranteed to attract some attention. However, the second matter which secured the WTO some air time was more unusual, in that it concerned the decision of one of its Dispute Settlement Panels to rule that certain Tasmanian laws restricting the importation of Salmon into Tasmania were in violation of WTO law.²

It is rare that WTO decisions are given any prominence in the Australian media for any prolonged period of time; but the decision in

* An earlier draft of this article formed the basis of a presentation at the Australasian Law Teachers Association Conference in Canberra, July 2000.

+ Andrew Field, BA (Hons), LLB, LLM (Monash); Assistant Lecturer, Dept of Business Law and Taxation, Monash University; Barrister at Law.

¹ 'Doomed to succeed', said WTO Director General Mike Moore, somewhat overstating the position, in his opening address to the Conference; Press Release 156 (30 November 1999), http://www.wto.org/wto/seattle/english/press_e/press156.htm.

² All WTO dispute resolution Panel and Appellate Body reports of cases cited in this paper, along with *The Agreement Establishing the World Trade Organisation* [hereinafter '*WTO Agreement*'] which includes those agreements and understandings annexed to it can be accessed at the WTO internet site at <http://www.wto.org>. In addition, the WTO Agreement texts can be found in bound form in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1995).

the *Australian Salmon Case*³ managed to raise regular comment for a month after the WTO Panel delivered its decision. No doubt a substantial reason for this prominence was the very vocal friction that it created between the Tasmanian government and the Commonwealth government. On the one side, the Commonwealth government, which as the tier of government with responsibility for external affairs was entrusted with arguing the validity of the laws; it had failed to do this, and on the basis that various other laws had been held to be valid (which was no mean achievement) had indicated that there would be no challenge to the finding regarding the Tasmanian laws.⁴ On the other side, the Tasmanian government, supported by numerous industry groups, was adamant, through its Premier, Jim Bacon, that the laws would stay in place because they were a pillar of the disease free status of Tasmanian fisheries. As Mr Bacon said:

This is not a trade issue. It is about protecting Tasmania's reputation as a producer of fine quality, disease free food. It goes to the heart of what Tasmanian stands for and we will not back down.⁵

To heighten the tension there was the allegation made that the reason for the decision was not that the laws themselves were inextricably in violation of WTO law, but rather that the Commonwealth government had simply failed in its preparation of the material to properly justify them. As one well placed commentator noted: '[T]he way we've handled this has been a shambles'.⁶ All in all, a wealth of material for the media.

Since that time, the deployment of fiery rhetoric over this particular dispute has diminished because an agreement has been reached between the governments of Australia and Canada. Pursuant to this agreement Canada, rather than imposing a 100 per cent tariff on certain Australian products, will be satisfied with a Commonwealth government undertaking to continue to seek observance from Tas-

³ *Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada* WT/DS18/RW (18 February 2000).

⁴ Mark Vaile, Minister for Trade, Media Release MVT 18/2000 (21 March 2000), obtained via <http://www.dfat.gov.au> (accessed 3 March 2000)

⁵ Jim Bacon, Premier of Tasmania, Media Release (21 March 2000), obtained via <http://premier.tas.gov.au> (accessed 22 March 2000).

⁶ Alan Oxley: Bronwyn Adcock, interview with Alan Oxley, former Australian Ambassador to GATT, Director of International Trade Strategies, ('PM', ABC radio, 21 March 2000). Transcript obtained via: <http://www.abc.net.au/pm/s11290.htm> (accessed 22 March 2000).

mania of WTO law.⁷ However, a basic issue, which still pervades the whole dispute and has been raised in a series of disputes before the WTO and its GATT Secretariat predecessors over the last decade, remains.

The decision in the *Australian Salmon Case*, by striking down laws which were intended to protect a natural environment from the threat of imported disease, has arguably provided further ammunition for the argument that the jurisprudence of the WTO and free trade are working against protection of the environment. The Tasmanian government essentially argued that their laws were a measure for the protection of the environment, their purpose being to protect Tasmanian fisheries from imported disease, measures filling a gap where Commonwealth laws failed. The Australian Government, on behalf of Tasmania, advanced these arguments before the WTO Dispute Settlement Panel. However, these laws were determined to be in violation of WTO law. A question is therefore posed: is WTO law inconsistent with measures to protect the environment?

Of course, one case does not make an argument. However, when viewed in the context of the last decade and a series of WTO decisions over that period, a trend emerges that would tend to indicate a drift away from measures intended to protect the environment. This trend has a touch of irony when it is noted that over a similar period of time both the global community and the WTO specifically have been strident in voicing their commitment to protecting the 'human' environment.⁸

The purpose of this article is to note, firstly, the way in which the causes of free trade and environmental protection have managed to co-exist over the last century. Secondly, to identify those cases which over the last decade have led to the perception that the WTO, through its dispute settlement body, has been interpreting WTO law in a way which has narrowed the ability of governments to enforce laws designed to protect the environment. Specifically, there are four cases that will be discussed. The first of these, which was decided before the creation of the WTO in 1994 under the dispute settlement

⁷ Mark Vaile, Minister for Trade, Media Release MVT 47/2000 (17 May 2000), obtained via <http://www.dfat.gov.au>. (accessed 8 June 2000).

⁸ The expression 'human environment' was that adopted at the Stockholm Conference on the Human Environment in 1972 (discussed below in the text), creating a phrase which puts humanity at the centre of the environmental question, and posits the issue of environmental protection as a necessity for human survival.

process of the GATT Secretariat, was the 1991 case concerning *United States Restrictions on Imports of Tuna* (the '*Tuna Dolphin Case*').⁹ This was the case that appears to have ignited the 1990s' concern as to whether GATT was consistent with environmental protection. The other cases to be discussed were decided under the WTO structure. They are the 1996 *United States – Standards for Reformulated and Conventional Gasoline Case* (the '*Gasoline Case*'),¹⁰ and the 1998 *United States – Import Prohibition of Certain Shrimp and Shrimp Products Case* (the '*Shrimp Sea Turtle Case*')¹¹, both of which expanded on the meaning of the original provision of the GATT Treaty; and the 1998 *EC Measures Concerning Meat and Meat Products (Hormones) Case* (the '*European Meat Products Case*'),¹² which demonstrated how new treaty arrangements, introduced at the founding of the WTO, appear to have worked to thwart laws designed for environmental protection, environmental laws that arguably would have been consistent with the global trade regime prior to 1994. These cases set a scene by which it might almost have been predicted that the Tasmanian laws would have been ruled contrary to WTO law.

Background to World Trade Law and the Environment.

A brief historical appreciation of international trade and the environment

It would, of course, be wrong to think that free trade and the protection of the environment cannot coexist. Indeed, even as recently as a decade ago, just before the founding of the WTO, when the cause of free trade was regaining some momentum, the substantial report on Trade and the Environment included in GATT's Annual Report of 1990-91 clearly embraced much of the wide spectrum of environ-

⁹ *United States Restrictions on Imports of Tuna* GATT Panel Report, GATT BISD 39S 155 (1991) (hereinafter '*Tuna Dolphin Panel Report*').

¹⁰ *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R (29 January 1996), 35 ILM 274 (hereinafter '*Gasoline Case Panel Report*'); WT/DS2/AB/R (29 April 1996), 35 ILM 603 (hereinafter '*Gasoline Case Appellate Body Report*').

¹¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R (15 May 1988) (hereinafter '*Shrimp Sea Turtle Panel Report*'); WT/DS58/1998 (12 October 1998) (hereinafter '*Shrimp Sea Turtle Appellate Body Report*').

¹² *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/R/USA (18 August 1997) (hereinafter '*European Meat Products Panel Report*'); WT/DS26/AB/R (16 January 1998) (hereinafter '*European Meat Products Appellate Body Report*').

mental issues noted in the 1972 Stockholm Declaration on the Human Environment, which extended from references to the safeguarding of the earth's natural resources and wildlife, to adequacy of conditions of life and the elimination of oppression.¹³

Further examples of the two causes working together indicate that such an idea is hardly a recent phenomenon. Indeed, a brief perusal of international treaty law reveals that protection of the environment in its various guises and its interaction with trade was clearly in the thoughts of law-makers at least a century ago, if not earlier.¹⁴ For example, in 1900 a multilateral treaty was signed at London between the Congo Free State (a Belgian Colony at that time), France, Germany, Great Britain, Italy, Portugal and Spain for the 'preservation of wild animals, birds and fish', its provisions requiring licences for the trade in a wide variety of wildlife listed in five categories, ranging from giraffes and gorillas to lions and leopards, rhinoceroses and elephants.¹⁵ Regularly since that time other treaties can be cited dealing with the preservation of wildlife, including the 1911 treaty between Britain, Japan, Russia and the United States for the preservation of fur seals and sea otters;¹⁶ the 1916 convention between Great Britain and the United States to protect migratory birds by specifying closed seasons for bird hunting;¹⁷ and the 1921 treaty between Italy and Yugoslavia to prohibit trade in fish caught by fishing methods having 'an injurious effect upon the spawning and preservation of fisheries'.¹⁸

¹³ Declaration of the United Nations Conference on the Human Environment (the 'Stockholm Declaration'), 11 ILM 1416, generally.

The 'moderately broad definition' adopted in the GATT Annual Report 'includes the full range of pollution-related problems, plus soil erosion and loss of fertility, deforestation, product safety (food, hazardous wastes), endangered species and the treatment of animals'.

'Trade and the Environment', *International Trade 1990-91: GATT Secretariat Annual Report* (1992) vol I (hereinafter 'GATT Report'), 19.

¹⁴ See discussion of Steve Charnovitz, 'Exploring the Environmental Exception in GATT Article XX' (1991) 25 *Journal of World Trade* 37, 39-41.

¹⁵ 188 CTS 418.

¹⁶ 37 Stat 1542, cited in Charnovitz, above n 14, 39.

¹⁷ *Ibid* 39-40.

¹⁸ Of course how successful these measures have been might be asked when, interestingly, it can be appreciated that the subject matter of these treaties can be directly identified as precursors to later treaties, or alternatively later trade disputes. For example, the 1900 treaty appears as an embryonic form of the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES') (1973) 993 UNTS 243. Conversely, the 1921 treaty provides an early indication of the sorts of concerns that would be apparent in the *Tuna Dolphin*

However, it is also clear that these two causes have in recent times achieved a greater and more broadly based momentum than ever before. With regard to the environment, it might be said that the catalyst for this growth was a realisation of the effects of a century of exponential global industrialisation and its effects on the environment. This appears to have prompted the 1972 United Nations Convention on the Human Environment, which in turn provided the stimulus for environmental protection over the last thirty years. No doubt the following words from the Stockholm Declaration struck a chord:

We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in the water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreparable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man made environment.¹⁹

Accordingly, since that time the environment has continued to be a major issue on the international agenda, its importance perhaps being most visible in the 1992 United Nations Conference on Environment and Development ('UNCED'), a gathering held at Rio in which the presence of many world leaders assisted in it achieving a high profile and being dubbed the 'Earth Summit'. Similarly, during the intervening twenty years, a new generation of environmental protection treaties with trade effects have emerged, the 1989 *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (the 'Basel Convention')²⁰ being perhaps the best known, its provisions which ban the trade in such wastes with non-parties to the Convention,²¹ in turn being a model for a further generation of environmental treaties with trade effects.²²

Case. Thus, there would appear to be nothing new in the concerns of, and the mechanisms employed to deal with, the interaction of trade and the environment.

¹⁹ Stockholm Declaration, above n 13, 1416, para 3.

²⁰ [1992] ATS No 7.

²¹ 'A party shall not permit hazardous wastes or other wastes to be exported to a non-party or to be imported from a non-party'; [1992] ATS No 7, art 4.5.

²² However, as the Basel Convention's history demonstrates, the implementation of such treaties can appear convoluted. Signed at Basel, Switzerland, 22 March 1989, it did not come into force globally for another three years, ninety days after the deposit of the twentieth accession to the agreement. And yet, as the Australian example demonstrates, its provisions were already being mirrored in domestic law. Australia deposited its instrument of accession on 5 February 1992, and the treaty came into force in Australia and globally on 5 May the same year. However, Australia's implementation of the Basel regime on the trade in hazardous waste although gradual did predate its accession to the Treaty, being contemporaneous:

Free Trade and the advent of the General Agreement on Tariffs and Trade

The cause of free trade is also not new. Further, it would be wrong to suggest that the proponents of this cause have been entirely impervious to environmental concerns. Indeed, to cite one example, the 1882 free trade treaty between France and Great Britain appeared to pursue both objectives, in that while ‘most favoured nation’ trading status was conferred reciprocally, there was a reservation that either party might impose ‘such prohibitions or temporary restrictions on the import, export or transit which they may think necessary to enforce for sanitary reasons’.²³ Similarly, although it never came into force, the treaty which emerged from the 1927 Geneva Conference (which has been described by one commentator as the ‘world’s first trade round’),²⁴ the *International Convention for the Abolition of Import and Export Prohibition and Restrictions*, is also worth noting. It too provided an exception to a signatory’s obligation to allow free trade for ‘prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites’.²⁵

However, the last sixty years have also perhaps seen the proponents of the cause of global free trade become a little more single-minded, at least since GATT first came into operation. This new tenacity

with the opening of the Treaty for signature, commencing with the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), which has since been amended to more fully encompass the provisions of the Basel Convention. Thus, it would appear that the influence of such treaty regimes is observable even when they are not actually in force.

Similarly, as noted in the text above, the influence of the Basel Convention can be seen in other ways, including in the promotion of a series of other international agreements based on the Basel pattern but dealing with more specific types of waste, or with specific regions. For example, the *Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Waste and to Control the Transboundary Movement and Management of Hazardous Waste within the South Pacific Region* (the ‘Waigani Convention’) [1995] ATS 13, to which Australia is also a party, effectively promotes the objectives of the Basel Convention, by banning the export of radioactive waste to all Pacific Island developing countries which are members of the South Pacific Forum. Other agreements, such as the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (the ‘Radwaste Convention’), signed by Australia on 13 November 1998, (not yet in force, but available at <http://www.iaea.org/wolrdatom/Documents/Legal/jointvovns.htm>) further pursues and underlines the Basel provisions by imposing regulatory obligations upon parties regarding transboundary movement of wastes.

²³ 160 CTS 144, 147, art II.

²⁴ Charnovitz, above n 14, 41.

²⁵ 97 LNTS 393, 405, art 4(4).

might be explained in terms of GATT's 'historical mission', the post-Second World War desire to prevent a repeat of the 1930s experience that led to war, based on an often repeated view that one of the primary causes of the Second World War was the distortions in world trade, caused by tariffs sometimes reaching as high as 50 per cent, which effectively closed off the markets of some countries and strangled the trade of others (and consequently their ability to generate wealth).²⁶ The fact that consensus was so elusive when attempts were made to negotiate a similar agreement twenty years earlier at Geneva is further indication of a compulsive idealism which seemed to entice the creators of GATT.

GATT was born of initiatives promoted most strongly by the United States, which, having reluctantly entered the Second World War as a belligerent, evidently at this time elected to abandon its previous isolationist stance in more than one area, the global economic front also receiving their attention. The most visible evidence of this was the 1944 conference at Bretton Woods, New Hampshire, which eventually led to the foundation of the International Monetary Fund ('IMF') and the World Bank. However, trade was not the central topic at Bretton Woods, and so in 1945 the United States promoted further proposals to establish an International Trade Organisation (the 'ITO'). This in turn led to a series of conferences held around the world all directed toward this goal. Unfortunately for those who envisaged something more than a threadbare treaty-based trading system, the idealism was short lived. Although a draft ITO Charter was agreed at Havana in 1948, it failed to gain the support of the United States Congress, which had lost its earlier enthusiasm for the project. Without the support of the world's strongest economy, the ITO proposals came to nothing.²⁷

What emerged in 1947 instead of the ITO was the General Agreement on Tariffs and Trade, or 'GATT' as it soon became known, agreed to by 23 trading nations. It was originally intended merely as a temporary measure until the foundation of such a trade organisation and, as such, an agreement largely bereft of necessary detail beyond some general principles and totally without a developed organisational support. In the event, GATT 1947 over time came to have

²⁶ General statements on this topic are contained in both Alan Oxley, *The Challenge of Free Trade* (1990), 4, and John H Jackson, *World Trade and the Law of GATT* (1969), 37.

²⁷ John H Jackson, William J Davey and Alan O Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Context* (3rd ed, 1995) 293-296.

over one hundred members (which made amending any of its shortcomings extremely difficult); developed ad hoc its own Secretariat Organisation (which promoted regular trade rounds among members to negotiate further global free trade) and created a dispute settlement system to support the meagre provisions for such matters within the Agreement itself.²⁸ Further, despite the temporary nature of the GATT, it is worth noting that with the founding of the WTO in 1994, GATT as amended is still the central piece of WTO law.

With regard to the Dispute Settlement system, which allowed Panels to hear disputes relating to breaches of GATT if consented to by the disputants, it should be noted that, despite a renaissance in its final decade preceding the introduction of the new compulsory system under the WTO, the GATT system was a body of varying authority, treated with such disdain that it fell into virtual disuse during the 1960s.²⁹ That it was held in such regard is still a matter of current significance because, as recent cases such as the *European Meat Products Case* show, many of its rulings still provide guidance to WTO Panels, thereby arguably tainting them with whatever flaws might have affected GATT Panel rulings.³⁰

What GATT did provide was the general rules governing obligations to be accorded reciprocally between its members in the pursuit of free trade. For the purposes of this discussion, four of its articles should be noted. First, Article I, the 'Most Favoured Nation' obligation, requires that each member extends to other members treatment 'no less favourable' than that extended to *any* other trading partners in the trade of any 'like' product. This means, for example, that if Australia (a GATT member) imported transistor radios from Japan (a GATT member) but applied a ten per cent import tariff, and then commenced importing 'like' transistor radios from China (not a GATT

²⁸ GATT art XXII provides for 'consultation', while art XXIII provides in general terms that in the event of nullification or impairment of a party's benefits, the responsible party shall give 'sympathetic consideration' when so consulted with a view to making any adjustment so as to discharge its obligations under GATT.

²⁹ Seven complaints were referred to GATT for Settlement in the 1960s, compared with 53 in the 1950s, 32 in the 1970s, and 115 in the 1980s. Robert Hudec *et al*, 'A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989' (1993) 2 *Minnesota Journal of Global Trade* 1, 19.

³⁰ *European Meat Products* Appellate Body Report, above n 12, para 117. Note also *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the *WTO Agreement* art 3.1: 'Members affirm their adherence to the principles for the management of disputes heretofore applied under articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein'.

member, although this is not relevant) and applied only a five percent tariff, under Article I Australia would be required to accord Japan - and indeed all GATT members - the same 'most favoured' treatment as that accorded to China (ie, the lower tariff).

Secondly, under Article III, subtitled 'National Treatment on Internal Regulation', members are to accord to imported products treatment no less favourable than that accorded to like products produced domestically. Essentially, this provision is covering ground left open by Article I, which, if standing alone, would not promote free trade because a general prohibition on imports would not discriminate between nations, and so would not offend Article I, but would leave the domestic market open to domestic producers. The effect of Article III is to prevent discrimination between the imported product and the domestic product.

Thirdly, to remove any further remaining restrictions on imports or exports, Article XI provides a general prohibition on quantitative restrictions (which includes prohibitions). However, in a tempering both of its own terms and those of Articles I and III, Article XI also provides certain exceptions. They allow the use of (i) export prohibitions or restrictions to prevent or relieve shortages in foodstuffs, (ii) import and export prohibitions for the classification, grading or marketing of commodities, and (iii) import restrictions on agricultural or fisheries products which either restrict the quantities of the like domestic product to be marketed, remove a temporary surplus of the domestic product, or restrict the quantities permitted to be produced the production of which is directly dependant on the imported commodity if the domestic production is negligible.

Evidently, however, the formulators of GATT were aware even in the 1940s that, if taken to their ultimate conclusion, the effect of these articles on the environment could be immensely destructive, an unfettered plundering of natural resources being but one possibility. In recognition of this, they also provided for exceptions to compliance with the above obligations, under Article XX. With regard to environmental protection, these are specifically Article XX (b) and (g), which read as follows:

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;.....

Of course, much has changed since 1947 and as noted above the GATT Treaty is now only one among a series of agreements constituting WTO law. In addition, the original twenty-three signatories to GATT have grown to 136 members of the WTO as of April 2000. Weight of numbers has therefore given the WTO an authority comparable only with the United Nations and its various bodies – including those bodies devoted to the environment. However, in addition to this, the ability of the WTO to authorise one member to impose a trade penalty by withdrawing trade concessions from another member which has breached its WTO obligations has also given the WTO an authority far more manageable than any possessed by even the United Nations. This can be said because, whereas any sanction imposed by the United Nations will require a consensus of nations that is always difficult to achieve in *that* forum, Article 22 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* merely requires the authorisation of the WTO Dispute Settlement Body (DSB). Admittedly the DSB is composed of representatives of every WTO member, so that at first instance it may appear that the task of achieving consensus is as elusive as in the United Nations. However, it should be recalled that the DSB is also the body that under Articles 16 and 17 of the *Understanding* will have already accepted the determination of the Panels and Appellate Bodies finding that a breach of WTO law exists. Accordingly, it is suggested that the progression to authorising sanctions in this context is almost inevitable. It has been this ability to strike down and penalise a member state for enforcing any measure ruled to be in breach of WTO law that has set the apparent conflict between trade and the environment into sharp focus, and highlights the significance of WTO dispute decisions and why environmentalists watch them so closely.

The Tuna Dolphin Case

Three years before the creation of the WTO, it was the result in the *Tuna Dolphin Case* that appears to have been the spark which ignited the 1990s debate on trade and the environment.

Briefly, the case concerned a United States law designed to reduce the incidental taking of dolphins in the fishing of tuna, which by the

early 1970s was reaching well into the hundreds of thousands.³¹ The subject of the dispute was that under the *Marine Mammal Protection Act* ('MMPA') a ban was effectively imposed on the importation of Mexican yellowfin tuna.³² With regard to domestic tuna fishing, the MMPA only allowed licensing of fishermen who used certain fishing techniques, so as to reduce the high level of incidental taking of dolphins.³³ Similarly, so as not to allow the sale in the United States of foreign fish produced in contravention of these standards, a corresponding requirement dealing with tuna produced in other countries required that those countries prove that their fishing regulatory regime was comparable to that of the United States, meaning that they prove that the incidental taking of dolphins was not in excess of 1.25 times the United States average.³⁴ A failure to provide such proof would lead to a ban on the importation of such fish. Thus, Mexico's failure to provide this proof led to the United States ban. Following Mexico's claim that the ban was in violation of GATT obligations, a GATT Panel was established, as requested by Mexico. The Panel, in turn, upon hearing the matter agreed that the ban was in violation of GATT. It further noted, Pilate-like, that its task was limited merely to examining the matter 'in the light of the relevant GATT provisions', something which 'did not call for a finding on the appropriateness of the United States and Mexico's conservationist policies'.³⁵ It suffices to say that this statement appeared to do little to stifle the subsequent debate.

Specifically, the Panel decided three significant issues. Firstly, there was the decision that the United States' prohibition was in violation of Article XI as a quantitative restriction.³⁶ This was contrary to the United States' argument that the measure was permitted under Article III as national treatment being accorded to a 'like' imported prod-

³¹ Estimates indicate that six to eight million dolphins have been killed since 1959 with as many as 300,000 a year in the early 1970s as a result of driftnet and purse seining fishing methods. Briefly, both of these fishing methods utilise fishing nets of miles in length – drift nets up to fifteen miles – which tend to catch all marine life which cross their path. For further information, see Carol J Miller and Jennifer L Croston, 'WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act' (1999) 37 *American Business Law Journal* 74, 75.

³² For the purposes of this discussion, the MMPA prohibition on tuna imports from intermediary nations which the Panel also addressed will not be dealt with.

³³ *Tuna Dolphin Panel Report*, above n 9, para 5.1.

³⁴ *Ibid* para 5.2.

³⁵ *Ibid* para 5.1.

³⁶ *Ibid* para 5.18.

uct, and that domestic tuna produced using the prohibited fishing techniques were also banned.³⁷ Fundamental to the Panel's rejection of this argument was the adoption of the 'product/production' distinction, the argument that the method of production of a product is irrelevant to the 'likeness' of a product which is determined by reference to its characteristics. As the Panel stated, '[r]egulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product'.³⁸

The two other major questions determined by the Panel concerned the two Article XX exceptions. In relation to these it found, firstly, that the prohibition did not qualify as an Article XX(b) exception, as being necessary to protect animal health of life. Secondly, it found that the prohibition did not qualify as an Article XX(g) exception, as relating to the conservation of an exhaustible natural resource. Common to both findings was a conclusion drawn by the Panel that the United States' prohibition, by reason of the pressure it exerted over Mexican fishermen, was purporting to operate with extra-jurisdictional effect. This was something that the Panel ruled GATT could not have authorised. To do so would effectively grant GATT members the power to determine the life or health policies of other members, therefore 'jeopardising their rights under the General Agreement'.³⁹ It might be briefly noted that this finding clearly ignores, firstly, the United States Article III position that the prohibition was an internal measure enforced at the point of importation. Secondly, the United States' argument that even if the prohibition did purport to operate with extra-jurisdictional effect, such a measure was neither uncommon nor forbidden at international law; the CITES Convention being cited as but one example of the employment of this practice.⁴⁰

The Panel also found additional reasons why the prohibition failed to satisfy the exceptions. With regard to Article XX(b), it noted the inclusion of the word 'necessary' as a pre-requisite for the exempted measure to protect animal life. This term it interpreted as requiring that 'all other options reasonably available and consistent with [GATT]' – and in particular the negotiation of international agreements – had been exhausted before the exception was invoked (an interpretation which might be considered a little unrealistic as it

³⁷ Ibid paras 5.8–5.10.

³⁸ Ibid para 5.15.

³⁹ Ibid para 5.27 on art XX(b); paras 5.31–5.32 on art XX(g).

⁴⁰ Ibid para 3.36.

failed to acknowledge the difficulties and time delays encountered in negotiating such agreements, factors which all GATT members were experiencing at that very time in finding agreement mid-way through the eight-year-long Uruguay Round). As this was something the United States had failed to demonstrate, this pre-requisite had not been fulfilled.⁴¹

Similarly, with regard to Article XX(g), the Panel seemed ultimately to base its decision on the argument that the prohibition could not be considered as relating to the conservation of exhaustible natural resources (ie, dolphins) because it was not 'primarily aimed' – the phrase adopted from a previous Panel⁴² – at such conservation.⁴³ Viewing this requirement in tandem with the Article XX preamble that requires such measures to be neither arbitrary nor unjustifiable discrimination, probably provided the Panel with its most persuasive ruling. The permissible levels for the incidental taking of dolphins with which the Mexicans had to comply were based not on an abstract and justified figure but rather on the subjective factor of United States takings *at the same time*. As the Panel noted, a limitation 'based on such unpredictable conditions could not be regarded as primarily aimed at conservation of dolphins'.⁴⁴ Indeed, what the Panel did not say, but is worth noting also, is that the linking of the standard to the United States takings might be considered to involve a degree of favouritism by the United States towards United States fishermen and the priority of *their* trade, which would clearly be seen to detract from the 'primary aim'.

However, regardless of any perceived strengths in the Panel report, by striking down an environmentally protective measure, it effectively surrendered an opportunity to make environmental protection an integral part of GATT. Further, its limited legal interpretations suggested a reading divorced from reality. Specifically, the interpretation of what is 'necessary' suggested that negotiation of agreements must be the solution before an exception is utilised, even though it is one constant of international law that negotiating agreements takes time, and another constant of the environment that the urgency of environmental causes can often not wait for periods of up to fifty years (ie, the time it took to negotiate the WTO). In addition, the case

⁴¹ Ibid paras 5.27 – 5.28.

⁴² Panel Report on *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, 1988 GATT BISD 35S/98, para 4.6.

⁴³ *Tuna Dolphin* Panel Report, above n 9, para 5.33.

⁴⁴ Ibid.

raises the question of how far the 'product/production' distinction extends, and was it so simplistic and superficial as to ignore such production processes as the production by slave or child labour of carpets,⁴⁵ or even the chemical or genetic treatment of food?

What can be seen is that, more than merely affecting very basic notions of environmental protection, the Panel's decision had the capacity to reach into a multitude of areas, some of which might be considered non-environmental to those who would place all matters into mutually exclusive categories (eg, trade, environment, health, labour), but which indicated the way in which all of these matters are inter-related, and can be encompassed into the Stockholm notion of the 'human' environment, the protection of which the GATT Panel did not appear ready to embrace.

Environmental Disputes under the WTO prior to the Salmon Case

Although the findings in the *Tuna Dolphin Case* sparked a substantial debate as to whether GATT could be consistent with the protection of the environment, the standing of the decision and its jurisprudence and its relevance to developing international trade was ambiguous. This was because, first, the Panel report was never actually adopted as the Mexicans never pursued the matter or sought any further remedies, presumably reasoning that there was more to be gained by reaching an independent settlement with the United States.⁴⁶ Similarly, a further Tuna Dolphin dispute decision dealing with the MMPA based on a complaint from the European Community, al-

⁴⁵ This last example was a current question when in 1993 the *Child Labor Deterrence Act* was introduced to the United States Congress. It was designed to curtail the exploitation of child labourers around the world – estimated to run into the hundreds of millions – by prohibiting the import of goods produced using such labour. For example, it would ban the importation of carpets from Pakistan where the ILO estimated 50,000 children worked on their manufacture (half of whom it was also estimated would never reach the age of twelve). However, as one commentator noted, in light of the *Tuna Dolphin Case*, if challenged the Bill would prove contrary to GATT. Leaving aside such questions as extra jurisdictional effects and necessity, basically, the production of the product would have nothing to do with whether the product was a 'like' product. See James P Kelleher, 'The Child Labour Deterrence Act: American Unilateralism and the GATT' (1994) 3 *Minnesota Journal on Global Trade* 161.

⁴⁶ Coincidentally, the North American Free Trade Association ('NAFTA'), which was formed in 1994, has as its parties the United States, Canada, and Mexico. The advantages of being admitted to membership were presumably in the thoughts of the Mexican Government at the time of the *Tuna Dolphin* dispute.

though reaching a similar decision, was also not adopted.⁴⁷ Arguably, therefore, although persuasive statements of the law, it might nevertheless be suggested that these decisions lacked a certain compelling quality.

Secondly, no doubt prompted by the ensuing debate about trade and the environment, which was also stimulated by the Earth Summit, it was apparent from its foundation in 1994 that the WTO was seeking to adopt a more environmentally conscious perspective in pursuing its free trade goal than had the GATT Secretariat. This was immediately evident in the preamble to the WTO Agreement, which spoke of 'allowing the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment', sustainable development of course being a hallmark phrase of international environmental law.⁴⁸ However, the WTO also embarked on other visible programs, including the establishment up of the WTO Committee on Trade and the Environment, for the purposes of promoting and undertaking the reporting and recommending of strategies to promote environmental protection in ways consistent with WTO law. Despite the suggestion that such a body was little more than a successor to the GATT 'Working Group on Environmental Measures and International Trade', in its favour it can be noted that its GATT predecessor, although founded in 1971, did not meet until 1991 in the wake of the first *Tuna Dolphin Case*.⁴⁹ The program of the present body is far more visible, regularly meeting and posting bulletins, and most recently having been the sponsor of a WTO 'Special Study', which demonstrated a clear familiarity with and understanding of the problems of trade and the environment.⁵⁰

However, despite this overt sympathy with environmental protection, the practical reality appears less well reconciled with this cause. This

⁴⁷ *United States – Restrictions on Imports of Tuna* 33 ILM 839 ('*Tuna Dolphin II*').

⁴⁸ This is something highlighted by both Miller and Croston, above n 31, 82 and Indira Carr, 'Environment versus International Trade: Where Are We Now?' (1997) 4 *International Trade Law Review* 130 esp at 132. As Carr points out, whereas the preamble to GATT speaks of 'developing the full use of the resources of the world', the preamble to the WTO Agreement speaks of 'allowing the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment' (emphasis added)

⁴⁹ Hakan Nordstrom and Scott Vaughan, *Special Studies 4: Trade and the Environment* (1999) 67-68.

⁵⁰ *Ibid.*

is apparent from the first three cases that found their way through the WTO's new dispute resolution system, from Panel hearings to the Appellate Body, the *Gasoline Case*, the *Shrimp Sea Turtle Case*, and the *European Meat Products Case*.

The Gasoline Case

The *Gasoline Case* was the first matter heard by the WTO's new Appellate Body and arose out of a complaint brought by Venezuela and Brazil against the United States regarding measures introduced under the *Clean Air Act 1990* ('CAA'). In summary, the facts were as follows.⁵¹

To ensure that pollution from gasoline combustion did not exceed 1990 levels and to assist in reducing pollutants in major population centres, the CAA established two gasoline programs. The first applied to what were termed 'non-attainment areas', meaning certain large population areas which had previously experienced the worst summertime ozone pollution; in these areas the sale of conventional gasoline would be prohibited, and only reformulated gasoline allowed for sale. This program was not the subject of dispute. However, the second program allowed for the sale of conventional gasoline in other areas, but subject to certain conditions. Specifically, it was required that gasoline sold by domestic refiners, blenders of gasoline, and importers of gasoline remain as clean as 1990 baseline levels. How this was determined was as follows. First, domestic refiners which had been in operation for at least six months in 1990 were required to establish an individual baseline representing the quality of gasoline they had produced in 1990, based on their own quality date and volume records. Conversely, for domestic refiners that had not been in operation for six months in 1990, a statutory baseline was established. Secondly, with regard to blenders of gasoline, they were also required to establish an individual baseline. However, if such information regarding 1990 information was unavailable, as was quite likely, they too were required to comply with the statutory baseline. This was the same rule that was applied to the third class of gasoline sellers, the importers of gasoline, and this was the basis of the complaint by Venezuela and Brazil.⁵² The 'Gasoline Rule', as it was termed, was claimed to discriminate against foreign refiners because it did not allow them to determine individual baselines, and presumably there was

⁵¹ *Gasoline Case* Appellate Body Report, above n 10, 608-610.

⁵² *Ibid* 614.

insufficient information provided to allow the importers to determine such baselines acceptable under the CAA. It was claimed that it violated Article III and did not fall within any of the Article XX exceptions.

Before the Panel at first instance, the claim was that the 'Gasoline Rule' was in violation of Article III, in that the imported 'like' product was being accorded less favourable treatment than the domestic 'like' product. This claim the Panel accepted.⁵³ Clearly, the determining factor under the CAA was the possession of what was essentially a producer's historical data regarding a product as a way of determining the permissible characteristics of the product in question. In other words, the method of production, and the characteristics of the producer were the basis of the discrimination. However, in finding that gasoline produced by a domestic refiner was 'like' gasoline produced by a foreign refiner, the Panel was indicating that this factor was irrelevant, and said that any domestic law which used it as a basis for discrimination between domestic and imported products was not allowed by Article III.⁵⁴ Thus, the product/production distinction adopted by the GATT Panels in the *Tuna Dolphin* Cases would appear to have survived. This was a finding against which the United States did not appeal.⁵⁵

However, regarding the Panel's finding that the 'Gasoline Rule' failed to fall under any of the Article XX exceptions, the fact that this finding was appealed might tend to indicate that in the new WTO era the United States felt that it could succeed. Specifically, with regard to its Article XX(b) finding, the Panel was consistent once again with the *Tuna Dolphin* decision, in finding that as a measure which was 'necessary to protect human, animal or plant life or health', the 'Gasoline Rule' was not 'necessary' because not all other options had been exhausted (consultation, treaties, etc). Further, although it found that under Article XX(g) clean air was an exhaustible natural resource, it nevertheless found that the 'Gasoline Rule' was not a measure 'relating to' the conservation of that resource.⁵⁶

The Appellate Body upheld the Article XX(b) finding as it was not challenged. However, it found the Panel in error regarding Article XX(g). With regard to determining what 'relating to' meant, the

⁵³ *Gasoline Case* Panel Report, above n 10 para 46.11.

⁵⁴ *Ibid* 6.11

⁵⁵ *Gasoline Case* Appellate Body Report, above n 10, 613.

⁵⁶ *Gasoline Case* Panel Report, above n 10, para 6.40.

Panel had endorsed the use of the phrase ‘primarily aimed’, the phrase which it will be recalled the *Tuna Dolphin* Panel had adopted from an earlier panel.⁵⁷ However, the Panel went on to say that it:

saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States.⁵⁸

The requirement of a ‘direct connection’ confounded the Appellate Body, which queried whether this phrase was merely a further synonym for ‘primarily aimed at’ (and therefore presumably for the words ‘relating to’), or whether a further requirement in addition to the measure being ‘primarily aimed’ at conservation was being required.⁵⁹ Suffice it to say, basing its reasoning on the *Vienna Convention on the Law of Treaties*, and specifically Article 31 which requires that the words in treaties be given their ‘ordinary meaning’, the Appellate Body adopted a less strict reading and determined that ‘the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g)’.⁶⁰ It therefore reversed the Panel’s finding and determined that the ‘Gasoline Rule’ did fall within the terms of Article XX(g).⁶¹

Nevertheless, this finding of error was insufficient to allow the ‘Gasoline Rule’ to clear the Article XX threshold because of further findings made by the Appellate Body regarding the meaning of the introductory words of that article, sometimes referred to as the ‘chapeau’ or the ‘headnote’, which addresses the manner in which the measures in question be applied, and which was intended to prevent the ‘abuse of the exceptions’. Effectively thwarting all of the gains made by the United States on the appeal, the Appellate Body went on to say that the burden of proving that the measure did not constitute a means of arbitrary or unjustifiable discrimination or a ‘disguised restriction on international trade was borne by the party invoking the exception’.⁶² It continued:

We have located two omissions in the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative

⁵⁷ See above n 42.

⁵⁸ *Gasoline Case* Panel Report, above n 10, para 6.40.

⁵⁹ *Gasoline Case* Appellate Body Report, above n 10, 619-620.

⁶⁰ *Ibid* 623.

⁶¹ *Ibid* 633.

⁶² *Ibid* 627-628.

problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III.4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade'. We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.⁶³

Thus, as one commentator has noted, there was good news and bad news for environmentalists:

The good news is that it will be easier to meet the terms of section (g). The bad news is that it will be very hard to meet the terms of the headnote. The Appellate Body has shown a willingness to invent new requirements for the headnote that do not exist in the text and to apply them arbitrarily. Looking at this jurisprudence as a whole, there would seem to be little basis for the conclusion that GATT rules place essentially no constraints on a country's right to protect its own environment.⁶⁴

No doubt this final comment would not have gladdened the spirits of the members of the Appellate Body, who (in a manner similar to the Panel in the *Tuna Dolphin Case*) were at pains to point out that their decision did not mean 'that the ability of any WTO member to take measures to control air pollution, or more generally, to protect the environment is at issue'.⁶⁵ As was pointed out, that would be to ignore Article XX.⁶⁶

The Shrimp Sea Turtle Case

In general terms, the ultimate decision in the *Shrimp Sea Turtle Case* would appear to have added little further evidence after the *Gasoline Case* to indicate the WTO moving any nearer towards embracing the cause of environmental protection, and appears to confirm even more certainly the decision in the *Tuna Dolphin Case* as reflective of WTO

⁶³ Ibid 632-633.

⁶⁴ Steve Charnovitz, 'Environment and Health Under WTO Dispute Settlement' (1998) 22 *International Lawyer* 901, 912.

⁶⁵ *Gasoline Case* Appellate Body Report, above n 10, 633.

⁶⁶ Ibid 634.

law. However, at least two positives can be extracted from the decision of the Appellate Body. Firstly, it gave the appearance of arresting a trend, apparent in the *Gasoline Case*, which was making the introduction to Article XX the only relevant part of the article. In this respect, the Panel decision appears to have been the high water mark for this reading of Article XX. Secondly, there was also an indication that WTO Dispute Resolution Bodies could be more amenable to hearing the views of interested non-governmental organisations.

The facts of the *Shrimp Sea Turtle Case* were very similar to those of the *Tuna Dolphin Case*. It concerned measures designed to protect sea turtles, seven species of which are listed in Appendix I of CITES as being threatened with extinction. Alarmed at the high rate of incidental killings of sea turtles by shrimp fishing vessels, in 1987 the United States issued regulations under the *Endangered Species Act 1973* requiring all United States shrimp fisherman to use approved Turtle Excluder Devices ('TEDs').⁶⁷ Two years later, in further pursuit of sea turtle protection, amendments to the Act (s 609) directed the US Secretary of State to initiate negotiations with the governments of other countries for the development of agreements assisting in this goal.⁶⁸ However, in addition to this, the amendments provided that the importation of shrimp products from shrimp which had been harvested with commercial fishing technology which may affect adversely such species of sea turtles would be prohibited. The only exception to this importation prohibition would occur in situations where the exporting country was certified.⁶⁹

Initially, the United States Government extended this prohibition only to the Caribbean/Western Atlantic region, which was fortuitous as, through the Inter-American Commission, standards had been devised for certification of exporting nations. Accordingly, under 1996 guidelines, certification would be granted if either (a) shrimp harvesting used only means that did not pose a threat to turtles; (b) shrimp trawling occurred in waters uninhabited by sea turtles; or (c) incidental taking of sea turtles satisfied United States comparable standards.⁷⁰ It was not until the United States Court of International

⁶⁷ *Shrimp Sea Turtle Panel Report*, above n 11, para 7.2; *Shrimp Sea Turtle Appellate Body Report*, above n 11, para 2.

⁶⁸ *Shrimp Sea Turtle Panel Report* above n 11, para 7.3; *Shrimp Sea Turtle Appellate Body Report*, above n 11, para 3.

⁶⁹ *Ibid.*

⁷⁰ *Shrimp Sea Turtle Appellate Body Report*, above n 11, para 3.

Trade ordered that these standards be extended worldwide⁷¹ – a move prompted by the Earth Island Institute (an environmental group), which had challenged the limited geographical operation of the guidelines – that the grounds of the dispute appeared. When the guidelines and the prohibition were applied to India, Pakistan, Thailand and Malaysia, these nations claimed that the measures were applied in breach of the United States' obligations under GATT and were not justified under Article XX.

As occurred in the *Tuna Dolphin Case*, the Panel found that s 609 was in breach of the United States obligations under Article XI of GATT, as it imposed a prohibition or restriction through import licences on a like product.⁷² Suffice to say, WTO jurisprudence had progressed to such a stage that the 'product/production' distinction was not even discussed. Whether they were Indian or American shrimps, regardless of how they were caught, regardless of how many more sea turtles might have been killed in the fishing of Indian shrimp in comparison with the fishing of American shrimp, they were all shrimp, all a 'like product'. There were no surprises here.

Where the Panel did appear to go further than previously, however, was in its dealing with the United States' claim that s 609 fell under Article XX(b) and (g). In a discussion, which was stated to be based on the decision in the *Gasoline Case*, and which to the author appears consistent with the Appellate Body's decision in the *Gasoline Case*, the Panel elevated the cause of free trade and the introduction of Article XX as a tool for this goal unambiguously to the fore over the terms of the exceptions. Indeed, in the course of the decision the terms of Article XX(b) and (g) became virtually irrelevant, as the Panel stated:

[W]hen invoking Article XX, a member invokes the right to derogate to certain specific substantive provisions of GATT 1994 but that, in doing so, it must not frustrate or defeat the purposes and objects of the General Agreement and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX.⁷³

Later in its decision the Panel continued:

We are of the opinion that the chapeau of Article XX, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, only allows Members to derogate from the

⁷¹ Ibid 6.

⁷² *Shrimp Sea Turtle Panel Report*, above n 11, para 7.17.

⁷³ Ibid para 7.40

GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system.⁷⁴

In other words, what the Panel was saying was that an environmental trade measure is only justified under Article XX if it is compatible with the maintenance of the WTO's trading system. Arguably, therefore, any distortion created by such a measure would therefore not be valid. Accordingly, the Panel found that s 609 was not within the 'scope' of the measures permitted under Article XX,⁷⁵ and did not even find it necessary to examine whether it came within the terms of Article XX(b) or (g).⁷⁶ Thus, these seemingly crucial issues vanished from the contest.

When the Appellate Body came to review this decision it was this methodology which it criticised, stating:

The Panel failed to scrutinize the *immediate* context of the chapeau: ie paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the chapeau of Article XX. Rather, the Panel looked into the object and purpose of the whole of the GATT 1994 and the WTO Agreement, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which 'undermine the WTO multilateral trading system' must be regarded as 'not with the scope of measures permitted under the chapeau of Article XX'.⁷⁷

Thus was this overt subsumation of the Article XX exception in the cause of free trade rolled back.

However, in most other respects, the decision of the Appellate Body was predictable. It was found that s 609 did fall within the scope of Article XX(g), sea turtles being considered an exhaustible natural resource⁷⁸, and s 609 being a measure 'relating to' their conservation.⁷⁹ In these circumstances, it was therefore unnecessary to determine whether the measure also fell within the scope of Article XX(b) as a measure for the protection of human, animal or plant life or health as it had only been raised by the United States as an alternative.⁸⁰ However, as occurred in the *Gasoline Case*, the measure in question still had to clear the threshold of the introduction of Article XX, no easy

⁷⁴ Ibid para 7.44.

⁷⁵ Ibid para 7.62.

⁷⁶ Ibid para 7.63

⁷⁷ *Shrimp Sea Turtle Appeal Report*, above n 11, para 116.

⁷⁸ Ibid para 134.

⁷⁹ Ibid para 142.

⁸⁰ Ibid para 147.

task even without the reading placed on it by the Panel. It was at this stage that s 609 fell, the Appellate Body finding, among other matters, a failure on the part of the United States to establish that it had attempted to negotiate an agreement with the complainants as it had done with its Caribbean neighbours:

[T]he United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable.⁸¹

Thus, another domestic environmental law fell foul of the WTO.

And yet, there was at least one matter that emerged from the *Shrimp Sea Turtle Case* that would give heart to environmentalists. In addition to hearing the submissions of the parties, the Appellate Body ultimately determined that the Panel was allowed under Article 13 of the WTO DSU⁸² to accept submissions from non-government organisations (the *amicus briefs*).⁸³ Before the Panel, non-requested submissions were volunteered by the Centre for Marine Conservation, the Centre for International Environmental Law and the World Wide Fund for Nature. However, the Panel held that it could not accept these submissions as they had not been sought by the Panel and they had not been offered by the parties.⁸⁴ In the event, portions of these submissions could only be accepted because the United States added them as Annexes to their own submissions.⁸⁵ By finding that this ruling was incorrect, the Appellate Body was arguably opening another door; the extent of what lies beyond it and in what situations such *amicus briefs* might be accepted has yet to be fully explored.

The European Meat Products Case

The *European Meat Products Case* provides a further, but important, example of a health and environment measure being struck down as inconsistent with GATT/WTO law. The significance of the decision lies in the reasons why the measure in question was struck down. Unlike the cases already discussed above, the measure was not struck down because it was inconsistent with GATT itself. Rather, it was considered inconsistent with the additional treaty law introduced at

⁸¹ Ibid para 172.

⁸² 'DSU', abbreviation for *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the *WTO Agreement* noted above n 2.

⁸³ *Shrimp Sea Turtle* Appellate Body Report, above n 11, para 110.

⁸⁴ *Shrimp Sea Turtle* Panel Report, above n 11, para 7.7.

⁸⁵ Ibid para 7.8.

the founding of the WTO, the more 'environmentally aware' WTO. In this case, which gave the Appellate Body its first opportunity to examine the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the 'SPS Agreement'),⁸⁶ it became apparent that agreements made at the founding of the WTO have had the effect of narrowing the Article XX exceptions and presenting a series of new WTO hurdles that domestic environmental laws must clear.

The *European Meat Products Case* concerned a series of European Council Directives⁸⁷ that prohibited the placing on the market of meat and meat products treated with any of six different types of growth hormone,⁸⁸ exceptions only being allowed for therapeutic purposes. The prohibition applied both to domestic and imported meat, the importation of the latter being banned.⁸⁹ However, the prohibitions prompted a complaint by the United States and Canada because they effectively closed the European market to certain North American meat products, the use of these hormones in the form of pellets and other food additives being an approved growth promoter in North America.⁹⁰

At the outset, it might have been considered that the European Communities were in a strong position with regard to the GATT breaches that were argued before the Panel by the United States because, unlike the situation in the *Tuna Dolphin Case*, they were able to present evidence that not only was the production process different, but so was the finished product. The European Communities were able to argue that they were not dealing with 'like' products. Specifically, they were able to show that cattle treated with the relevant hormones contained higher residues of these hormones.⁹¹ In addition, they were able to point to the general acceptance that certain high levels of such hormones in humans had a carcinogenic effect.⁹² Accordingly, it might well have been thought that such evidence would surely defeat all but the most superficial 'like' product arguments (even though this is exactly what the United States were sug-

⁸⁶ Above n 2.

⁸⁷ European Council Directives 81/602 EEC; 88/146 EEC; 88/299 EEC; 96/22 EC.

⁸⁸ The six hormones were oestradiol, progesterone, testosterone, trenbolone, acetate, and zeranol.

⁸⁹ *European Meat Products* Appellate Body Report, above n 12, paras 1–5.

⁹⁰ *European Meat Products* Panel Report, above n 12, para II.10.

⁹¹ *Ibid* para IV.248–254.

⁹² *Ibid* para IV.48.

gesting should be the case in their argument for a breach of Article III).

However, in the result the Panel ultimately considered it 'unnecessary' to address any question of a breach under GATT. Accordingly, the Appellate Body had no negative finding to consider on this question, a matter that should be frustrating to all observers as it still leaves open the question of how far the 'product/production' distinction is to be taken. And yet, the reason why the question was not addressed, that a further breach of WTO law had been established, would be even more frustrating to those looking for evidence of an embrace of environmental protection by the WTO, as it suggests a trend in the opposition direction.⁹³ The breach established was under the *SPS Agreement*, one of the agreements concluded during the Uruguay Round and which since 1994 has been part of WTO law. The European Communities had argued that a breach of GATT must first be established before any potential breaches of the *SPS Agreement* were addressed,⁹⁴ a reading which would appear justified by reason of the explanation, contained in the Agreement's preamble, of the Agreement as an elaboration of the rules of GATT and particularly Article XX(b). As noted above, the Panel rejected this argument - a finding that might be considered questionable - and proceeded to examine whether the Agreement itself had been breached.

Under Article 2 of the *SPS Agreement* members have the right to apply measures for the protection of human animal or plant life or health, although limited only to the extent necessary for such protection, 'based on scientific principles and ... not maintained without sufficient scientific evidence' (Article 2.2). Further, to achieve international conformity, Article 3.1 requires that such measures be based on international scientific standards. However, Article 3.3 provides exceptions, allowing higher standards to be imposed 'if there is a scientific justification *or* as a consequence of the level of sanitary or phytosanitary protection which a member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.⁹⁵ The eight paragraphs of Article 5 provide

⁹³ Ibid paras CCLXXX – CCLXXXI.

⁹⁴ Ibid para XLI.

⁹⁵ Art 3.3 reads:

Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary protection than would be achieved by measures based on the relevant international standards, guidelines or

various criteria upon which any measures should be based such as, for example, assessments of risks to human, animal or plant life and health (paragraph 1) and the avoidance of arbitrary distinctions (paragraph 5).⁹⁶

In the event, how the Panel and the Appellate Body interpreted Article 3.3 proved crucial and, ultimately, extraordinary. In its decision the Panel found that an international standard did exist regarding permissible levels of hormones in meat for human consumption, the standards of the Codex Alimentarius Commission,⁹⁷ and that European Communities' standards, by reason of the prohibition, were exceeding them.⁹⁸ In addition, the Panel found that the European Communities had not complied with all of the provisions of Article 5 in setting their standards, specifically paragraphs 1 and 5.⁹⁹ As a consequence, the European Communities were forced to rely on the apparent choice of pretexts for setting the higher standards noted in Article 3.3. However, as the Appellate Body explained, having noted that the article also required any higher standard be 'not inconsistent with any other provision of this Agreement', there was in fact no choice. The use of the word 'or' in Article 3.3 was deceptive. Noting that 'Article 3.3 is evidently not a model of clarity in drafting and

recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

⁹⁶ In summary, the eight criteria under Article 5 to be considered when setting levels for sanitary and phytosanitary protection are: an assessment of risks to human, animal and plant life and health (paragraph 1); the taking into account of available scientific evidence (paragraph 2); relevant economic factors (paragraph 3); the objective of minimising negative trade effects (paragraph 4); the avoidance of arbitrary and unjustifiable distinctions in levels set (paragraph 5); ensuring that levels set are not more trade sensitive than required (paragraph 6); in the absence of scientific evidence the available pertinent information including that of the relevant international organisations (paragraph 7); and, where relevant international standards guidelines and recommendations do not exist, the provision upon request of an explanation of the reasons for the setting of the measure (paragraph 8).

⁹⁷ The European Communities did note, however, that these standards were adopted by a vote of only 33 votes in favour to 29 against with 7 abstentions (ie adopted by a minority of Codex members). *European Meat Products* Panel Report, above n 12, para IV.77.

⁹⁸ *Ibid* para CXC VII.

⁹⁹ *European Meat Products* Appellate Body Report, above n 12, para 6.

communication' and that '[t]he use of the disjunctive "or" does indicate that two situations are intended to be covered', the Appellate Body nevertheless concluded that "Any other provision of this Agreement" textually includes Article 5'.¹⁰⁰ In other words both choices required compliance with Article 5. The Appellate Body, although it reversed the Panel's finding that the measure applied an arbitrary distinction, agreed that there had not been a sufficient risk assessment as required under Article 5.1, finding only that what scientific evidence the European Communities relied on had not actually been taken into account when the prohibitions had been introduced and did not form a risk assessment.¹⁰¹ Therefore, as the European Communities had not satisfied these requirements, their measures were inconsistent with their WTO obligations and should be altered accordingly.

This finding, in itself, is perplexing as it displays a rigid adherence to certain of the words of the *SPS Agreement* over others and a defiance of what might be considered ordinary statutory interpretation. Of further concern, however, was that the rejection of the European case also involved the rejection of what was termed the 'precautionary principle' as invoked by the European Communities. If it were to be determined that the European Communities had no choice but to satisfy the provisions of Article 5, then it was argued that compliance could be subject to this principle, which could assist in showing that a sufficient risk assessment had been conducted. Identified by the European Communities as a principle of customary international law to be utilised in the interpretation of the *SPS agreement*, the precautionary principle was described as applying where there existed doubt over the safety of a product, but the scientific evidence on the issue was inconclusive. As an illustrative portion of the Panel report summarises:

Such an approach was required to avoid situations as those portrayed by many cases of health hazards which only become apparent long after substances or products has been assumed to be safe such as Thalidomide and DES. Two cases of recent interest in the European Communities illustrated the desirability of taking a precautionary approach to consumer protection: E Coli and BSE.¹⁰²

This was the European Communities' basis for arguing that although their own assessments might initially appear insufficient for the pur-

¹⁰⁰ Ibid paras 175–177.

¹⁰¹ Ibid paras 188–209.

¹⁰² *European Meat Products* Panel Report, above n 12, para IV.203.

poses of an Article 5.1 risk assessment, they could nevertheless be considered satisfactory in light of the principle. That is, as the Panel summarised:

The European Communities claimed that the point was not that science did not know *everything* about hormones. The point was that it knew a lot, including the fact that they were carcinogenic. The problem was that science did not know exactly how, and under what circumstances, this carcinogenic effect occurred. That is why the Europeans took a precautionary approach.¹⁰³

However, the Panel did not consider that such an approach was correct. Regardless of the existence of the principle – a matter which the North Americans disputed before the Panel – and even if it could be used to assist in the interpretation of Article 5.1, the Panel found that the principle could not override the ‘explicit’ wording of Article 5; there were minimum standards for what constituted a risk assessment and these had not been satisfied.¹⁰⁴ This was a finding left undisturbed by the Appellate Body.¹⁰⁵

In light of the decision in this case, it is difficult to view the post *Tuna Dolphin* development in the WTO as anything other than moving further away from health and environmental protection. As noted above, the new *SPS Agreement* – to which both disputants would have agreed as parties – played a part. However, it is important to note that on its own the *SPS Agreement* might not have contributed to this end, and it is the significance of the readings given to it by both the Panel and the Appellate Body which cannot be underestimated. On at least two crucial and basic questions of law, these bodies chose to close a door of opportunity. Specifically, these were, first, the decision to ig-

¹⁰³ Ibid para IV.48

¹⁰⁴ Ibid para CLXV. This finding was also based on the definition given to ‘risk assessment’ in paragraph 4 of Annex A of the *SPS Agreement*, which reads as follows:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

As indicated in the *European Meat Products Case* and later in the *Australian Salmon Case*, the key words would appear to be ‘evaluation’ and ‘likelihood’, denoting justifiable quantum of probability, and allowing no room for precaution in the event of scientific ignorance.

¹⁰⁵ *European Meat Products* Appellate Body Report, above n 12, paras 60, 120-125.

nore the provisions of GATT when the subsequent *SPS Agreement* was arguably subject to them, and, secondly, when they chose to take one of two particular readings of Article 3.3, even when it was noted that a choice was apparent on the face of the article and that the confusion which they detected was based on bad drafting. Why did the Appellate Body choose to find that Article 3.3 was subject to Article 5, when it might have found that Article 5 should have been read subject to Article 3.3, which by its terms surely was indicating a situation in which Article 5 might have been ignored? By its choice, not only did it thwart the European Communities' protection measures, but it also mocked the *SPS Agreement* and made some of its terms superfluous and nonsensical; hardly the end anticipated when it was drafted and agreed.

The Australian Salmon Case

As at the time of writing, the *Australian Salmon Case* comprises three WTO decisions. The original 1998 Panel hearing,¹⁰⁶ the subsequent decision of the Appellate Body which was also delivered in 1998,¹⁰⁷ and the further decision of the original Panel, which was reconvened on the application of Canada when it alleged that Australia had not complied with the earlier rulings.¹⁰⁸ This latter decision was that referred to in the Introduction above.

State of the Law.

Based on the foregoing discussion, it can be said that the development of 1990s case law up until the *Australian Salmon Case* was developing along the following lines:

First, under the original fifty year old GATT treaty which provided that members must accord the same treatment to 'like' products produced in any member nations, it was determined that likeness literally was based on the superficial characteristics of the finished product, the manner, method and other circumstances of production being irrelevant.¹⁰⁹

¹⁰⁶ *Australia – Measures Affecting Importation of Salmon* WT/DS18/R (12 June 1998) (hereinafter '*Australian Salmon Panel Report*').

¹⁰⁷ *Australia – Measures Affecting Importation of Salmon* WT/DS18/AB/R (20 October 1998) (hereinafter '*Australian Salmon Appellate Body Report*').

¹⁰⁸ *Australia – Measures Affecting Importation of Salmon* WT/DS18/R/RW (18 February 2000) (hereinafter '*Australian Salmon Art 21.5 Panel Report*').

¹⁰⁹ *Tuna Dolphin Case*, above n 9; see text above under heading '*Tuna Dolphin Case*'.

Secondly, for any nation seeking to invoke an Article XX environmental exception to establish that a measure taken was not in violation of their GATT obligations, one of two options had to be demonstrated. It had to be shown that either all alternatives had been exhausted including negotiations with other States which might be adversely affected and not be prescribing laws with extra-jurisdiction affect, or that the measure was primarily aimed at the conservation of the 'exhaustible natural resource'.¹¹⁰

Thirdly, in addition it also had to be demonstrated that the measure did not contravene the chapeau of Article XX by being arbitrary or unjustifiable discrimination or a disguised restriction upon international trade, a matter upon which a measure might fail simply because a State could not demonstrate, once again, that it had explored all other means of achieving the desired environmental aim, including international negotiations.¹¹¹ The 'high water mark' of what was arbitrary or unjustified was for a time actually stated to mean that it was not allowed to impact at all upon the multilateral trading system.¹¹² This presumably meant that such a measure was not allowed to impact upon a WTO member's right to 'like' treatment for a 'like' product regardless of its environmental consequences.

Finally, because of the 1994 Uruguay Round WTO agreements, the additional treaties which imposed further obligations upon WTO members in addition those imposed under GATT, to justify an environmental measure which affected trade, it was not enough to show

¹¹⁰ Ibid; *Gasoline Case*, above n 10; see text above under heading 'Gasoline Case'.

¹¹¹ Interestingly, this ruling appears to introduce a 'doubling up'. It will be recalled that in the *Tuna Dolphin Case* when the Panel specified what 'necessary' meant under Article XX(b), it determined that a measure might be necessary if all other avenues had been explored without success, including the possibility of international agreements through negotiation. However, in the *Gasoline Case*, as noted in the above text, when the Appellate Body came to determine what would make a measure 'arbitrary' or unjustified under the Article XX chapeau (which obviously applies to Article XX(b)), it decided that a failure to negotiate with the complainants Venezuela and Brazil and attempt to reach an agreement would tend to indicate that the measure in question was 'arbitrary'. If this reading of the chapeau and the previous reading of 'necessary' in Article XX(b) were combined, it would appear that this requirement to attempt to negotiate towards an international agreement is specified twice in the same treaty provision. If this interpretation by the Panels and the Appellate Body is correct, then at best it reflects bad draughtsmanship in GATT; and at worst it is reflective of a series of uncertainties in WTO treaties which are not apparent on the face of the treaties when viewed in isolation, uncertainties which arguably were not apparent to members when the agreements were signed.

¹¹² *Shrimp Sea Turtle* Panel Report, above n 11; see above text under heading 'Shrimp Sea Turtle Case'.

that the products in question were not 'like' products and therefore that different treatment required by the measures was not in breach of GATT. Specifically, under the *SPS Agreement*, a further obligation required that any health measure restricting trade be supported by specified criteria. No longer was it sufficient to show that like treatment was being accorded to like products. Henceforth, any health measure had to be supported by a risk assessment consistent with the *SPS Agreement*. In accordance with this last finding, there was no room for the precautionary principle where scientific ignorance reigned. 'Zero risk' was in violation of WTO law.¹¹³

The Dispute before the Panel and the Appellate Body.

The matter came before a WTO Panel based on a complaint by Canada regarding Australia's prohibition on the importation of fresh, chilled or frozen salmon under the *Quarantine Act 1908* (Cth). Specifically, *Quarantine Prohibition 86A*¹¹⁴ of 1975 ('QP86A'), which was designed to prevent to importation into Australia of diseases which could harm Australian fisheries, prohibited the

importation into Australia of dead fish of the sub-order Salmonidae, or in any parts (other than semen or ova) of fish of that sub order, in any form unless:

prior to importation into Australia of the fish or parts of fish have been subject to such treatment as in the opinion of the Director of Quarantine is likely to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants.

It was upon this basis that, while imports of certain heat-treated salmon products for human consumption were allowed into Australia, the Director of Quarantine had restricted imports of uncooked salmon from a number of countries, including Canada, which sought access to the Australian market for fresh, chilled or frozen uncooked salmon. Towards the end of 1995 Australia and Canada commenced WTO-sponsored consultations, which resulted in no solution which was satisfactory to the parties, and accordingly Canada requested the establishment of a Panel which delivered its report at the beginning of 1998.

In general terms, Canada's complaint was similar to that which it had raised together with the United States in the *European Meat Products*

¹¹³ *European Meat Products Case*, above n 12; see above text under heading 'European Meat Products Case'.

¹¹⁴ *Australian Government Gazette*, No S33, 21 February 1975.

Case. As in that case, it was claimed that QP86A was in breach of the GATT, specifically as a quantitative restriction or prohibition in breach of Article XI, and was not justified under the Article XX exceptions. Similarly, it was also argued that QP86A was also in breach of the *SPS Agreement*, and specifically Article 2 (requirement that protection be based on sufficient scientific principles and not maintained without scientific evidence); Article 3 (requirement that higher standards if imposed are allowed if there is scientific evidence or if in accordance with the requirements of Article 5, 'or' meaning 'and'); and Article 5.

In the Panel's decision, as in the *European Meat Products Case*, with the exception of a jurisdictional question raised by Australia, the questions regarding GATT were largely ignored and not discussed, the issues in dispute finally falling within the provisions of the *SPS Agreement*. Where there was a difference was that, in viewing the provisions of the *SPS Agreement*, the Panel deferred a discussion of Article 3 which allowed the setting of higher than agreed international standards, on the basis that there were no international standards which existed for a number of the diseases of concern to Australia. As it found Australia to be in breach of Articles 2 and 5 and therefore its actions already inconsistent with the *SPS Agreement*, there was no requirement to finally decide the matter and the Article 3 question was not finally determined.¹¹⁵

The Panel found that QP86A was not consistent with Article 5, and specifically with paragraphs 1, 5 and 6, findings that were upheld by the Appellate Body. As in the *European Meat Products Case*, despite being based on some scientific material, it was found that the measures were not based on a risk assessment under Article 5.1. In its decision, the Appellate Body expanded on what was required in a risk assessment beyond the discussion in the *European Meat Products Case* and beyond the definition provided in Annex A of the *SPS Agreement*.¹¹⁶ It indicated three matters must be satisfied. First, a risk assessment must identify the diseases whose entry and spread a member wants to prevent. Secondly, it must evaluate the likelihood of entry, establishment or spread of these diseases and the economic consequences. And thirdly, it must evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures that might be applied. Both the Panel and the Appellate Body found

¹¹⁵ *Australian Salmon Panel Report*, above n 106, para 8.184.

¹¹⁶ See above n 104.

that the 1996 risk assessment upon which QP86A was based failed to satisfy these criteria. As the Panel had said, the 1996 Final Report which

lends more weight to the unknown and uncertain elements ... results in general and vague statements of mere possibility of adverse effects; statements which constitute neither a quantitative nor a qualitative assessment of probability.¹¹⁷

A statement of probability was placed at the centre of a risk assessment.¹¹⁸

The second significant finding was that QP86A did not comply with Article 5.5 because it had the effect of applying an arbitrary or unjustifiable distinction in the levels appropriate in different situations. The Panel considered that:

three elements are required in order for a Member to act inconsistently with Article 5.5:

the Member adopts different appropriate levels of sanitary protection in several 'different situations';

those levels of protection exhibit differences which are 'arbitrary or unjustifiable'; and

the measure embodying those differences results in 'discrimination or a disguised restriction on international trade'.¹¹⁹

It was found that in comparison with the import prohibition on salmon, Australia, admitted imports of uncooked Pacific herring, cod, haddock, Japanese eel and plaice, Atlantic cod, and Dover sole for human consumption which constituted 'different situations',¹²⁰ and that the evidence led in the case tended to indicate that the risk of these different fish products was at least as high (and in some cases higher) as that relating to salmon,¹²¹ the first two elements were made

¹¹⁷ *Australian Salmon Panel Report*, above n 106, para 8.83.

¹¹⁸ Noting this conclusion, the implications of an assessment of probability regarding human, animal and health does lead to some disturbing conclusions. As was noted in the *European Meat Products Case*: 'The European Communities protests vigorously that, by doing so, the Panel is requiring a Member carrying out a risk assessment to quantify the potential for adverse effects on human health': *European Meat Products Appellate Body Report*, above n 12, 185.

Evidently, the European Communities were concerned by this prospect.

¹¹⁹ *Australian Salmon Panel Report*, above n 106, para 8.108

¹²⁰ *Ibid* para 8.121.

¹²¹ Based on the evidence presented, the Panel queried whether herring used as bait and ornamental finfish actually represented a higher risk as a disease carrier than ocean caught Pacific Salmon. *Ibid* para 8.134.

out. Finally, with regard to the third element, the Panel found that satisfying the first two elements were ‘warning signals’ which when taken into account cumulatively with a series of other factors, including the lack of internal controls for movement of salmon in different conditions in Australia,¹²² the unexplained reversal of certain contrary Australian recommendations in an earlier draft of the 1996 report,¹²³ and the Panel’s Article 5.1 finding,¹²⁴ indicated that QP86A was a disguised restriction on trade. Accordingly, Australia had not satisfied Article 5.5.¹²⁵ When the Appellate Body came to review these findings, it upheld them, adding in the course of its decision that Australia’s arguments to the contrary were ‘without merit’.¹²⁶

Accordingly, the recommendation was made that Australia bring its quarantine measures into conformity with its obligations under the *SPS Agreement*.

The Dispute before the Article 21.5 Panel and the Precautionary Principle

Under Article 21.5 of the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes*, where there is a disagreement as to the existence or consistency of measures taken to comply with recommendations and rulings, the disagreement can be referred to the original Panel. In July 1999, soon after the announcement of the introduction of new quarantine measures by Australia¹²⁷ – which had promptly led to the granting of a certificate for the import of Canadian salmon and the granting of an import permit¹²⁸ – the Canadian Government requested that the dispute be referred to the original panel. In the event, the matters the Panel had to decide upon included not merely new measures introduced by the Australian Government, but also a prohibition introduced by the State of Tasmania.

¹²² Ibid para 8.158.

¹²³ Ibid para 8.154.

¹²⁴ Ibid para 8.151.

¹²⁵ Ibid para 8.160.

¹²⁶ *Australian Salmon* Appellate Body Report, above n 107, para 172.

¹²⁷ Section 43 of the Quarantine Proclamation 1998 as amended by Quarantine Amendment Proclamation 1999, and Quarantine Amendment Proclamation 1999 (no 2) generally prohibits the importation into Australia of fish of the family *Salmonidae* or *Plecoglossidae*, but allows a series of exceptions including those situations in which a permit is granted by the Director of Quarantine. A series of Animal Quarantine Policy Memoranda, which are described in the *Australian Salmon* Art 21.5 Panel Report, above n 106, at paras 2.19 – 2.31, contain outcomes of risk analysis and the criteria used in determining whether a permit is granted.

¹²⁸ *Australian Salmon* Art 21.5 Panel Report, above n 108, para 3.6.

Australian Quarantine Measures

As heard before the Panel, the substance of the major part of the dispute was an illustration of how a State can comply with a WTO recommendation. In response to the Canadian allegation that the new Australian measures were not consistent with the *SPS Agreement*, the Panel's findings can be summarised as follows:

First, with regard to the requirement of a risk assessment under Article 5.1, Australia had referred to its new 1999 Import Risk Analysis ('IRA'). Whereas the 1996 risk assessment, which had formed the basis to QP86A, dealt with 'possibilities', the Panel found that the new IRA not only identified which fish diseases were a high priority and therefore presented an unacceptable risk, but it also expanded upon the vague possibilities and dealt in probabilities. Accordingly it found that that IRA was a risk assessment for the purposes of Article 5.1, and that most of Australia's new quarantine requirements were based on that assessment.¹²⁹

Secondly, regarding the requirement that the new measures be neither arbitrary nor unjustifiable under Article 5.5, the Panel stated that, as a result of the earlier recommendations and rulings, Australia had produced a risk assessment dealing not only with salmonids, but also with non-salmonids and live ornamental fish. The Panel said:

On that basis, Australia not only imposed a less trade restrictive import regime in respect of salmonids at issue here, but also tightened, or will tighten, the import restrictions for non-salmonids, including in particular herring for use as bait and live ornamental fish referred to in the original dispute.¹³⁰

As the Panel found that Canada's arguments on this issue were only general,¹³¹ that Australia's treatment of different categories of fish had converged, and that there was an apparent justification for this

¹²⁹ With regard to a requirement that salmonid product which was not in a 'consumer ready' form (ie, head off, gilled, eviscerated fish of greater than 450 g in weight) be processed to a consumer ready stage at a Government approved processing plant before release from quarantine, neither the Panel nor any of the experts could find any basis in the IRA for the requirement that they be 'consumer ready', and so found these requirements did not comply with Article 5.1. Ibid paras 7.78-7.83.

¹³⁰ Ibid para 7.91

¹³¹ The Panel considered that the only comparison referred to by Canada which warranted examination was that between salmonids and pilchards. Ibid para 7.96. As noted in the text, most of the species relied on in this argument in the original dispute were subsequently covered by the IRA.

treatment put forward by Australia (ie the IRA), Canada had failed to show that the new measures were not contrary to Article 5.5.¹³²

Accordingly, when the Australian Minister for Trade, Mark Vaile, announced that Australia's new quarantine risk assessment measures had received a 'big tick'¹³³ from the WTO, his exuberance was not entirely misplaced; having environmental protection measures found consistent with WTO law by a WTO Panel does appear to be extremely rare.

Concerns with the new Australian Measures and Tasmania's Restriction on Salmonid Imports.

Unfortunately, despite the Panel's satisfaction with the new IRA and associated quarantine measures as presented by the Australian Government, there were substantial concerns in Australia as to whether the IRA had been, and whether the new measures were, adequate. Reflecting this concern, within a month of the release of the IRA a Senate Parliamentary Committee had referred to it an inquiry into the new measures and the basis on which they had been determined. When it issued its report almost a year later, it said of the IRA that:

While the science per se was not at issue, the incompleteness of scientific data at present was. Many submissions argued that, in the face of scientific uncertainty, the precautionary principle should be applied and no imports allowed until the precise extent of the risk to human, animal and plant life and the environment could be assessed. They argued that, however slight the risk might be, the consequences were such that due caution should be exercised.¹³⁴

It further concerned the committee that much of the information potentially available to AQIS¹³⁵ when it prepared the IRA had either not been sought or alternatively had not been taken into account.¹³⁶ One significant matter dealt with in the report was the allegation that

¹³² Ibid paras 7.94 and 7.107.

¹³³ Media Release, above n 4.

¹³⁴ Senate Rural and Regional Affairs and Transport Legislation Committee, *An Appropriate Level of Protection? The Importation of Salmon Products: A case study of the Administration of Australian Quarantine and the Impact of International Trade Agreements*, Report (2000) (hereinafter 'Senate Report') xv.

¹³⁵ Australian Quarantine Inspection Service.

¹³⁶ Senate Report, above n 134, 161, The Senate Committee received 66 submissions ranging from the obvious Commonwealth government organisations concerned with this trade law question (ie AQIS, the Department of Foreign Affairs and Trade, etc), to various state and industry organisations (ie, NSW Fisheries, Victorian Trout Association, Tasmanian Salmonid Growers Association Ltd, etc) who claimed some interest and expertise. Ibid 197–199.

AQIS had not taken into account the special conditions applicable in Australia when determining the risk of import and spread of disease. The question was posed, for example, whether warmer water conditions in Australia as opposed to cooler climates (such as that of Canada) increased the vulnerability of salmonid populations in Australia to disease, the advice given to the Committee by AQIS was:

But the SPS Agreement does not allow us to take into account in evaluating the risk all of those considerations, including the differences in water temperature, the different vulnerabilities of fish, stocking rates, whatever it is. That all goes into the analysis of what is their risk from the product coming into the country.¹³⁷

Accordingly, in light of this and similar concerns with both the new IRA and the new measures, the Committee made 15 recommendations which included that Australia make application to the WTO for a variation of WTO rules, and that AQIS review its IRA procedures to ensure wider consultation.¹³⁸ Thus, the Committee recognised and reflected the uneasiness felt in Australia with regard to the management of the dispute.

However, the State of Tasmania went a step further. It has frequently been stated by the Tasmanian Government that it trades on its disease free status in its primary industries, including the farming of salmon.¹³⁹ In correspondence with the Committee, the Tasmanian Minister for Primary Industries, Water and the Environment said:

Tasmania is concerned that the Commonwealth unilaterally determines a level of quarantine protection 'appropriate for Australia' without regard to the sovereignty of States and Territories in such matters. Also, in a country as large and diverse as Australia, the suitability of a 'one size fits all' set of quarantine measures is highly questionable given that the Sanitary and Phytosanitary (SPS) Agreement requires that countries adopt least trade restrictive measures. The need for different quarantine measures in different parts of Australia is quite apparent when consider-

¹³⁷ *Ibid* 165.

¹³⁸ Interestingly, as a further reflection on the way in which the dispute was dealt with before the WTO Panel and Appellate Body by the Department of Foreign Affairs and Trade, the Committee also considered this should be re-examined and recommended that an International Legal Advisor's Office be established within the Attorney-General's Department to deal with such international law matters in the future. *Ibid* 191-195.

¹³⁹ For example, 'Tasmania is the only salmon producer in the world that is disease free and we have managed to maintain that status through tough quarantine measures': Jim Bacon, Premier of Tasmania, Media Release (20 February 2000), obtained via <http://www.media.tas.gov.au> (accessed 9 March 2000).

ing precautions necessary to prevent establishment of salmonid diseases in Australia.¹⁴⁰

Accordingly, first in October 1999, and then by extension in November, the Government of Tasmania declared a large part of Tasmania a protected area for the purpose of preventing the introduction of disease, stating that ‘fish from the family *Salmonidae* must not be moved in the prohibited area’, unless an inspector issued an import permit.¹⁴¹ In addition, to the Australian Quarantine measures, this new Tasmanian measure came within the Panel’s purview.

The discussion of the Tasmanian measures was brief.¹⁴² Essentially, the arguments offered by Australia revolved around whether the measures were within the Panel’s terms of reference under Article 21.5 as being ‘measures taken to comply’ with the recommendations of the Appellate Body. Australia argued that they were not, and were actually measures ‘taken independently of Australia’s measures’; they were ‘a completely new measure and a completely new claim’.¹⁴³ The Panel disagreed and ruled on these measures.

As to the merits of the measures, the Panel found that salmon will only be allowed to be moved in the ‘protected area’ if the Chief Veterinary Officer is satisfied that it has been sourced from areas free of six specified diseases. Canada, it noted, acknowledged that it was not free from all of those diseases, so such salmon from Canada was effectively banned from the protected area of Tasmania. However, the Panel also found that this measure by imposing a stricter regime than the Australian measure, was not based on the IRA. Accordingly, it was not consistent with Article 5.1 of the SPS Agreement, and so in violation of WTO law.¹⁴⁴

Conclusion on the Australian Salmon Case.

A few conclusions can be drawn from the *Australian Salmon Case*, its assessment by the various WTO dispute settlement bodies and what it says about the changing nature of WTO law. First, with regard to measures for the protection of human, animal or plant health and their environment under Article XX(b), GATT itself has now been largely withdrawn from the argument. A difference between Tasma-

¹⁴⁰ 11 January 2000, quoted in Senate Report, above n 134, 67.

¹⁴¹ Quoted in *Australian Salmon Art 21.5 Panel Report*, above n 108, para 2.32.

¹⁴² Indeed, throughout the Panel’s decision, it has the appearance of being ‘tacked on’ to the discussion of the Australian Quarantine measures.

¹⁴³ *Australian Salmon Art 21.5 Panel Report*, above n 108, para 4.35.

¹⁴⁴ *Ibid* paras 7.158–7.163.

nian Salmon and Canadian Salmon which might have once been crucial in showing GATT compatibility, in demonstrating that one product was arguably a diseased fish while the other was not, and that therefore neither were 'like' products, has become irrelevant. In other words, the measure, which might once have been compatible with GATT by merely treating different products differently, has now become inconsistent with the enhanced framework of WTO law.

Under the *SPS Agreement*, any measure for the protection of human, animal or plant life or health which sets higher standards than the international standards must be based on a risk assessment which sets out risk in terms of probabilities supported by scientific evidence. And, apparently, where that evidence is insufficient to support a measure of probability, then there will not be a justification for the higher standard. The underlying rationale behind this should be of concern. Indeed, in certain respects it suggests a way of thinking more akin to pre-Reformation thinking from the Middle Ages; the implication is that the extent or limits of scientific knowledge mark the boundaries of risk.¹⁴⁵ Presumably, under WTO law there is no risk in ignorance.¹⁴⁶

¹⁴⁵ Indeed, having noted a possible rebirth of the mentality of medievalism, it is perhaps pertinent to also note that the way out of the dark ages in various areas has frequently been based on educated guesswork that has not been founded on reams of scientific evidence. To illustrate, it can be recalled that many of the health reforms and discoveries through the Nineteenth and Twentieth centuries were based not on unassailable and unambiguous scientific information, but rather upon such educated guesswork, based on general observations. For example, Sir Joseph Lister's discovery of antiseptics resulted from his noting that cattle treated with carbolic acid did not suffer from hoof disease, so he applied carbolic acid to his patients prior to, during, and after surgical operations, little realising that this would be the greatest step forward in fighting bacteriological infection in surgical operations. Similarly, the fight against cholera and the drive towards improved public sanitation in Nineteenth century London commenced with the flushing of streets on the basis of Sir Edwin Chadwick's view that disease and bad health were associated with 'bad smells'. This is not to say that all such guess-work was as informed as it might have been, or that the results necessarily produced positive results. The practise of 'bleeding the patient', for example, appears to have been based more on superstition than observations producing an hypothesis and treatment. However, to deny the utility of action based on such guesswork would not only be to deny many of the causes of the advance of western civilisation over the last millennium, but also to arguably prevent further similar advances. It is suggested that the same recognition of ignorance and lack of scientific information which prompts reliance on the precautionary principle, prompted Lister and Chadwick's intuitive advances which were unimpeded by anything approaching a 'risk assessment'. Had a risk assessment been required for all such advances, the world would certainly be a different place.

¹⁴⁶ Admittedly, under Article 5.7 of the *SPS Agreement*, it is provided that where relevant scientific evidence is insufficient provisional measures may be adopted

The Australian Government managed to demonstrate what was required to satisfy a risk assessment but in so doing – and in failing to effectively impose measures beyond the scope of this risk assessment which only deals in quantifiable probabilities – also provoked the concerns of those who fear that there are areas of risk which cannot be quantified at present, if ever. It was predictable that the Tasmanian measure would fail before the WTO Panel; it exceeded the terms of the proffered risk assessment opting instead in favour of precaution. But, as is now well understood, with regard to substantive measures, the precautionary principle has no place in WTO law.

Conclusion.

What the *Australian Salmon Case* illustrates is an example of strict environmental measures, once again, being found to be in breach of WTO law. It is also an example of only those measures which are viewed as inadequate by many interested parties being able to survive WTO scrutiny. However, the effects of such a posture by the WTO upon both its standing and the interaction of trade law with environmental law should also be considered.

When the cases discussed in this paper are recalled, an interesting trend can be observed in the ways in which they were ultimately resolved. As has been noted, despite the ultimate finding in the *Australian Salmon Case*, it appears that the Tasmanian prohibition on the importation of fresh Canadian Salmon will be allowed to stand because an agreement has been reached between the Australian and Canadian governments. Similarly, it will also be recalled that going right back to the *Tuna Dolphin Case*, despite an adverse finding, the United States managed to withstand the effects of the decision because the decision was never formally adopted; the United States and Mexico managed to settle their differences independently by negotiation. In addition to these two cases, the further history of the *European Meat Products Case* should also be noted. This case had commenced as a trade war, which for a decade prior to it reaching a WTO Panel was characterised by the imposition by the United States of duties of up to 100 per cent on a series of European products in retaliation for the European prohibition on American beef. After the dispute's appearance before the WTO, it reverted to such a position, the European

provided the additional scientific information necessary is sought within a reasonable period of time. Interestingly, neither in the *European Meat Products Case* nor in the *Australian Salmon Case* was it argued that the measures in question were provisional. No doubt at some time, a future Panel will determine what is meant by 'provisional' and what is meant by 'a reasonable time'.

prohibition still in place over two years after the decision was given by the Appellate Body, the only difference being that now the American retaliatory measures have WTO endorsement.¹⁴⁷

Viewed in this context, it would appear that the views of the WTO have done little to detract from the measures of those member nations who have set themselves upon a particular course towards environmental protection. Indeed, despite the apparent authority of the WTO, and the willingness of member nations to participate in its dispute settlement process, the reality as represented by these cases would appear less innovative. Indeed, on certain issues, the status of the WTO dispute settlement process is little more than that of one of a number of weapons to be utilised in the course of waging a trade war by those nations seeking to undermine such measures.

If the WTO is to realise the ambitions of its founders, and attract around the cause of free trade the nations of the world, then it must find within its own legal framework the ability to embrace the concerns of the global community; it must be more flexible in allowing its members to adopt measures reflecting those concerns, including the protection of the environment. The difficulty will always be that such measures will almost always have some effect on trade, and when it is alleged that such a measure is in fact a disguised restriction on trade and a measure of protectionism, it will be difficult to expel this latter possibility. However, perhaps a more pragmatic view should be taken. Perhaps it should be noted that certain measures that are introduced to restrict trade nevertheless also have a positive environmental effect. The issue the WTO will have to address is whether striking down such measures is really in its own interests. Maybe striking down a purported environmental protection measure is a course consistent with WTO law, and as such will protect the integrity of WTO law. However, of what value is this law if it loses the respect and support of the various nations of a world, with each

¹⁴⁷ Specifically, on 3 June 1999, upon the EC failing to comply with the Dispute Settlement Body's (DSB) recommendations and remove the prohibitions, the United States and Canada requested authorisation from the DSB to suspend trading concessions to the EC. Upon the EC requesting the matter be arbitrated pursuant to Article 21.5, the original Panel determined that because of the EC's failure to comply with the recommendations, the resulting level of nullification suffered by the United States was equal to US\$11.8 million and that suffered by Canada was equal to Can\$11.3 million. Accordingly, on 26 July 1999 the DSB authorised the suspension of concessions to the EC by the United States and Canada at levels equivalent to the sums noted. See: <http://www.wto.org/sto/dispute/bulletin.htm> (accessed 14 February 2000).

county determining to protect its environment. Of what value is WTO law if the nations of the world determine to ignore it?

Ultimately, the question of WTO survival will probably be reduced to a pragmatic equation along the following lines: compromise or 'count your days'.¹⁴⁸

¹⁴⁸ Interestingly, at the time of writing other well placed observers were also suggesting that the WTO needs to compromise. However, although this paper has indicated that the WTO needs to reconcile its adherence to the free trade goal which is its *raison d'etre*, with the environmental concern, it was suggested by Australia's Ambassador to the United States, Michael Thawley, in a speech at Georgetown University, that the WTO should be seeking to reconcile some its own internal anomalies as they further threaten its credibility in the Australian community. As he stated in response to the recent WTO decision by which Australian subsidies to leather goods manufacturers were found to be in breach of WTO law (*Australia — Subsidies provided to producers and exporters of automotive leather* (WT/DS126/1):

Our community at home...found it difficult to understand why it was that it was not OK for Australia to provide a grant of (US)\$18 million as part of a process of overall liberalisation of our textile sector, but it was OK and is OK, for example, for the US Government to provide (US)\$15 billion worth of farm support. Now the experts know that part of the answer lies in the fact that agriculture is not yet subject to the same rules in the WTO as other sectors, but its difficult to persuade the community.

'Genuine Commitment to Free Trade', News Release (26 June 2000), obtained via <http://www.austemb.org/PR/TradeConf.htm>.