Kommentar:

CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY

STUDENT NUMBER: 999944060

PROGRAMME: LL.M European Energy & Natural Resources Law & Policy

COURSE: International Business Transactions

TITLE OF THE RESEARCH PAPER: Does the GATT/WTO dispute settlement system offer an efficient and proportional legal framework which effectively balances the needs of both multinational enterprises - undertaking international trade or foreign direct investment - and necessary global standards of environmental protection?

ABSTRACT OF THE PAPER:

This research paper examines the concepts of the GATT/WTO dispute settlement system and focuses on its impact on the application of current and the development of future international, transnational and domestic legal standards of environmental protection. For that purpose, international trade disputes related to environmental law are assessed. Finally, the analysis will conclude that the current dispute settlement system generally offers a suitable and proportional tool to promote legal security in international trade. In contrast, trade restrictions in order to protect the environment generally do not pass the proportionality test which means that alternative measures will offer higher standards of environmental protection without causing excessive drawbacks concerning the global economy in the next Millennium.

Wordcount: 3287

PRESENTED TO: Prof. Dr. Thomas Wälde

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Research Paper

Does the GATT/WTO dispute settlement system offer an efficient and proportional legal framework which effectively balances the needs of both multinational enterprises - undertaking international trade or foreign direct investment - and necessary global standards of environmental protection?

by

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LL.M Programme

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Abbreviations

CTE	WTO Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
MEA	Multilateral Environmental Agreement
MNE	Multi National Enterprise
SME	Small and Medium Sized Enterprises
TREM	Trade Related Environmental Measure
WTO	World Trade Organization

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1. Introduction

This paper will discuss both the substantive law of the World Trade Organization [WTO] and the procedural provisions concerning the General Agreement on Tariffs and Trade [GATT] and the WTO dispute settlement system whether they not only offer a proportional legal framework for solving international trade disputes which are based on a unilateral trade related environmental measure [TREM] but also whether the legal relationship between international trade law and a multilateral environmental agreement [MEA] should be clarified by legal amendments of WTO. This approach is justifiable as the optimisation of the legal relationship between WTO law and numerous MEAs is controversially assessed by legal scholars and the Member States of the WTO. Furthermore, its relevance is underlined by the current crises of the WTO exemplified by the "Battle in Seattle" where the WTO failed to establish an agenda for a new round of multilateral trade negotiations due various reasons. Firstly, the paper will address the core provisions of WTO Law and will introduce the old GATT panel procedure and the modern dispute settlement system.
The next chapter discusses environmentally influenced trade disputes under both systems of judicial review. It will be interrogated whether the panels successfully cope with the task to balance the needs of free trade and the application of current international standards of environmental protection. Having analysed the WTO law, the scope of MEA and certain cases, it will be concluded that the current substantive and procedural WTO offer a proportional legal framework which should not be a subject of delimitations amendments due to both the risk of long negotiations with unforeseeable results and the fact that a simple, consistent delimitation of the scope of WTO law and international law is not feasible. Another conclusion is that trade

restrictions are usually only the second best solution to address environmental problems. However, apart from generally convincing results of the panel procedures, it has to be criticised that the legal methodology applied by several panels is highly questionable. It has to be recommended that the Panels focus on the wording of Art. XX, not ignore the preamble of the WTO and that they honour the basic principles of international legal interpretation mainly laid down in Art. 30-34 of the Vienna Convention on the Law of the Treaties[1].

2. Background : Principles of GATT/WTO Law and the dispute settlement system

Before examining specific disputes dealing with the complex interface between international trade and environmental law and policy, the key-provisions of the GATT, the systemic and teleological alterations due to the results of the Uruguay round and the basic rationale of the different stages of GATT/WTO dispute resolution are reported.

2.1 Core Provisions and Principles of the GATT 1947 - 1994

Between 1947 and 1994, the GATT was not only used as collection of substantive legal norms but also as the source of dispute settlement norms and the framework for institutional provisions[2]. This situation occurred as the U.S. had failed to ratify the Havana Charter establishing an International Trade Organisation[3] so that the GATT was applied for more than forty years on the weak basis of a Protocol for Provisional

[1] Vienna Convention on the Law of the Treaties, May 23, 1969 [hereinafter: VCLT].
[2] R.A. Brand, Sustaining the Development of International Trade and Environmental Law, unpublished paper p 6 - 7.
[3] Havana Charter Establishing an International Trade Organisation.

Application[4]. The key-provisions are formed by a series of principles: Art. I (1) GATT denotes that one Member State granting specific trade advantages is obliged to grant other members the same conditions of market access - Most Favoured Nation Treatment [MFN] - whereas Art. II GATT deals with the creation and enforcement of schedules in order to reduce domestic tariffs[5]. Art. III (1-3) GATT obliges Member States not to discriminate between nationally manufactured goods and imported products as long as the former are like the latter[6]. Finally, Art. XI (1) GATT demands the abolishment of quotas and other non tariff barriers to trade.

These few and simple principles are subject to numerous, complex exceptions[7] whose interpretation is severely discussed.

The evaluation of this legal system remains ambiguous. On the one hand, this drafting approach is a valuable basic strategy of international negotiations to focus on a draft with few easily agreeable principles and to ignore difficult details by means of a series of exemptions which were deemed to be partially or fully dropped during later re-negotiations. However, as the number of participants had increased, the negotiators began to induce side agreements[8] during the Tokyo Round negotiations which were usually not agreed by all the members in order to avoid the difficult process of finding a consent in order to amend the GATT itself[9]. This lead to

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[4] Protocol for Provisional Application of October 30, 1947. 61 Stat. Part 5 at A2051 (1947); T.I.A.S. No. 1700; 55 U.N.T.S. 308 (1950).

[5] The tarif limits are laid down in detailed tariff provisions ("schedules") in the annexes.

[6] It is controversially discussed which criteria should be used in order to define like products.

[7] Art. I (2) GATT; Art. III (3-10) GATT; films Art. IV GATT; dumping causing material injury to domestic industries Art. VI GATT; temporary import and export prohibitions Art. XI (2); balance of payment difficulties Art XII GATT; subsidies Art. XVI GATT; preferential treatment for developing countries Art. XVIII and Part IV GATT; safeguards against unforseeably increased imports Art. XIX. GATT; general exemptions Art. XX GATT; national security exemptions Art. XXI GATT; customs unions and free trade zones which virtually affect all trade Art. XXIV GATT; Waiver Art. XXV GATT.

[8] e.g. the GATT Subsidies Code of 1979.

[9] R.A. Brand, Sustaining the Development of International Trade and Environmental Law, unpublished paper p 6 - 7; J.H. Jackson and W.J. Davey and A.O. Sykes, Legal Problems of International Economic Relations - Cases, Materials and Text (3rd ed.) (St. Paul, U.S., West Publishing Co., 1995) p 296.

additional complexity which threatened the determination of the mutual countries' obligations[10]. Additionally, Grandfather rights remained in force[11]. The vague wording of many provisions may be seen as a further drawback of the system. Although explanatory notes exist concerning doubtful issues, their usage may be limited by the VCLT. Finally, as a result of the weak legal backing[12], the complex exemptions and the proliferation, prevented the wording from gaining significant importance related to its interpretation. Power based diplomacy rather than careful legal reasoning dominated the structure of the former substantive GATT law.

2.2 Dispute Settlement System 1947 - 1994

The traditional dispute settlement procedure is based on Art. XXII and XXIII GATT and can be separated into different stages. At the beginning the Contracting Parties solved disputes on their meetings exactly pursuant to the wording of Art. XXII and XXIII GATT. During the 1950s, a panel procedure was introduced so that a party could ask for a panel after negotiations and eventual conciliation had failed[13]. The proceedings were not public and only the final panel reports were a subject of an adoption by unanimous consent of the Contracting Parties[14]. This panel procedure was institutionalised by an Understanding of 1979[15] and frequently amended[16].

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[10] This is described as "GATT à la Carte".
[11] Art. 1 b Protocol for Provisional Application of October 30, 1947. 61 Stat. Part 5 at A2051 (1947); T.I.A.S. No. 1700; 55 U.N.T.S. 308 (1950).
[12] The legality of GATT was doubted in the U.S. as it relies on presidential powers instead of the Congress. q.v. Jackson, J.H. and W.J. Davey and A.O. Sykes, Legal Problems of International Economic Relations - Cases, Materials and Text (3rd ed.) (St. Paul, U.S., West Publishing Co., 1995) p 296.
[13] Jackson, J.H. and W.J. Davey and A.O. Sykes, Legal Problems of International Economic Relations - Cases, Materials and Text (3rd ed.) (St. Paul, U.S., West Publishing Co., 1995) p 339: The panel is formed by the directorate general.
[14]Jackson, J.H. and W.J. Davey and A.O. Sykes, Legal Problems of International Economic Relations - Cases, Materials and Text (3rd ed.) (St. Paul, U.S., West Publishing Co., 1995) p 339: A draft report was issued whose factual findings were commented by the involved parties. A a draft report was issued whose factual findings were commented by the involved parties. The final report was issued.
[15] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, 26th Supp. BISD 210 (1980). Frequent Amendments:

An analysis of the old dispute settlement system has to underline, that its efficiency suffered from the above noted weaknesses of the substantive law. Furthermore, the required unanimous consent[17] in order to adopt a panel report enabled the party who lost the case to object the adoption. This probability threatens the interpretation of dispute settlement as a judicial review: The panel relied more on the persuasive political power of its decisions which may be backed by a large majority of members rather than on stringent legal categories such as legal security or enforcement of individual rights. Another negative element is expressed by the fact that a party had no individual right to demand the establishment of a panel until 1989[18]. Furthermore, the procedure could easily be delayed at various stages[19].

2.3. Substantive WTO Law

Although the WTO Charter of 1994 only introduces GATT 1994 without amending the wording of the traditional GATT - which is now called GATT 1947 -[20], the traditional interpretation of many substantive provisions is challenged due to the new surrounding legal framework and institutions.

First of all, the legal framework in-doubtfully entered into force and a completely new set of rules for dispute settlement is inaugurated. Furthermore a the substantive law is surrounded by institutional provisions. This process can be best summarised as

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[16] 1982 Ministerial Declaration on Dispute Settlement Procedures, 29th Supp. BISD 13 (1983); 1984 Action on Dispute Settlement Procedures, 31st Supp BISD 9 (1985); 1989 Improvements to the GATT Dispute Settlement Rules and Procedures, 36th Supp. BISD (1990).

[17] The requirement is pursuant to the rationale of Art. XXII GATT as only Contracting Parties are mentioned. Public international Law is general based on unanimity due to national sovereignty unless a treaty expressively provides for qualified majority voting (transnational structure).

[18] 1989 Improvements to the GATT Dispute Settlement Rules and Procedures, 36th Supp. BISD (1990).

[19] W.J. Davey, *Dispute Settlement in GATT*, 11 Fordham J.INtl.L. 51, 81-89 (1987): e.g. nomination of panel members, adoption of the report, implementatio of the report.

[20] GATT 1994 is just a legal document which defines that it consists of GATT 1947 and several decisions and understandings.

a legalisation of the GATT organs which shall now focus on stringent textual, systemic and teleological analysis rather than on power based diplomacy.

2.4 Key-Provisions of the WTO Dispute Settlement System under the Dispute Settlement Understanding in Terms of Art. 3 (4) WTO-Charter

In contrast to the broad provisions of Art.XXII and XXIII GATT 1947 and the former panel procedures, the new Dispute Settlement Understanding[21] guarantees a more efficient resolution of disputes. Firstly, a member will criticise the breach of GATT-Law by another state which is obliged to enter into considerations[22]. Apart from informal dispute resolution[23], the pursuing party may claim the establishment of a panel unless there is a reverse consent of all member states[24]. The Panel is established under Art. 6 and 8 DSU and hears the arguments and assesses the statements before a draft report is issued which is subject to factual and legal analysis of the parties[25]. The final report is issued and will be adopted under Art. 16 DSU unless there is reverse consensus against it. Every party may appeal the case. The appellate body only decides on these factual and legal topics which are subject to the initial report. Its report is adopted under similar conditions. Later on, the Dispute settlement body monitors the implementation of the decision[26] and Art. 22 DSU may authorise one other party to withdraw some trade concessions unilaterally.

An assessment of the DSU has to consider that this Understanding is the most stringent approach of international dispute settlement. As MEA usually focus on framework agreements which are a frequent adjusted in later Protocols adopted in consent, they tend either to ignore or not to formulate appropriate provisions

[21] Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994 [hereinafter DSU] .
[22] Art. 4 DSU.
[23] conciliation, arbitration under Art. 5 DSU.
[24] Art. 6 DSU.

regarding dispute settlement[27]. This is one of the major reasons that environmentalist pressure groups are keen to amend and utilise the WTO dispute settlement procedure for their objectives. One of the major drawbacks is that the suspension of trade concessions is only a valuable tool if the economic power between the involved parties is nearly equal. Otherwise, the suspending party may be hurt more than the party who failed to implement the decision. Another drawback is that only states can raise court actions on the WTO-Level although mainly multinational enterprises [MNE] are trading. A private entity may only publish concerns and ask or sue its domestic governments to take action. The latter will decide on the basis of broad discretion. Alternatively, direct applicability of WTO-Law in domestic court actions is controversially discussed.

3. Analysis of Environmental Disputes

A series of 7 environmental disputes were settled by the former GATT panel procedure and two are settled by dispute settlement body [DSB]. They usually focus on the principles of Art. I (1), III (1-3) , XI (1) GATT and assess the general exemptions under Art. XX GATT.

3.1 Panel Report of 1982 concerning U.S. Prohibition of Tuna Imports

The panel decided that the U.S. prohibition of Tuna Imports from Canada infringed Art. XI (1) GATT without being justified by Art. XI (2) or Art. XX (g) GATT[28]. Art. XX is applied in a two step approach. First of all, the specific paragraphs are analysed. Secondly, if these are applicable, the measure will be examined under the chapeau

[25] Art. 12 DSU.
[26] Art. 21 DSU.
[27] R.A. Brand, Sustaining the Development of International Trade and Environmental Law, unpublished paper, p 15 - 16.
[28] BISD 29 S/91-109.

of Art XX GATT which consists of two variants. The first deals with arbitrary or unjustifiable discriminative barriers whereas the second exempts disguised trade restrictions from the scope of the Art. XX GATT exception. As Art. XX GATT is an exceptional provision to general principles it usually has to be narrowly interpreted[29] and the burden of proof is on the party who invokes the exemption (usually the defendant)[30]. Another well recognised feature of exceptional provisions is that they should be regarded as exhaustive provisions if they offer a catalogue of different variants[31]. This also follows the concept of judicial self restraint. However, in the European Community [EC] law a different approach was chosen by the ECJ[32] but this is justified due to the objective of the EC to create a far more reaching internal market which may cause need of temporal exceptions not mentioned in the wording of the treaty enabling the ECJ to engage in judicial legislation[33].

The U.S. prohibition is deemed not to be justified under Art. XX (g) as the U.S. failed to proof that similar restrictions were applied to domestic products[34]: Therefore, the final criterion of Art. XX (g) was not met.

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[29] This is a general legal principle in order to address the systematic intentions of the legislator; q.v. Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 334.

[30] BISD 36S/345, 385, Section 5.27; Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 334.

[31] This idea is crucial in order to avoid a proliferation of exemptions which destroys the relation between principles and exemptions intended by the legislator.

[32] concerning Art. 30 ECT 1997 (Art. 36 ECT 1992); q.v. Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 335.

[33] Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 335.

[34] Petersmann, E.-U., The GATT / WTO Dispute Settlement System - International Law, International Organisations and Dispute Settlement (London, U.K., Kluwer Law International, 1997) p 97.

3.2 The 1987 Panel Report on U.S. Taxes on Petroleum

The second environmental panel dealt with U.S. petroleum taxation provisions which imposed a higher tax rate on imported petroleum[35]. The Panel stated that this discrimination was a violation of Art. III (2) GATT but stated also that specific other tax on imports could be justified as border tax adjustments which was neglected by the complainants who tried to invoke the "polluter pays principle" which causes the final consumers to pay[36].

3.3 Panel Report on Canadian Unprocessed Herring and Salmon Export Restrictions

Canadian Export restrictions concerning fish exports were the subject of the third relevant panel[37]. It was stated that these restrictions were inconsistent with Art. XI GATT without being a subject of Art. XI (2) or Art. XX (b) or (g). It was argued that the challenged Act tried to restrict exports in order to keep the quality of fisheries resources but the panel refused to apply Art. XX (b) as the bill was deemed not to be necessary. The interpretation of the term necessary in Art. XX is controversially discussed. The prevailing opinions uses a consistent meaning for the whole Article and argues that a measure which is generally inconsistent with GATT law is necessary when neither no consistent measure is feasible nor a less inconsistent measure is feasible[38]. This approach leads to the result that the Canadian Statute is in-necessary as it would be sufficient to ban low quality exports to achieve its target rather than prohibiting all. Another idea is to interpret word necessary as a general

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[35] BISD 34 S/136-166; q.v. tax rate imposed on domestic petroleum 8.2 cents, on imported petroleum 11.7 cents per barrel.

[36] Petersmann, E.-U., The GATT / WTO Dispute Settlement System - International Law, International Organisations and Dispute Settlement (London, U.K., Kluwer Law International, 1997) p 98.

[37] BISD 35 S/98-115.

[38] BISD 36S/345, 385 Section 5.26; Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 337 and 338.

proportionality test asking whether the aim of a measure is appropriate whether the measure is suitable to achieve its aim if it is the one which causes the least implications with conflicting legal values and if it does not causes severe infringements of other values which may outweigh the benefits of the measure.

It is difficult to evaluate both approaches. The latter interpretation is likely to cause the redundancy of the chapeau. However, it seems to be more appropriate in order to deal with conflicting environmental objectives which were not foreseeable for the original legislator of the GATT to the extent which is nowadays addressed by MEAs. Additionally, the concept of self restraint in order to deal with national sovereignty may favour the first approach[39]. However, actual environmental problems can only be efficiently solved by international structures as the increasing number of MEAs indicates so that the WTO organs should not be reluctant to interpret WTO law in the light of MEA provisions. Finally, this proportionality concept is also available to accept that unilateral measures are normally not necessary as long as no good faith negotiations were conducted in order to solve a problem.

Regarding Art. XX (g), the panel stated that the Act addressed exhaustible natural resources and concluded that the measures were related to their protection. The term related to in interpreted as having the primary target to address the described target[40]. Another opinion may favour an interpretation that related to simply accepts any logic connection but such an approach is not feasible as exceptional provisions should be narrowly interpreted. Finally, the panel concluded that the Act was inconsistent with

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[39] Mattoo, A. and P.C. *Mavroidis, Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of GATT, in* International Trade Law and the GATT/WTO Dispute Settlement System (E.-U. Petersmann ed.: London, U.K., Kluwer Law International,1997) p 337 and 339.

[40] q.v. T.L. McLarty, *WTO and NAFO Coalascence: A Pareto Improvement for Both Free Trade and Fish Conservation*, 15 Virginia Environmental Law Journal 469 (Spring 1996) p 492; Essay deals with the Tuna Panel, supra.

Art. XX (g) as Canada failed to apply the same restriction on domestic trade with herring and salmon[41].

3.4 Thailand's Import Restrictions on Cigarettes

The next panel had to assess whether Thailand's import restrictions on cigarettes which infringe Art. III (1-2) GATT were justified by Art. XX (b) GATT[42]. The panel chose the narrow interpretation of the term necessary in order to refuse a justification as Thailand did not apply milder domestic measures with at least the same beneficial effect for the health of the nationals[43].

3.5 1991 and 1994 Panel Report on U.S. Tuna Import Restrictions

The 1991 and 1994 tuna cases[44] are similar to the above mentioned Tuna dispute. The panel did not justify the U.S. restriction of tuna imports under Art. XX (b) as the measure was deemed not to be necessary as it does not provide additional protection for dolphins. Clearly, the panel stated that the first step of GATT dispute settlement is negotiation rather than unilaterally imposing import restrictions. This argument was also used in terms of Art. XX (g). The most challenging problem is whether the U.S. have jurisdiction about the process of manufacturing goods outside its territory by foreign nationals. This could only be accepted on the basis of the universality principle of public international law. This concept is traditionally only applied on international terrorism so that the U.S approach is not justifiable. But reports were not adopted[45].

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[41] Petersmann, E.-U., The GATT / WTO Dispute Settlement System - International Law, International Organisations and Dispute Settlement (London, U.K., Kluwer Law International, 1997) p 99.
[42] BISD 37 S/200-228.
[43] like labels, restrictions of sales applied to domestic and imported cigarettes.
[44] BISD 39S/155-205; DS29/R of 16 June 1994 and I.L.M. 842 (1994).
[45] Petersmann, E.-U., The GATT / WTO Dispute Settlement System - International Law, International Organisations and Dispute Settlement (London, U.K., Kluwer Law International, 1997) p 101 and 103.

3.6 US taxes on automobiles

Another panel dealt with an U.S. Statute demanding certain average energy consumption thresholds of the cars sold by a manufacturer for more than $ 30,000. The panel decided to regard cars below and above this some as different products so that an infringement of Art.III (3) was denied[46]. This finding is remains highly questionable[47].

3.7 Reformulated Gasoline

The DSB was involved as Venezuela and Brazil complained that their oil imports were treated less favourable than domestic products concerning certain additives in petroleum which were enabled to meet average thresholds instead of fixed thresholds[48]. The report concluded that the part of the Act dealing with the threshold was inconsistent with Art. III GATT without being justified by Art. XX (b)(d)(g). The Appellate Body emphasised that it is more appropriate to assess the whole Act rather than on the threshold provisions[49]. However, its conclusion was similar as it stated an injustifiable discrimination of foreign products[50]: It would be feasible to impose the same standard on all petroleum products.

3.8 Shrimp Imports

The DSB which dealt with U.S. Shrimp import restrictions[51] due to non sea turtle friendly harvesting methods ignores the traditional two step approach of interpreting Art. XX GATT: Immediately, it focuses on the chapeau and states that this should be

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[46] DS31/R of 11 October 1994 and I.L.M. 1397 (1994).
[47] The term of like products is controversially discussed.
[48] Petersmann, E.-U., The GATT / WTO Dispute Settlement System - International Law, International Organisations and Dispute Settlement (London, U.K., Kluwer Law International, 1997) p 101 and 108.
[49] C.A. Valenstein and D.Hembrey, *The WTO Gasoline Dispute: A Case Study in WTO Dispute Resolution*, OGLTR 332 (1996) p 336.
[50] C.A. Valenstein and D.Hembrey, *The WTO Gasoline Dispute: A Case Study in WTO Dispute Resolution*, OGLTR 332 (1996) p 336.
[51] S.M.Cone, *The Appellate Body, the Protection of Sea Turtles and the Technique of "Completing the Analysis"*, 33 Journal of World Trade 51 (April 1999) p 52.

a separate category and considers the drafting materials as a means of interpretation[52]. This new approach ignores not only the wording but also the systemic structure and the teleology of WTO law but also the basic principles of treaty interpretation as they are laid down in the VCLT Art. 30-34. This approach also ignores the idea of in dubio mitius which lays down that treaties have to be analysed near to the wording in order not to violate the sovereignty[53]. The Appellate corrected these errors by applying the two step approach, justified the measure under Art. XX (g) but stated that it contained a non justified discrimination as the U.S. should have considered bilateral negotiations instead of trade restrictions[54].

3.9 Evaluation of Art. XX GATT 1994

The analysis of the examined cases clearly shows that the existing Art. XX GATT is a suitable tool to address environmental questions. The problems are in the field of legal interpretation. It does not seem desirable to amend this provision in order to a textual clarification regarding environmental problems and MEAs as such a measure is too blunt. It would lead to an exhausting catalogue of provisions which would rapidly become inappropriate. It is far more important to focus on a stringent interpretation of Art. XX, considering its wording, the system of surrounding provisions including the WTO preamble and to invoke the interpretative principles provided by the VCLT.

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[52] R.Howse, The Turtles Panel, Another Environmental Disaster in Geneva, 32 Journal of World Trade 73 (October 1998) p 82, 84.
[53] R.Howse, The Turtles Panel, Another Environmental Disaster in Geneva, 32 Journal of World Trade 73 (October 1998) p 84; Survey World Trade, Turtle Wars, The Economist, October 3rd 1998, at 22.
[54] S.M.Cone, *The Appellate Body, the Protection of Sea Turtles and the Technique of "Completing the Analysis"*, 33 Journal of World Trade 51 (April 1999) p 53.

4. Committee on Trade and Environment

With regard to environment, a WTO Committee on Trade and Environment [CTE]is established which has to address the borderline between international trade law and MEAs[55]. On the first meeting on 16 February 1995, the CTE adopted an agenda dealing with the clarification of the meaning of substantive provisions related to MEAs[56]. It focuses on the relation between unilateral TREMs recently provided by certain MEAs[57] and the chapeau and paragraphs (b), (d) and (g) of Art. XX GATT 1947 and the new WTO preamble. The CTE also concentrates on transparency and is due to is proposals in future reports[58]. However the outcome is doubtful and the Member States are still discussing how to address environmental objectives within the WTO law most effectively[59].

5. Conclusion

Finally, it has to be concluded that the present legal framework offers a strong basis to deal with environmental cases. The problem which remains is that the organs dealing with dispute settlement take environmental issues sufficiently into account and do not ignore precise textual analysis. The basic rationale should be that unilateral trade restrictions are never the first best solution. Negotiation and

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[55] Trade and Environment Decision of 14 April 1994, MTN.TNC/MIN(94)/1/rev.1, p 4.
[56] O.Lomas and D. Gibbons, *International Trade and the Environment-Recent Activities of the WTO*, Environmental Law and Management 225 (1996) p 227.
[57] e.g. trade restrictions in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]; Montreal Protocol on Substances that Deplete the Ozone Layer, September 16, 1987, S.Treaty Doc. No. 10, 100th Cong., 1st Sess.2 (1987), 26 I.L.M. 1550 (1987) (entered into force September 22, 1988)[hereinafter Montreal Protocol].
[58] O.Lomas and D. Gibbons, *International Trade and the Environment-Recent Activities of the WTO*, Environmental Law and Management 225 (1996) p 229.
[59] Members discuss WTO's relationship with environmental agreements, 40 WTO Focus 6 (May-June 1999).

multilateral enforcement of MEA are far more appropriate as it is showed by the flexible mechanisms of the Kyoto Protocol. Finally it has to be stated, that it is impossible to fix the relationship between the WTO and MEA by means of a simple rule as always new collisions are likely to occur.