POLITICS, PROCESS AND PRINCIPLE: MUTUAL SUPPORTIVENESS OR IRRECONCILABLE DIFFERENCES IN THE TRADE-ENVIRONMENT LINKAGE

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I INTRODUCTION

This paper reflects on the current state of the international trade–environmental law linkage. This is an issue that has excited enormous public, political and academic attention over the past 15 years, since a trade Panel ruled against the United States for banning tuna imports from countries with dolphin-dangerous fishing practices.[1] In the period since the now-infamous *Tuna – Dolphin* decision under the *General Agreement on Tariffs and Trade* ('*GATT*'),[2] a new multilateral trade institution with over 150 Members, a comprehensive set of trade agreements and a binding dispute settlement process has emerged. Since its inception, the World Trade Organization ('WTO')[3] has emphasised the need for a mutually supportive approach to trade–environment questions – one that advances the interests of both regimes. Yet various tensions and perceived fragmentation persist.

The promotion of international trade produces a range of environmental impacts. These include impacts from the production, use or disposal of specific damaging or beneficial products; increased resource degradation from the overall expansion in economic activity that trade promotes; shifts in the structure of economic activity arising from new market demands; and environmental

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1 *United States – Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991) 40S/155 (Report by the Panel Unadopted) ('*Tuna – Dolphin I*'). The International Law Commission's Report on fragmentation of international law makes repeated reference to conflicts between the WTO trade regime and international environmental law: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission,* UN Doc A/CN.4/L.682 (2006) ('ILC 2006').

2 See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995); annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

3 Established pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*').

degradation flowing from the transportation of traded goods.[4] This web of impacts and interrelationships between trade and environment could fill (and has filled) many books.[5] A comprehensive mapping of this web calls for detailed economic, demographic, and scientific data, and is therefore beyond the scope of this article. Rather, I consider the trade regime's impacts on environmental governance – encompassing the institutions, processes and content of environmental law and policy. The legal dimensions of the trade–environment linkage do little to address the larger impacts associated with expanding production, consumption and transport of goods associated with trade liberalisation, especially for countries where economic development takes priority over environmental protection. But they do affect the ability of the international community and individual states to nurture the environmental regulatory regime.

The rise to prominence of the WTO occurred in the context of a broader globalisation agenda encompassing telecommunications and information technology, foreign direct investment and, to a lesser extent, migration. It has

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4 Organisation for Economic Co-operation and Development ('OECD'), *The Environmental Effects of Trade* (1994). See also Herman Daly, 'Problems with Free Trade: Neoclassical and Steady-State Perspectives' in Durwood Zaelke, Paul Orbuch and Robert F. Housman (eds), *Trade and the Environment: Law, Economics and Policy* (1993); Herman Daly, 'Sustainable Growth? No Thank You' in Jerry Mander and Edward Goldsmith (eds), *The Case Against the Global Economy: and for a Turn Toward the Local* (1996) 192; Paul Ekins, Carl Folke and Robert Costanza, 'Trade, Environment and Development: the Issues in Perspective' (1994) 9 *Ecological Economics* 1–12; Richard Steinberg, 'Understanding Trade and the Environment: Conceptual Frameworks' in Richard H. Steinberg (ed.) *The Greening of Trade Law: International Trade Organizations and Environmental Issues* (2002).

5 In theory, liberalised trade can produce environmental gains as well as costs. A sample of the relevant literature includes OECD, above n 4; Daniel Esty, 'Bridging the Trade-Environment Divide' (2001) 15 *Journal of Economic Perspectives* 113; Trade and Environment Division – WTO, *Trade and Environment at the WTO: Background Document* (2004) EcoLomics International – Geneva <www.ecolomics-international.org/tanded_div_trade_and_env_at_WTO_0404.pdf> at 14 August 2007; The United Nations Environment Programme and The International Institute for Sustainable Development, *Environment and Trade: A Handbook* (2000) The United Nations Environment Programme ('UNEP') <http://www.unep.ch/etu/etp/acts/aware/handbook.pdf> at 7 July 2007; Hakan Nordström and Scott Vaughan, *Trade and Environment*: *WTO Special Studies 4* (1999) World Trade Organization <http://www.wto.org/english/res_e/booksp_e/special_study_4_e.pdf> at 7 July 2007. A properly functioning market would see the full internalisation and pricing of all costs of production, including environmental and social costs. The valuation of environmental services provided by intact ecosystems would force a more considered assessment of the real costs and benefits of alternative land uses. Similarly, the removal of subsidies that actually reward unsustainable logging, fishing, agriculture and mining would create market opportunities for developing countries with true comparative advantage in these sectors: John Humphreys, Martin van Bueren and Andrew Stoeckel, *Greening Farm Subsidies – The Next Step in Removing Perverse Farm Subsidies* (2003) Rural Industries Research and Development Corporation <http://www.rirdc.gov.au/reports/GLC/03-040.pdf> at 7 July 2007; WTO, *Understanding the WTO* (3rd Edition, 2005) 11–15. Extreme poverty exacerbates environmental degradation. While trade can produce its own distortions and generate impacts of scale, structure and transport, its capacity to break the poverty–environment nexus should not be discounted. World Bank, *World Development Report* (2004); World Bank, *Globalisation, Growth and Poverty: Building an Inclusive World Economy* (2002) The World Bank <http://www.econ.worldbank.org/prr/globalization/text-2857/> at 8 July 2007; Magda Shahin, 'Trade and Environment: How Real is the Debate?' in Gary Sampson and W Bradnee Chambers (eds), *Trade, Environment and the Millennium* (2002) 45, 45–53; Jagdish Bhagwati, *In Defense of Globalization* (2004) 135–161. Cf Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty* (2002).

also occurred in conjunction with a proliferation of regional or preferential trade agreements, many of which contain innovative mechanisms for dealing with non-trade linkages such as environmental protection. It is salutary to note, therefore, that the combined effect of these forces on environmental governance is far greater than that of the international trade regime per se.[6] The line between the WTO's influence and those of other forces is necessarily blurred, but this article limits itself to an exploration of the way in which the WTO influences the development and implementation of environmental law .[7]

Most analyses of the trade–environment interface have concentrated on the interpretation of key 'environment' provisions of the *GATT* and other WTO agreements, and the principles that can be distilled from those disputes. This paper is premised upon the view that to focus only on the substantive rules is to miss much of the WTO's influence on environmental law and governance. Accordingly, the analysis is organised into three parts examining respectively the WTO's impact on the 'politics', 'processes' and 'principles' of environmental law. Part II considers the broader political landscape of the trade–environment relationship. It examines the power of the WTO as a global institution and how the dominance of the WTO has highlighted, and some would say exacerbated, the weaknesses of the fragmented international environmental regime. The claims of the WTO's 'chilling' effect on international and domestic environmental law are weighed. Against these concerns, part two also evaluates proposals for the creation of an international environmental organization as an institutional counterweight to the WTO.

Part III looks at the way in which WTO requirements have influenced the processes by which environmental norms develop and are applied. Set within the broader context of having to make environmental laws 'WTO-defensible', it examines the need for risk assessment procedures that comply with WTO agreements, and the 'sound scientific basis' requirement. It also considers the

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6 Relaxation of foreign investment requirements makes it far easier, for example, for transnational corporations to invest in environmentally sensitive industries outside their home state, with limited levels of public scrutiny and accountability. There is extensive literature on the environmental impacts of foreign direct investment. For legal analyses see Robert Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1 (1995); Jan McDonald, 'The Multilateral Agreement on Investment: Heyday or MAI-Day for Ecologically Sustainable Development' (1998) 22 *Melbourne University Law Review* 617; United Nations Conference on Trade and Development ('UNCTAD'), *World Investment Report 2000* (2000) <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=2435&lang=1> at 19 August 2007; United Nations Environment Programme Mining Department, World Bank Group Mining Minerals and Sustainable Development Project, *Finance, Mining and Sustainability* (2002); Howard Mann, *The Final Decision in Methanex v United States: Some New Wine in Some New Bottles* (2005) International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/commentary_methanex.pdf> at 10 July 2007; Aaron Cosbey et al, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (2004) International Institute for Sustainable Development <http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf> at 10 July 2007; International Institute for Sustainable Development and The Royal Institute of International Affairs , *Investment, Doha and the WTO – Background paper* (2003) International Institute for Sustainable Development <http://www.iisd.org/pdf/2003/investment_riia_iisd.pdf> at 10 July 2007.

7 Although much may be said about the environmental dimension of the major bilateral or pluri-lateral free trade agreements such as the European Union and the North American Free Trade Agreement.

implications of the WTO's preference for multilateral solutions to environmental problems and the appropriateness or efficiency of such a requirement. Part III also acknowledges that the influence of trade law on the environment has not been entirely one-way and that the WTO's attitude towards environmental issues has evolved over the past two decades. It considers the way in which the procedural elements of sustainable development, such as public participation and accountability, are enhancing decision-making processes within the WTO.

Part IV then turns to the content or principles of environmental law. Part four suggests that the principles of trade liberalisation have pervaded the lexicon of environmental policy and law-makers, forcing international negotiators and national regulators to devise environmental laws that heed or adopt the language of trade norms. It also assesses how environmental law principles are used within the WTO, showing that while some principles have contributed to WTO interpretation, the WTO still risks treating itself in 'clinical isolation' from the broader body of international law.

In part V, I conclude that the way in which environmental law has modestly infiltrated trade law should ultimately spread to the politics and institutional mindset of the WTO, thereby reducing its environmental impact and enlarging the scope for true mutual supportiveness. Yet increased acknowledgment and accommodation of environmental imperatives has coincided with growing instability and weakness within the WTO, most obviously the stalling and near collapse of the Doha negotiations and the shift towards bilateral and regional arrangements. The continued proliferation of preferential trade agreements and the fragmentation of WTO authority risks making these modest environmental gains less significant, yet properly harnessed, it also has potential to create powerful new regional sites for upward harmonisation which together can apply pressure to the WTO.

II TRADE LAW'S IMPACTS ON THE POLITICS OF ENVIRONMENTAL GOVERNANCE

From its establishment in 1995, the WTO enjoyed an extraordinarily rapid rise to dominance in international relations. While there remains debate about how fragile or resilient the institution really is, especially in light of the poor progress of the Doha Round of negotiations,[8] the WTO has become the 'poster child' for much of the positive and negative critique of globalisation. Developed country critics argue that multilateral policies on human rights, worker safety, and environmental protection are constrained by 'faceless bureaucrats' in Geneva, ignoring non-trade priorities and undermining democratic processes at the national level.[9] The concerns of developing countries, on the other hand, relate more to the unsatisfactory nature of the WTO 'deal', such as rules on agriculture

8 Ann Capling, 'The Multilateral Trade System at Risk? Three Challenges to the World Trade Organization' in Ross Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (2003), 37.

9 Lori Wallach and Patrick Woodall (for Public Citizen), *Whose Trade Organization? A Comprehensive Guide to the WTO* (2004) 19.

and intellectual property that constrain their development opportunities and undermine their comparative advantage.

The expansion of the WTO's membership to over 150 states gave it greater democratic legitimacy, although the North–South power imbalance, the processes for negotiating new undertakings, and the democratic deficits of individual Member states are still problematic.[10] The broader membership does, however, mean that many developing countries are now subject to its disciplines and entitled to its protections.[11] Developing country Members are increasingly willing to access dispute settlement, to challenge the environmental or health measures of developed countries that they perceive to be undermining their WTO market access entitlement.[12]

The WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('*Dispute Settlement Understanding*' or '*DSU*')[13] transformed the former *GATT* disputes system from a forum for structured trade diplomacy, to a rules-based, adversarial system.[14] The juridification of the dispute settlement system gave WTO agreements an enforceability that international environmental instruments could only dream of. Domestic environmental laws enacted to achieve national or international environmental policy objectives can be subjected to scrutiny in the trade forum, but there is no reciprocal mechanism for scrutinising the environmental effects of trade arrangements. The consequences of the privileged position of the WTO's dispute settlement forum are considered in the remainder of this article.

The combination of expanded membership and the formalisation of dispute procedures backed by enforcement mechanisms reinforces and strengthens the content of the WTO agreements and the authority of the WTO as a global

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10 David Robertson, 'Civil Society and the WTO' (2000) 23 *The World Economy* 1119. See also the debate between Esty and Henderson: Daniel Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Review* 7; David Henderson, 'WTO 2002: Imaginary Crisis, Real Problems' (2002) 1 *World Trade Review* 277; Daniel Esty, 'Rejoinder' (2002) 1 *World Trade Review* 297.

11 In practice, however, the internal negotiation processes of the WTO still favour developed countries, especially the United States and EU. See Surendra Bhandari, *The World Trade Organsiation (WTO) and Developing Countries* (1998); Martin Khor, *Presentation to Panel on 'Synergies between Liberalisation, Environment and Sustainable Development', WTO Symposium on Trade and Environment* (1999) Third World Network <http://www.twnside.org.sg/title/synergy-cn.htm> at 14 July 2007; Homi Katrak and Roger Strange (eds), *The WTO and Developing Countries* (2004); Shahin, above n 5; UNCTAD, *Trade and Environment Review 2003* (2003) <http://r0.unctad.org/trade_env/test1/publications/TER2003eversion/openTERF1.htm> at 19 August 2007.

12 See, eg, the dispute led by Malaysia against the United States' requirement that Shrimp trawlers must install turtle excluder devices: *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) ('*Shrimp – Turtle AB*'); *United States – Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia,* WTO Doc WT/DS58/AB/RW, AB-2001-4 (2001) (Report of the Appellate Body) ('*Shrimp – Turtle art 21.5*'), and the Philippines threat to challenge Australia's ban on banana imports.

13 *WTO Agreement*, above n 3, annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

14 Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333; David Palmeter and Petros Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 *The American Journal of International Law* 398.

institution. The institutional dominance of the WTO sharply contrasts with the fragmentation, dysfunction, and weakness of the international environmental regime.[15] There is no international organisation responsible for administering, coordinating or overseeing the growing collection of environment-related treaties, or that could speak with a single voice representing environmental priorities. Nor is there a unitary dispute settlement system or indeed a singular dispute process with effective enforceability. The environmental voice is therefore muted compared with that of the WTO, even in procedural relations *inter partes*. Whereas the WTO has observer rights at most multilateral environmental agreement ('MEA') meetings, the WTO is still debating whether and how to allow MEA Secretariats to attend WTO meetings.[16]

Commentators, policy-makers and activists who point to the seemingly inescapable logic of 'weakness in disunity' argue that the environmental message is diluted by the multiplicity of agencies and agreements. Accordingly, the establishment of an overarching World Environment Organisation or Global Environment Organisation (with the suggestive acronym, 'GEO') has been advocated by scholars and governments,[17] to provide an institutional counterbalance to the WTO.

It would simplify the WTO's role to be able to remove the trade–environment linkage from its agenda, so it is unsurprising that trade bureaucrats might advocate a GEO. Proponents of the international trading system have long criticised the linkage debate as introducing non-trade elements to a regime that is simply ill-suited to accommodating such considerations.[18] But the establishment of such an organisation would not change the fact that WTO Members retain the right to challenge environmental measures under WTO dispute settlement procedures where they can show that the measures infringe their WTO rights. Even if the GEO had an institutional mandate to hear such disputes, only a change to the WTO agreements themselves could remove the right to access the trade forum instead. Such change is highly unlikely, so the quest for mutual supportiveness must be advanced from within the WTO itself.

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15 Gabriel Marceau and Alexandra González-Calatayud, 'The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO' in Liane Schalatak (ed), *Trade and the Environment, the WTO, and MEAs* (2001) 71; Rajendra Ramlogan, 'The Environment and International Law: Rethinking the Traditional Approach' (2001) 3 *Vermont Journal of Environmental Law* <http://www.vjel.org/journal/VJEL10008.html> at 10 July 2007.

16 MEA Secretariats do not have a general observer status in the WTO Committee on Trade and Environment or in the Committee on Trade and Environment Special Session, but are often invited to participate and make presentations.

17 See the symposia on a world environmental organisation in: (2002) 25 *The World Economy* 599; (2001) 1 *Global Environmental Politics* 1. See also Frank Biermann, 'The Case for a World Environment Organization' (2000) 42 *Environment* 22; Steve Charnovitz, 'A World Environment Organization' (2002) 27 *Colombia Journal of Environmental Law* 323; Richard Tarasofsky and Alison Hoare, *Implications of a UNEO for the Global Architecture of the International Environmental Governance System* (2004) Chatham House <http://www.chathamhouse.org.uk/publications/papers/view/-/id/285/> at 11 July 2007.

18 Alan Oxley, 'Poor Environmental Policy – the Fundamental Problem in the "Trade and Environment" Debate' (Paper presented at the *Environment Australia Roundtable,* Canberra, 25 August 1999); Kym Anderson (ed), *Strengthening the Global Trading System: From GATT to WTO* (1996); Kym Anderson and Richard Blackhurst (eds) *The Greening of World Trade Issues* (1992).

There may be other benefits to the creation of a powerful environmental agency, such as reducing environmental treaty 'congestion' and streamlining treaty administration. This theoretical advantage is far from guaranteed, involving as it would the relocation and presumably some downsizing of existing secretariats. Indeed, there is every chance that a GEO would simply be added to the existing suite of environment-related secretariats and agencies and that trade issues would dilute the negotiation of its institutional mandate from the outset.

The institutional dominance of the WTO needs to be met with fundamental changes to the way the international community addresses environmental problems. Although the expression itself has become hackneyed, the sentiment of mainstreaming environmental issues into economic, security and development decision making and dispute settlement remains a priority. If international economic law does not expressly incorporate environmental considerations, then its texts should at least be interpreted in accordance with the principles of 'systemic integration'. The International Law Commission ('ILC') defines systemic integration as the process whereby international obligations are interpreted by reference to their normative environment. It plays down conflicts between potential competing norms by viewing those norms form the perspective of their contribution to a broader shared 'systemic' objective.[19] The principle of mutual supportiveness might be understood as both an objective of systemic integration and an interpretive tool for achieving harmonisation of potentially competing norms.

Eckersley suggests that an additional potential benefit of a GEO is to 'dramatise the conflict' between the two spheres, which would in turn focus public attention on the need for internal reform in the WTO.[20] Unless, however, it were possible to relocate trade–environment disputes out of the WTO and into a more impartial forum or to somehow encourage Panels to take a systemically integrated approach to treaty interpretation, there is a risk that devoting energy and resources to the establishment of a GEO could actually undermine efforts towards better environmental governance.

III TRADE LAW'S IMPACTS ON THE PROCESSES OF ENVIRONMENTAL DECISION-MAKING

The power of the WTO as a political force, its dispute settlement system, and the array of substantive rules in its various agreements all affect when and how environmental laws are developed. This Part examines some of the trade regime's impacts on the processes of environmental law and policy making. It starts with the claim that the existence of the WTO impedes the development of environmental law, then examines some specific procedural requirements that trade rules impose on environmental law makers.

19 ILC 2006, above n 1, [410], [413], and the references cited therein; [423]. Article 31(3)(c) of the Vienna Convention on the Law of Treaties reflects this principle.

20 Robin Eckersley, 'The Big Chill: the WTO and Multilateral Environmental Agreements' (2004) 4(2) *Global Environmental Politics* 24, 46.

A The Chilling Effect on Regulation

Many argue that increased trade liberalisation has resulted in environmental legal reforms being stymied or diluted at both the international and national levels.[21] The perception that environmental regulation actually undermines jobs and profitability is far greater than the reality,[22] but the spectre of negative impacts on an industry's competitiveness is consistently raised to prevent the implementation of cost internalisation policies.[23] There is little evidence that countries actually lower their environmental standards in order to attract investment or facilitate trade,[24] but the threat of regulatory stagnation or chill is very real. Zarsky observes that it is less a matter of countries 'racing to the bottom' and more that they are 'stuck in the mud'.[25] It is impossible to measure the chilling effect of these competitiveness arguments because this involves the *non-occurrence* of an event or, as Esty and Geradin suggest, 'it requires hearing ... the bell that does not ring'.[26] But one example might be the Australian Government's reluctance to introduce a target for greenhouse emission reductions, a policy that has been expressly justified by reference to concerns about the economic impact and the risks of 'carbon leakage'.[27]

The reluctance to improve environmental regulation for fear of disadvantaging local industry is compounded by the way in which WTO rules can constrain Members from mitigating the adverse impacts on competitiveness or demanding

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21 Ibid.

22 Nordström and Vaughan, above n 5, 35, refer to a 1990 *Wall Street Journal* poll that showed that one third of respondents believed that it was somewhat or very likely that their jobs were threatened by environmental regulations. The authors point out that in fact only 0.01 per cent of job losses in the United States at that time could be attributed to stricter regulatory requirements.

23 Duncan Brack, 'Balancing Trade and the Environment' (1995) 71 *International Affairs* 497, 501; Paul Ekins, 'Proposals for Reconciling Trade and Environmental Sustainability' (paper presented at the Commerce International, Environnement et Développement Durable, Université Pierre Mendes-France, Grenoble, September 1996).

24 Indeed, many argue that liberalisation spurs innovation and can drive and upward harmonization. See David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (1997).

25 Lyuba Zarsky, *Stuck in the Mud? Nation States, Globalization and the Environment* (1997) The Nautilus Institute <http://www.nautilus.org/archives/papers/enviro/zarsky_mud.html> at 11 July 2007; Lyuba Zarsky, 'Havens, Halos and Spaghetti: Untangling the Evidence on Foreign Direct Investment and Institutional Issues' (Paper presented at the OECD Conference on Foreign Direct Investment and the Environment, Paris, 29 January 1999) 3.

26 Daniel Esty and Damien Geradin, 'Environmental Protection and International Competitiveness: A Conceptual Framework' (1998) 32 *Journal of World Trade* 4, 19; Andre Dua and Daniel Esty, *Sustaining the Asia Pacific Miracle: Environmental Protection and Economic Integration* (1997) 86. See also Mari Pangestu M and Roesad Kurnya, 'Experiences from Indonesia and Other ASEAN Countries' in Simon Tay and Daniel Esty (eds), *Asian Dragons and Green Trade: Environment, Economics and International Law* (1996) 101.

27 'Carbon leakage' refers to the risk that carbon intensive industries subject to emissions reduction targets may be replaced by dirtier industries in countries that have not made such commitments.

equivalent standards of competitors.[28] The application of tariffs to imported goods from countries with poor environmental standards would violate *GATT* tariff bindings; laws that prescribe how a product must be produced in order to gain market access have been vigorously contested in the WTO.[29] Rather than deal with them systematically, the WTO has preferred a default interpretive approach to the trade–environment linkage that resolves potential conflicts only on an as-needs basis.[30] The WTO Appellate Body has opened the door for domestic laws governing environmentally damaging production or harvesting methods, urging that the WTO not be viewed in clinical isolation from the broader corpus of international law.[31] The interpretive approach is politically the most feasible, but the ongoing threat or risk of WTO inconsistency for domestic measures remains a convenient justification for governments avoiding regulation in the first place *especially* when the institution appears to reject or ignore the interpretive gains from dispute settlement.[32]

Instead, many governments have preferred voluntary market-led initiatives, such as industry codes, labelling, and certification schemes, rather than binding and enforceable obligations. The preference for softer regulatory instruments finds its roots in modern regulatory theory which advocates a cooperative

28 There is evidence that national regulators have used the threat of WTO challenge to justify low environmental standards. In litigation challenging the US Animal and Plant Health Inspection Service regulation for imports of untreated wood in 1997, APHIS sought to justify its choice of regulation on the basis that the WTO constrained its power to opt for a zero risk approach to introduced timber pests. Patti Goldman and Joseph Scott, *Our Forests at Risk: The World Trade Organization's Threat to Forest Protection* (1999) 11, citing *Oregon Natural Resources Council v Animal & Plant Health Inspection Service*, 1997 US Dist. Lexis 9521 (N.D. Cal. June 5 1997).

29 The most significant disputes that have been resolved through *GATT*/WTO dispute settlement are: *European Communities – Measures Concerning Meat and Meat Products (Hormones)*: *Complaint by the United States*, WTO Doc WT/DS26/R/USA (1997) (Report of the Panel) ('*Hormones Panel* – USA'); *European Communities – Measures Concerning Meat and Meat Products (Hormones): Complaint by Canada*, WTO Doc WT/DS48/R/CAN (1997) (Report of the Panel) ('*Hormones Panel – Canada*'); *European Communities – Measures Concerning Meat and Meat Products,* WTO Doc WT/DS26/AB/R and WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body) ('*Hormones AB*'); *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/R (1998) (Report of the Panel) ('*Shrimp – Turtle Panel*'); *Shrimp – Turtle AB,* above n 12*; European Communities — Measures Affecting the Approval and Marketing of Biotech Products,* WTO Doc WT/DS291/R, WT/DS292/R and WT/DS293/R (2006) (Reports of the Panel) ('*Biotech Panel*'). The literature is, again, extensive. Good starting points include: Steve Charnovitz, 'Solving the Production and Processing Methods Puzzle' in Kevin Gallagher and Jacob Werksman (eds) *The Earthscan Reader on International Trade and Sustainable Development* (2002) 229; Gabrielle Marceau and Joel Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods', (2002) 36 *Journal of World Trade* 811; Gregory Shaffer, 'The World Trade Organization Under Challenge: Democracy, and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25 *Harvard Environmental Law Review* 1.

30 David Leebron, 'Linkages' (2002) 96 *The American Journal of International Law* 5, 22.

31 See above n 28, for discussion on the effect of the case law.

32 For example, there was very strong criticism of the *Shrimp – Turtle* decision, and the principal public affairs document explaining the WTO to a general audience provides an account of the current state of WTO interpretation that is far narrower and trade-oriented than the Appellate Body's decision in *Shrimp – Turtle*, and *Shrimp – Turtle art 21.5*, above n 12. See *Understanding the WTO*, above n 5, 70.

approach to environmental improvement in the first instance.[33] But the shift towards voluntarism is also driven by the WTO's expectation, also reflected in instruments like Agenda 21,[34] that Members will pursue the 'least trade restrictive' method of achieving their regulatory objective.[35] The debate in the WTO's Committee on Trade and Environment over the legality and trade impacts of eco-labelling, scrutinising even voluntary NGO-led schemes, shows the sensitivity of trade concerns to environmental initiatives.[36]

Nordström and Vaughan suggest, optimistically, that the long-term implication of concerns about regulatory chill may be procedural rather than substantive, in that the domestic pressure to postpone new measures may force countries to pursue multilateral solutions.[37] For environmental problems that demand immediate and resolute attention, however, the very fact that essential decisions are deferred is itself problematic. More problematically, however, the threats of WTO inconsistency are also raised in the multilateral environmental fora themselves.[38] Trade concerns dominated the negotiation of the *Cartagena Protocol on Biosafety* ('*Biosafety Protocol*'),[39] and influenced other Convention text.[40] The ILC criticises this influence on the basis that while MEA text reflects the need to harmonise trade concerns, the relationship with other important

33 See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Neil Gunningham, *Leaders and Laggards: Next-Generation Environmental Regulation* (2002); John Braithwaite and Peter Drahos, *Global Business Regulation* (2000).

34 Agenda 21 is the Programme of Action for Sustainable Development which was agreed at the UN Conference on Environment and Development at Rio de Janeiro in 1992. See UN Department of Economic and Social Affairs – Division for Sustainable Development, *Agenda 21* (1992) <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> at 17 August 2007.

35 'Least trade restrictiveness' language is found in the *Agreement on the Application of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade* (see fn 42). While it is not expressly contained in the *GATT*, the Appellate Body interpreted art XX(d), one of two key environmental exceptions, to imply a 'least trade restrictive reasonably available' test: *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* WTO Doc WT/DS161/AB/R, WT/DS169/AB/R, AB-2000-8 (2000) (Report of the Appellate Body) [164] ('*Korea Beef AB*').

36 The WTO negotiations and submissions on labelling can be accessed from: WTO, *Environment: Issues – Labelling* (2007) <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> at 17 August 2007. For background views and analysis see Arthur Appleton, *Environmental Labelling Programmes: International Trade Law Implications* (1997); WTO Committee on Trade and Environment Secretariat, *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics,* WTO Doc WT/CTE/W/10, (1995) (Secretariat Note for the Committee on Trade and Environment).

37 Nordström and Vaughan above n 5, 35–40.

38 Eckersley 2004, above n 20, 25.

39 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 39 ILM 1027 (entered into force 11 September 2003).

40 Ibid; ILC 2006, above n 1, 139 [273]; International Institute for Sustainable Development, *State of Trade and Environment Research: Building a New Research Agenda,* (2003) 10; Peter Andrée, 'The Cartagena Protocol on Biosafety and Shifts in the Discourse of Precaution' (2005) 5(4) *Global Environmental Politics* 25; Aarti Gupta, 'Advance Informed Agreement: A Shared Basis for Governing Trade in Genetically Modified Organisms?' (2001) 9 *Indiana Journal of Global Legal Studies* 265; Aarti Gupta, 'Governing Trade in Genetically Modified Organisms: The Cartagena Protocol on Biosafety' (2000) 42(4) *Environment* 22.

international instruments, such as the Biological Weapons Convention, is left unaddressed.[41]

Ironically, at the same time that that environmental regulation has been 'chilled', the international community has consistently expressed a preference for multilateral solutions to environmental problems and the international harmonisation of standards, including standards with human health or environmental policy objectives.[42] The WTO Appellate Body has endorsed the preference for multilateral solutions to environmental problems,[43] and indicated that Members will be expected to explore, if not conclude, multilateral negotiations before resorting to unilateral measures.[44] The agreements aimed at reducing non-tariff barriers to trade, especially the *Agreement on Technical Barriers to Trade* ('*TBT Agreement*')[45] and the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('*SPS Agreement*'),[46] both promote the use of international standards. Implemented with the goal of mutual supportiveness in mind, this might have helped build bridges between trade and environmental regimes and bolster the role of multilateral environmental agreements. But the development of standards for food or product safety, animal health or quarantine is not placed in the hands of environmental bodies or the secretariats of MEAs. Rather, the WTO has delegated its rule making power to bodies like the industry-oriented International Organisation for Standardisation ('ISO'), Codex Alimentarius ('Codex'), the *International Plant Protection Convention* ('*IPPC*') and the World Organisation for Animal Health (known as the OIE; previously the International Organisation for Epizootics).[47] The composition and decision-making procedures of these organisations are open to greater manipulation than the MEAs and indeed than the WTO itself.[48] Far from promoting truly multilateral environmental solutions, it might be argued that the WTO has sidestepped accepted mechanisms for developing international standards, preferring organisations that are poorly understood and whose decisions will

41 ILC 2006, above n 1, 139 fn 359. The tension in MEA negotiations is not helped by the United States' hypocritical position. It was happy for the Appellate Body to draw upon the *Convention on Biological Diversity* and *UN Convention on the Law of the Sea* to adopt a modern interpretation of *GATT* art XX(g), but has lobbied for a narrow approach to the Doha agenda item relating to MEAs and has blocked MEA Secretariats from key WTO negotiations or meetings, such as *TRIPS* Council meetings: Eckersley, above n 20, 39, citing *Summary Report on the Sixth Meeting of the Committee on Trade and Environment Special Session* , WTO Doc TN/TE/R/6 (2003) 3 (Note by the Secretariat).

42 *Rio Declaration on Environment and Development: Report of the UN Conference on Environment and Development,* UN Doc A/CONF.151/5/Rev.1 (1993) Principle 12; Agenda 21, above n 34, [39.3(d)]; WTO, *Understanding the WTO*, above n 5, 70. See also: *WTO Agreement*, above n 3, annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493, Article 3 ('*SPS Agreement*'); *WTO Agreement*, above n 3, annex 1A (*Agreement on Technical Barriers to Trade*) 1868 UNTS 120, Article 2 ('*TBT Agreement*').

43 *Shrimp – Turtle AB,* above n 12.

44 *Shrimp – Turtle art 21.5*, above n 12.

45 See *TBT Agreement*, above n 42.

46 See *SPS Agreement*, above n 42.

47 These organisations are referenced in the Annexes to the *TBT* and/or *SPS Agreement*s, above n 42. Both Agreements allow for the addition of other recognised standard-setting bodies.

48 Jan McDonald, 'Domestic Regulation, International Standards, and Technical Barriers to Trade' (2005) 4 *World Trade Review* 249.

therefore escape close scrutiny. In any event, the WTO retains the last word on the meaning of those international measures. If a disputing Member relies on compliance with an international standard, it is the dispute Panel that must interpret and apply those international standards.[49] So while the WTO might encourage Members to negotiate multilaterally for environmental protection, its own techniques of international harmonisation lack transparency and public accessibility.

B Establishing the Scientific Case for Environmental Choices

The WTO agreements expect Members to be able to demonstrate the scientific justification for their environmental laws. This claim has two related components: first, that WTO Members must somehow justify environmental laws that have incidental trade effects, and second that this justification must have a scientific foundation.

1 *Structural Bias in Choice of Dispute Forum*

The fact that environmental measures may be tested for WTO consistency within the WTO means that Members have to make those measures defensible in trade terms, as well as on environmental grounds. This means complying with procedures for notifying Members of new regulations, but more importantly being able to satisfy a WTO disputes Panel that substantive requirements, like the need to base measures on 'sound science', have been met.[50] This has prompted criticism that matters of international and domestic environmental policy must dance to trade law's tune. In facing adjudication by a dispute Panel comprised of trade experts, '[a]nswers to legal questions become dependant on whom you ask, what rule-system your focus is on'.[51]

The relevance of environmental factors in WTO disputes depends in part on the type of measure at issue and which WTO agreements govern their introduction and implementation. Most WTO agreements recognise the right of Members to adopt or maintain domestic measures aimed at achieving legitimate regulatory goals.[52] The Appellate Body has acknowledged this 'right', although the *GATT* expresses it as a 'general exception'. Moreover, the allocation of the burden of proof means that once a measure is found to be inconsistent with the basic disciplines, it must be proved that the product is unsafe or environmentally damaging. The preferable approach would be to expect the complaining Member to prove the safeness or environmental friendliness of the product that they are seeking market access for.

The WTO's *Dispute Settlement Understanding* requires Panels to assess a dispute in light of the relevant WTO agreements and examine and weigh the

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49 *European Communities – Trade Description of Sardines,* WTO Doc. WT/DS231/R (2002) [7.95] (Report of the Panel); WTO Doc WT/DS231/AB/R, AB-2002-3 (2002) [239], [256], [258] (Report of the Appellate Body) ('*Sardines AB*').

50 *SPS Agreement*, above n 42, arts 2.2 and 5.1

51 ILC 2006, above n 1, 245 [483].

52 These are set out in *GATT* Article XX.

evidence submitted to them, including expert opinion.[53] Panels are typically comprised of experts in the specific trade law issue in dispute, rather than environmental scientists or lawyers. A few cases have included panelists possessing considerable environmental law expertise, but there is no requirement that they do so. It is clear from the approach taken in several environment-related disputes that Panels consider themselves capable of assessing the legitimacy or weight of differing scientific views and reaching a view about the substance of the evidence presented.[54] Judges in domestic courts routinely assess scientific and other evidence, so the concern about insufficient expertise is not unique to the WTO. What is problematic, however, is the likelihood that panelists will privilege the (trade) expertise that they do have. Several jurisdictions, including Australian states, have attempted to improve adjudication of environmental disputes involving complex science, by establishing specialist tribunals that include at least one scientific assessor. Were it committed to enhancing the synergy between trade and environmental regimes, the WTO could potentially do the same even though it would require a formal change to the *DSU*. At the very least, Panels should be willing to engage with a broad range of expert views, including those presented as *amicus curiae* briefs and to call for input from relevant MEA secretariats.

2 *The Need to Establish a Sound Scientific Basis*

The 'necessity', 'least trade restrictive' and 'proportionality' obligations in the *SPS* and *TBT Agreements* do not operate as defences to general disciplines; rather, they are core obligations with which Members must comply. Accordingly, the burden falls on the party complaining about a health or safety measure to show that it was more trade restrictive than necessary to achieve its stated objective. This places domestic regulation on a stronger footing procedurally, but in the case of the *SPS Agreement* at least, this has not fundamentally changed the way that quarantine or food safety laws are 'wrong-footed' by WTO dispute settlement. Complaining parties have found it easier to establish non-compliance with other *SPS Agreement* obligations, including the requirement that measures be based on sound science and follow a risk assessment process.[55] Neither the *GATT* nor the *TBT Agreement* contain an express science requirement, but will still be expected to justify their measures on objective, factual grounds, so much of the discussion here remains apposite.[56]

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53 WTO, *Dispute Settlement: Understanding on Rules and Procedures Governing the Settlement of Disputes*, arts 7.1 and 13.

54 Theofanis Christoforou, 'Settlement of Science-Based Trade disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty' (2000) *NYU Environmental Law Journal* 622, 643; *Japan – Measures Affecting the Importation of Apples,* WTO Doc WT/DS245/RW (2003) (Report of the Panel) (*Japan – Apples Panel*).

55 *SPS Agreement*, above n 42, arts 2.2, 5.

56 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc WT/DS135/R (2000) (Report of the Panel) ('*Asbestos Panel*'); *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) (Report of the Appellate Body) ('*Asbestos AB*').

It might be argued that the scientific rigour of the risk assessment process reduces the chance that quarantine standards can be used as a de facto trade restriction whose real purpose is to protect local industry. Many critics have countered that the *SPS Agreement*'s institutional bias toward scientific rationality undermines Members' ability to adopt a precautionary approach to legitimate public health concerns.[57] Even if one accepts the benefits of a rational scientific approach to plants and animal health risks, the definition of risk assessment sets more demanding standards for environmental protection than for food safety. Food safety risk assessments need only determine the *potential* or possibility of health threats from a food additive, residue, contaminant, or disease, which does not require any 'minimum degree of risk'.[58] Risk assessments for the spread of pests and diseases, on the other hand, require an evaluation of the *likelihood* or *probability* of entry, establishment and spread of pests and diseases.[59] This assessment may be qualitative or quantitative, but it still demands a higher threshold of scientific proof before measures may be said to be based on 'sufficient scientific evidence', even though it may be far harder to reverse environmental impacts. The *SPS Agreement* also requires Members to assess the specific risks created by the product whose importation or use is restricted, rather than enabling them to draw inferences from general studies.[60] This may set an unreasonably high standard in cases where a general link or risk has been identified but its precise application would be unreasonably complex or costly to determine. This alone may discourage policy makers from introducing new measures, in order to prevent the possible occurrence of a risk that has not yet been fully investigated.

A Member may avoid the *SPS Agreement*'s risk assessment disciplines using Article 5.7, which gives Members the right to introduce provisional measures where there is 'insufficient evidence upon which to conduct a risk assessment'. As Article 5.7 is an independent right, a complaining party has to demonstrate non-compliance with one of its conditions in order to show that it cannot be relied upon.[61] This has been possible in each of the disputes in which it has been

57 David Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines' (1994) 27 *Cornell International Law Journal* 817; Jeffery Atik, 'Science and International Regulatory Governance' (1997) 17 *Northwestern Journal of International Law & Business* 736; James Cameron, 'The Precautionary Principle' in Gary Sampson and Bradnee Chambers (eds) *Trade, Environment and the Millennium* (1999) 240; Michael Nunn, 'Allowing for Risk in Setting Standards' in David Robertson and Aynsley Kellow (eds), *Globalization and the Environment: Risk Assessment and the WTO* (2001) 95; Alan Sykes, 'Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View' (2002) 3 *Chicago Journal of International Law* 353; Robert Howse (2000), 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization' 98 *Michigan Law Review* 2329.

58 Christoforou, above n 54, 622–648; Gavin Goh, 'Precaution, Science and Sovereignty – Protecting Life and Health under the WTO agreements' (2003) 6 *The Journal of World Intellectual Property* 441.

59 *SPS Agreement*, above n 42, Annex A. The assessment for spread of pests and disease also requires a calculation of the economic consequences of such a spread *and* the options for reducing the risks. Risks to human health need not consider the economic consequences of the risk materialising, or the costs of risk reduction.

60 *Hormones AB,* above n 29, [196–199]; *Japan – Measures Affecting the Importation of Apples,* WTO Doc WT/DS245/AB/R, AB-2003-4 (2003) [203–206] (Report of the Appellate Body) (*Apples AB*).

61 *Biotech Panel,* above n 29, [7.2969].

raised to date.[62] The decisions show that measures must be truly provisional, Members must be prompt in their investigation and accumulation of further evidence,[63] and that they may be precluded from relying on Article 5.7 if any form of risk assessment has been undertaken in the past, even where new evidence comes to light to cast doubt on the earlier findings.[64]

There has been lengthy scholarly debate about the real impact on environmental law of the WTO's science requirements.[65] Many argue that they enhance the quality of environmental regulation, by forcing policymakers to fully weigh up the pros and cons of various sources of action and preventing 'knee-jerk' populist reactions to perceived risks. As Howse puts it, '[t]here is more to democracy than visceral response to popular prejudice and alarm; democracy's promise is more likely to be fulfilled when citizens, or at least their representatives and agents, have comprehensive and accurate information about risks, and about the costs and benefits associated with alternative strategies for their control.'[66] On the other hand, some critics argue that scientific evidence requirements undermine regulatory sovereignty in situations involving scientific uncertainty.[67] Scientific understanding is socially and culturally constructed, and must therefore be allowed to vary from country to country, yet the WTO's requirements seem to assume a value-free universal rationality.[68] There are also disciplinary assumptions that limit the scope of scientific understanding: researchers may have failed to understand what lies *outside* a risk assessment, or limited their knowledge to specific disciplines.[69] In addition to these more abstract concerns are practical drawbacks of requiring risk assessment. The widespread use of industry science in risk assessment, especially under US Food and Drug Administration procedures, can affect the quality and rigour of the risk assessment process, or at least impair its perceived legitimacy. Moreover, the structure of the *SPS Agreement* regime means that Members must follow the time consuming process every time they wish to introduce new measures. Article 5.7 is not available in cases where evidence is available, but has not been used for a full risk assessment process.

62 An Article 5.7 argument has failed in *Japan – Measures Affecting Agricultural Products*, WTO Doc WT/DS76/AB/R, AB-1998-8 (1999) (Report of the Appellate Body) ('*Varietals AB*'); *Japan – Apples Panel,* above n 54; *Apples AB* above n 60; *Biotech Panel,* above n 29.

63 *Varietals AB*, above n 62, [89].

64 *Biotech Panel*, above n 29, [7.3255]–[7.3260].

65 See, eg, Christoforou, above n 54; Goh, above n 58; Howse, above n 57; Sykes, above n 57; Université de Genève, *Roundtable: WTO Law, Science and Risk Communication – Program and Overview* (2006) <http://www.unige.ch/droit/fac/organisation/centres/envir/roundtable_risk_communication_110506.pdf> at 18 August 2007.

66 Howse, above n 57, 2330.

67 Sykes, above n 57, 354–55.

68 David Winickoff et al, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law' (2005) 30 *The Yale Journal of International Law* 81.

69 Joel Tickner (ed), *Precaution, Environmental Science and Preventive Public Policy* (2002).

C Environmental Law's Enhancement of WTO Processes

The foregoing discussion may have portrayed trade law as the new Leviathan,[70] a truly transnational monster that infiltrates legal regimes without regard for national regulatory sovereignty, paying mere lip service to its commitment to mutual supportiveness between trade and environmental objectives. While the establishment of the WTO did give trade considerations the institutional and procedural upper hand, the process has not been entirely one-way. Environmental law's commitment to improving decision making through access to information and public participation[71] has influenced developments within the WTO.

Awareness of the trade–environment interface grew rapidly over the 1990s, starting when the *Tuna – Dolphin* decision[72] coincided with the negotiation of the *North American Free Trade Agreement* ('*NAFTA*'). A range of primarily European and North American non-governmental organisations ('NGOs') began to mobilise resistance to the WTO and globalisation more generally.[73] These groups were accustomed to North American laws that gave public interest groups the opportunity to make comments on proposed regulations with significant potential environmental impacts and to challenge those decisions in court if the decision-maker's reasoning or procedures were flawed. The *GATT* procedures made no such concessions to civil society. Indeed, during the *GATT* years, it was difficult to discover what complaints had been lodged, or their scope and progress, let alone contribute to the legal and policy arguments at play. Panel decisions were only made publicly available when published as part of the annual 'Basic Instruments and Selected Documents' series, often years after the decision had been reached.

Once the *NAFTA* had made efforts to harmonise trade and environmental factors substantively and procedurally, there was no principled reason why the same could not occur at the WTO. Since the mid 1990s, there has thus been a progressive improvement in the transparency and accountability of WTO deliberations, facilitated by the rise of the internet as a means of mass communication. Copies of WTO agreements and undertakings, dispute settlement submissions and reports, updates on negotiations and secretariat and committee information papers are now readily available online.[74] Dispute Panels and the Appellate Body now accept *amicus curiae* briefs from NGOs and other groups, although the use of those briefs remains limited. In 2006, the Appellate Body allowed NGO observers to observe a live video stream of the oral arguments in one of the WTO's longest running disputes – over the EU's ban on beef treated with growth hormones. The introduction of a limited form of deliberative democracy into WTO dispute settlement creates a 'green public

70 Thomas Hobbes, *Leviathan* (first published 1651, 1968 ed).

71 *Rio Declaration*, above n 42, Principle 10; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, Denmark (1998) (The Aarhus Convention)

72 *Tuna – Dolphin I*, above n 1.

73 See Steinberg, above n 4; Zaelke, Orbuch and Housman (eds), above n 4.

74 See WTO <http://www.wto.org> at 18 August 2007.

sphere'.[75] Allowing the 'sunshine' to shed light on WTO deliberations, and providing some stage for broader concerns and interests to be aired should improve the quality of the decisions themselves, although this can never be guaranteed. The procedural improvements have other benefits. Improved accountability and information dissemination makes it easier for civil society to know what issues they need to raise with the national governments of WTO Members, in order to influence their position in WTO negotiations.[76] The creation of the public sphere in the WTO regime can thus enhance deliberations at the national level.

The opening up of the WTO cannot be attributed solely to the influence of environmental law and environmental advocates. The ease with which the internet could be used as a simple, low cost mode of mass dissemination clearly played a pivotal role. But Members might have been less inclined to embrace communication technologies were it not for the pressure from *green demandeur* Members like the EU[77] and civil society to make the organisation more transparent than its predecessor. That said, it must also be noted that the opening up of this green space in WTO dispute settlement has been emphatically resisted by the majority of WTO Members and the Trade Negotiations Committee remains largely resistant to the inclusion of civil society participants, even as observers to the process.[78] Conclusions about the contribution that these deliberative influences can make towards mutual supportiveness must therefore be guarded.

IV TRADE LAW'S IMPACTS ON THE PRINCIPLES OF ENVIRONMENTAL LAW

Part II of this paper noted the overarching power imbalance between the international trade and environmental law regimes. It argued that the existence of a single institution and a comprehensive set of binding trade rules affects the power balance between trade and non-trade interests, which places the quest for mutual supportiveness firmly in the WTO's hands. It affects the development of environmental law and policy-making, constraining or paralysing them in some cases and regulating the processes of environmental law-making in others. Those procedural influences were examined in Part III. The institutional power of the WTO treaties also influences the content of environmental laws themselves, forcing environmental law to adopt or observe the language of liberalisation.

75 Robin Eckersley, 'A Green Public Sphere in the WTO: The Amicus Curiae Interventions in the Trans-Atlantic Biotech Dispute' (2005) 2 *EcoLomic Policy and Law* <http://www.ecolomics-international.org/epal_2005_2_robyn_eckersley_wto_green_public_sphere_amici_ec_bt.pdf> at 18 August 2007, developing Jurgen Habermas' notion of the public sphere: Jurgen Habermas (Ciaran Cronin and Pablo De Greiff eds), *The Inclusion of the Other: Studies in Political Theory* (1998) 177.

76 Daniel Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion' (1998) 1 *Journal of International Economic Law* 123; Daniel Esty 'Linkages and Governance: NGOs at the World Trade Organization' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 709.

77 Eckersley, above n 20, 31.

78 Eckersley, above n 75, 19.

Rather than rehearse the way in which WTO disputes have interpreted key treaty provisions and phrases, this part considers whether trade law's influence mutually supports or undermines the principles of environmental law.

The WTO agreements respect Members' rights to introduce measures for environmental protection or conservation but balance them against the choice and design of measure by which to achieve those objectives.[79] Domestic environmental regulations must satisfy both the procedural and substantive disciplines of the WTO disciplines. The consistent use of these principles throughout the covered Agreements entrenches their influence on domestic policy making, since the Appellate Body will generally strive to achieve internal consistency in interpretation across the covered agreements unless context clearly demands otherwise.[80] Domestic measures that discriminate between functionally similar products based on the environmental impact of production or processing methods may violate the basic 'most favoured nation' ('MFN') and national treatment disciplines,[81] unless a number of preconditions are met, such as negotiating with trading partners to attempt a pluri-lateral solution.[82]

The WTO added a range of new disciplines to the *GATT*'s non-discrimination principles, including harmonisation of standards, necessity, reasonableness, least trade restrictiveness, and regulatory consistency.[83] Measures will be considered necessary if there is no other measure reasonably available to achieve the same outcome. A Panel will weigh and balance the importance of the environmental or health objective, the extent to which alternative measures contribute to the realisation of the health objective being pursued, and its impact on trade.[84] To meet the WTO's standard of reasonableness, environmental instruments must be aimed at a risk that has some scientific evidence, impose an economic or trade impact that is proportionate to the risk, and be selected after other reasonable alternatives are considered, in light of economic and administrative realities.[85] These requirements are arguably becoming easier to satisfy and often form part of a domestic policy of minimising regulatory impact in any event.[86] But governments around the world must now explicitly address these criteria when designing their regulatory tools.

WTO disciplines also expect Members to be consistent in their imposition of regulatory burdens. If a law controls the risk to human health from one source, it

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79 *Korea Beef AB,* above n 35 [164].

80 The expression 'like product' is one example of a term that may be interpreted differently depending on context: *Japan – Taxes on Alcoholic Beverages,* WTO Docs WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, AB-1996-2 (1996) 20–1 (Report of the Appellate Body) ('*Japan Alcohol AB*').

81 *GATT*, above n 2, Articles 1 and III on Non-Discrimination.

82 This may change in the future. One Appellate Body member in *Asbestos AB* indicated that the scope of the 'like product' concept may need to be revisited in future, *Asbestos AB,* above n 56, [154].

83 These provisions are contained in the *TBT Agreement*, above n 42, arts 2–4 and in the *SPS Agreement*, above n 42, arts 2, 3 and 5.

84 *Korea – Beef AB,* above n 35, [162–163], [166].

85 *Asbestos Panel,* above n 56, [8.207]. The *Asbestos* dispute illustrates this point. The *Asbestos AB* held that it would not be reasonable to require France to introduce a measure that continued the very risk that the ban sought to halt: *Asbestos AB,* above n 56, [168], [174].

86 See *Best Practice Regulation Handbook* (2006) Australian Government Office of Best Practice Regulation <http://www.obpr.gov.au/bestpractice/index.html> at 10 July 2007.

must impose equivalent restrictions on other sources of the same risk. The regulatory consistency obligations reflect a rational theory of choice which assumes that 'economic and political agents act with consistency, coherence, and maximum effectiveness toward maximisation of their utility'.[87] The limitations of the rationality criterion are well recognised.[88] Inconsistency in domestic regulatory priorities may be attributable to differing public pressures, perceptions and values[89] and the requirement of regulatory consistency potentially jeopardises environmental measures that are selected according to national preferences, priorities, values or resources.

The political influence of the trade liberalisation agenda has also moved these substantive principles and balancing exercises into the language of MEA's. The most striking early example of this is found in Principle 12 of the *Rio Declaration* which incorporates the precise language of the chapeau to *GATT* Article XX, when it exhorts that '[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.[90] The overt influence of trade concerns is found more in the preambles to later treaties. The *Biosafety Protocol*, the *International Treaty on Plant Genetic Resources*,[91] the *Persistent Organic Pollutants Covention* ('*POPs Convention*')[92] and the *Prior Informed Consent Convention* ('*PIC Convention*'),[93] all recognise that trade and environmental policies should be mutually supportive. In addition, the PIC Convention provides that the treaty should not be interpreted to imply a change in the rights and obligations of a Party under any existing international agreement, whilst not creating a hierarchy or subordinating the MEA to other WTO agreements.[94] This language clearly acknowledges that conflicts are possible but defers resolution of conflict to some future time, and displaces resolution to an unidentified forum.[95] While there is little other evidence of trade law influence in the text of these treaties, this may well be a case of Esty and Geradin's 'bell that did not ring'; it is hard to assess what measures *might* have been included in those texts in the absence of trade influences.

The formal adoption of an interpretive approach involves deferral of conflict resolution to a later point and unspecified venue. This essentially guarantees that disputes will be heard in the WTO where the complaining party is not a member

87 Jan Bohanes, 'Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle' (2002) 40 *Columbia Journal of Transnational Law* 323, 357.

88 Bohanes, ibid; Cass Sunstein, 'Beyond the Precautionary Principle' (2003) 151 *University of Pennsylvania Law Review* 1003, 1016.

89 Cass Sunstein and Richard Pildes, 'Experts, Economists and Democrats' in Cass Sunstein, *Free Markets and Social Justice* (1997) 133.

90 This language is elaborated in Agenda 21, above n 34, [39.3(d)].

91 *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, [2006] ATS 10 (entered into force 29 June 2004).

92 *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 40 ILM 532.

93 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* 1998, opened for signature 10 September 1998, [2004] ATS 22 (entered into force 24 February 2004).

94 Ibid 'Preamble'.

95 ILC 2006, above n 1, 140–2.

of the MEA. Uncertainty remains over the relevance of MEAs in WTO interpretation and application. While the WTO's jurisdiction is limited to disputes arising under the WTO covered agreements, there is no such limit on the instruments that might be deployed to interpret those agreements.[96] WTO treaty interpretation must be undertaken in accordance with the customary rules of interpretation of international law[97] and Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* directs a treaty interpreter to consider 'any relevant rules of international law applicable in the relations between the parties'. Adjudicators should use this provision to give effect to international law's 'strong presumption against normative conflict'.[98] As the ILC points out, '[t]reaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well'.[99]

This essentially calls for WTO dispute Panels and the Appellate Body to situate trade rights in the context of their broader normative environment.[100] The use of other instruments and principles of international law to interpret WTO instruments does not 'add or diminish rights or obligations'.[101] It merely understands and explains the proper scope and operation of those rights and obligations Despite this, there have been mixed approaches to the WTO's engagement with MEA texts and other principles of international law. Early on, the Appellate Body made clear that the WTO agreements must not be read in 'clinical isolation' from the broader corpus of international law.[102] It referred to both the *Convention on Biological Diversity* ('CBD')[103] and the *United Nations Convention on the Law of the Sea*[104] in the *Shrimp – Turtle* dispute to aid in interpreting *GATT* Article XX(g)'s concept of 'exhaustible natural resources'.[105] Yet it has also declined to acknowledge the customary international law status of the precautionary principle.[106]

In the recent *Biotech* dispute, the Panel evinced an unwillingness to promote a harmonious approach to the WTO's *SPS Agreement* obligations, the precautionary principle, and the CBD's *Biosafety Protocol*. In *Biotech,* the European Communities urged the Panel to consider the effect of the CBD and *Biosafety Protocol* – especially their adoption of the precautionary principle – on Members' obligations to avoid trade restrictions on genetically modified organisms under the *SPS Agreement*. Given that the *Biosafety Protocol* is specifically designed to control the trans-boundary movement of genetically

96 Ibid [45].
97 WTO, above n 53, art 3(2).
98 ILC 2006, above n 1, [37].
99 Ibid.
100 Ibid [423].
101 Ibid [447].
102 *United States – Standards for Reformulated and Conventional Gasoline,* WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) [36] (Report of the Appellate Body) ('*Reformulated Gasoline AB*').
103 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
104 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).
105 *Shrimp – Turtle AB,* above n 12, [126]–[134].
106 *Hormones AB,* above n 29, [125].

modified organisms, its provisions offer more specific guidance on the regulation of trade in GMOs than the *GATT*, *SPS* or *TBT Agreements*. The Panel, however, declined to consider the Protocol, holding that it was not a rule of international law 'applicable in the relations between the parties ...'[107]

The Panel ventured that the obligation to consider other relevant principles of international law required that those principles be applicable to *all* WTO Members, not merely those WTO Members who were parties to the dispute.[108] This approach will make it virtually impossible for MEAs ever to be taken into account under Article 31(3)(c), since every WTO Member would have to have joined the MEA. The structural bias of WTO dispute settlement appears to triumph yet again, as 'the [P]anel buys the "consistency" of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole.'[109]

The Panel decided that where some WTO Members are not parties, treaties might illuminate the 'ordinary meaning of language used in WTO texts, in the same way that one might use a dictionary[110]:

> [s]uch rules [contained in MEAs] would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character.[111]

Apart form being a 'contrived' way of avoiding the WTO's clinical isolation from international law,[112] the use of MEAs to divine 'ordinary meaning' is unlikely to assist when Panels do not have the institutional inclination to embrace other principles. Without explaining why, the Panel 'did not find it necessary or appropriate to rely on these particular provisions in interpreting the WTO agreements at issue in this dispute'.[113] Instead, it based its interpretation on the collection of glossaries, reference works and official documents which had been furnished following requests to various international organisations, including Codex, the Food and Agriculture Organization, the *IPPC* Secretariat, the World Health Organization, the OIE, the CBD Secretariat and UNEP. The Panel declined to express a concluded view on the status of the precautionary principle in international law, but doubted that status had changed since the Appellate Body's ruling that it was not yet part of customary international law.[114]

The Panel's refusal to find that neither the precautionary principle nor the *Biosafety Protocol* could assist or inform its interpretation of the WTO's *SPS Agreement* in a dispute involving biotech products is disturbing, given the *Biosafety Protocol*'s relevance and specificity. This was not a situation where 'trade rationality' was necessarily at odds with the rationality of environmental

107 *Biotech Panel*, above n 29, [7.68]–[7.72].
108 Ibid.
109 ILC 2006, above n 1, [450].
110 *Biotech Panel,* above n 29, [7.94].
111 Ibid [7.92].
112 ILC 2006, above n 1, [450], [471].
113 *Biotech Panel,* above n 29, [7.95].
114 Ibid.

protection.[115] For the Panel to simply ignore its interpretive utility is a missed opportunity to enhance the compatibility of, and minimise the conflict between, these different spheres of international law. It might have also given further impetus to the negotiations under paragraph 31 of the Doha Agenda, rather than render that item redundant or inutile.[116] The MEA agenda item calls upon Members to investigate 'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements'.[117] The agenda item is expressly restricted to clarifying the relationship in cases where both WTO Members are parties to the MEA. The fact that the WTO Members themselves framed this agenda item in this way suggests that they considered that the relationship might well be different in disputes where not all WTO Members were parties to the MEA, but the Parties to the dispute were.

V CONCLUSIONS

This article has reflected on the influence of international trade and the various limbs of environmental governance: decision making institutions, processes and principles. It argued that while the WTO as a single institution might be internally fragile, it is extremely powerful compared with other more fragmented regimes, especially international environmental law. The size of the WTO's membership and the juridification of WTO rules under the dispute settlement system give it enormous international presence and authority. This authority influences domestic and international environmental law making. The WTO's membership remains smaller than most of the major MEAs,[118] yet there is evidence of trade considerations dominating discussions at MEA negotiations and other global environmental fora. Its disciplines can also serve as a disincentive to raising domestic standards, and at the very least they set procedural and substantive requirements for how those domestic standards are designed and implemented.

Environmental law and the principles of sustainable development have had some influence on the WTO. The WTO has been forced to add a small number of trade–environment linkage issues to its Doha negotiating agenda, although five years of negotiations on these issues has seen little, if any, progress.[119] Many aspects of WTO deliberations have become more accessible and transparent, and

115 ILC 2006, above n 1, 72 [134].

116 The Appellate has consistently sought to interpret WTO texts in a way that would promote effectiveness and would avoid making whole clauses or paragraphs redundant or inutile: *Reformulated Gasoline AB,* above n 102, 23.

117 See [31.1] of the Doha Declaration: *Ministerial Conference – Fourth Session: Doha, 9-14 November 2001 – Ministerial Declaration Adopted on 14 November 2001*, WTO Doc WT/MIN(01)/DEC/1 (2001).

118 *Convention on International Trade in Endangered Species of Flora and Fauna*: 172 parties; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*: 170 parties; *Montreal Protocol*: 191 parties; *United Nations Framework Convention on Climate Change*: 191 parties; *Kyoto Protocol*: 175 parties; *Convention on Biological Diversity* 190 parties; *Biosafety Protocol* 141 parties; *POPs Convention*: 146 parties.

119 The same could also be said of the broader Doha negotiations, which stalled completely in late 2006 and were only restarted in February 2007.

there have been some steps towards civil society participation in decision-making. The Appellate Body has interpreted *GATT* provisions with guidance from multilateral environmental agreements, reducing the actual and perceived potential for conflict between *GATT* and legitimate environmental laws. There remains, however, a pattern of Panels having to be corrected on their inclination to interpret the WTO in clinical isolation from the broader body of international law. Moreover, where interpretive gains have been made in the dispute settlement context, they have been resisted by the membership.

One is therefore compelled to conclude that there is still little demonstrated commitment to the WTO's own goal of mutual supportiveness. There have been numerous instances of environmental law being constrained or modified to satisfy trade considerations, but only a few examples – principally in the Appellate Body – of trade law attempting to support the integrity of environmental objectives. Where, then, does this leave the state of the trade–environment linkage? Does the progress achieved to date merit continued faith in the ability of the WTO to eventually deliver on its commitment, especially when the authority of WTO as the driver of trade liberalisation is undermined by the proliferation of bilateral and regional preferential trade agreements?

It is clear that the ongoing demands of civil society for greater accountability are yielding benefits, albeit gradually. In time, these improvements in accountability and transparency can be expected to infiltrate the substance of WTO discussions and deliberations. As a single entity the progress of the WTO is easy to monitor and, if necessary, criticise, all of which militates in favour of persevering with the existing, albeit flawed, system. By contrast, the multiplicity of bilateral and pluri-lateral agreements makes their negotiation, implementation and enforcement harder to scrutinise.[120] The sheer number of agreements makes the monitoring task more time consuming. Many of these are not available online, or are available only in the languages of the parties, and the dispute settlement systems are less transparent and less rules-based than the WTO's. There is a risk that the preferential trade agreement phenomenon may create new power imbalances and risks undermining the gains of the multilateral regime.

On the other hand, many pluri-lateral agreements contain much stronger commitments than those in the WTO. The *NAFTA* and EU frameworks are the most obvious examples but most recent FTAs involving the United States have demanded improvements in environmental enforcement.[121] Regional agreements therefore have the potential to create clusters of consensus over ways to enhance trade's environmental impact that might make their transfer and introduction to the WTO easier to achieve.[122] Once a Member has made a commitment to improve environmental governance in a bilateral agreement, they may be less suspicious of the same commitment finding its way into the multilateral regime.

120 ILC 2006, above n 1, 108 fn 265. Forty-three RTA's were notified to the WTO in the year from January 2004 to February 2005.

121 USTR, *Trade Facts: Environment* (2007) United States Trade Representative <http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file457_11280.pdf> at 9 July 2007.

122 ILC 2006, above n 1, 106–108 makes this point about regionalism and international law more broadly.

Many also insist on recourse to domestic courts for dispute resolution, which enables the local community to be better informed of specific points of tension. The spontaneous upward harmonisation of domestic environmental standards, starting from bilateral and regional agreements, could relieve the WTO of some of the pressure to address the trade and environment linkage from within. Such an outcome would no doubt be welcomed by those who assert the WTO's unsuitability as a forum for resolving environmental tensions.

It is beyond the scope of this article to analyse the environmental provisions of regional trade agreements, but an emerging body of research relating specifically to the environment linkage is adding to the existing critiques of regionalism versus multilateralism.[123] A conclusive view must therefore wait until this literature offers more concrete evidence of the benefits of a more diffuse approach. Meanwhile, it can only be hoped that the iterative interpretive approach of the Appellate Body, combined with improved accountability, participation and transparency, will eventually enhance the institution's respect for other systems and bodies of law. Only then can the WTO implement the ILC's recommended approach of systemic integration, and inch the trade and environmental regimes closer to true mutual supportiveness.

123 Lorand Bartels and Federico Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (2006).