

is an open question as to whether such a structure might have had any impact upon the conduct of the current pensions mis-selling difficulties.

International co-ordination

Contemporaneously with the launch of the new regulator a memorandum of understanding was announced between the SEC and the Commodities and Futures Trading Commission (CFTC) (which regulate the US securities and derivatives markets respectively) and the Bank of England and the new regulator. This is a very important development, since regulatory co-ordination between the US and UK regulators is of great importance to the industry and also suggests that SEC and CFTC have been to some extent

involved in the planning process for the new regulator, since it is unlikely that they would have agreed such a memorandum of understanding with an unknown body. It is important, and very welcome, that the process of reform in the UK should begin with a vote of confidence from the US.

BANK OF ENGLAND RESTRUCTURE

Simultaneously with the publication of the documents relating to the new regulator, the government published a Bank of England Bill, to implement the restructuring of the Bank of England. The Court of Directors of the Bank will continue in place; however, a statutory Monetary Policy Committee will be established which will be responsible for the design and implementation of the Bank's

monetary policy.

The Monetary Policy Committee is given statutory objectives. These are:

'To maintain price stability and, subject to that, to support the economic policy of Her Majesty's Government, including its objectives for growth and employment.'

This formulation, in particular the use of the words 'subject to that', appears to go a very long way towards giving the Bank an overriding statutory obligation to combat inflation, a requirement which is widely viewed as being at the core of central bank independence. 

Simon Gleeson
Richards Butler

International Trade Law

The GATT/WTO system and environmental standards

by Erasmo A Lara-Cabrera

Only five years after the United Nations was established, a comprehensive text on the law of the UN had already been written, by Hans Kelsen. In his *Preface on Interpretation* Kelsen stated that:

'... [s]ince the law is formulated in words and words have frequently more than one meaning, interpretation of the law, that is determination of its meaning, becomes necessary' (The Law of the United Nations, ed. G W Keeton & G Schwarzenberger, Stevens & Sons Ltd, London, 1951 at p. (xiii))

and that:

'... it is considered to be the specific function of interpretation to find and establish the one, "true" meaning of a legal norm.'

However, he continued, 'there is almost always a possible interpretation different from that adopted by [a] law applying organ in a concrete case.' In this context, Kelsen concluded that 'law' as a 'means', is in reality subordinated to 'politics' as an 'end' and, in that context:

'... the choice of interpretation as a law-making act is determined by political motives. It is not the logically 'true', it is the politically preferable meaning of the interpreted norm which becomes binding' (at p. xv).

In the context of the World Trade Organisation (WTO), this difference between juridical and political acts is not

as clear that which Kelsen suggests for the UN. However, it is believed that within the context of the WTO law-making and law-applying institutions, the decisions of the latter are to be 'guided' to a certain extent by the 'practice' determined by the former; although the latter do complement and can set 'precedents' for the actions of the former. This assertion can be illustrated by an exploration of the WTO constitutional structure

WTO CONSTITUTIONAL STRUCTURE

Within the WTO both the 'political' and the 'judicial' bodies are constantly faced with interpretative tasks. Within the trade/environment discussion, the problems relating to interpretation are particularly significant, specifically with regards to the balance between the values and principles of both fields. In the GATT/WTO context, this discussion has been acquiring greater relevance. It is considered necessary that the WTO system take a more determined 'environmental' approach. Following Kelsen's arguments, it is believed that for that to happen in a 'juridically certain' way, the WTO 'political' body will be the body which will need to adopt this approach as the 'end' to reach. It seems then that the adoption of waivers, interpretative

decisions, or treaty amendments (for details see art. IX and X of the *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter WTO Charter)), by the WTO Members will be a possible answer. Nevertheless, the Dispute Settlement Body (DSB) – motivated by the panels and Appellate Body (AB) – may decide to reach the 'finishing line' in advance of this.

WTO POLITICAL AND JUDICIAL BODIES

In the spirit of establishing a functional distinction, the WTO 'political' body can be deemed to be the Ministerial Conference and the General Council (however they act), while the WTO panels and Appellate Body can be considered as the WTO 'judicial' or 'judicial' body.

WHO INTERPRETS LAW?

Within the constitutional structure of the WTO, there are different bodies whose functions relate to the task of interpreting the law. The Ministerial Conference (MC) and the General Council (GC) have wide powers of interpretation; the DSB a more restricted one. In relation to this, the WTO Charter

provides that both the MC and GC have the ‘exclusive authority to adopt interpretations of [the Agreements which form part of the WTO]’ (art. IX(2), WTO Charter). On the other hand, the Dispute Settlement Understanding (DSU) provides that the:

‘... [r]ecommendations and rulings of the DSB [(including the interpreting function)] cannot add or diminish the rights and obligations provided in the [agreements]’ (art. 3(2), DSU)

and that:

‘... [t]he provisions of the Understanding are without prejudice to the rights of Members to seek authoritative interpretation [by the MC and GC] of provisions of a covered agreement through decision-making under the WTO’ (art. 3(9), DSU).

An important distinction is the following. On the one hand the panels and AB are *de facto* juridical organs whose dispute settlement reports need, however, to be adopted by the DSB, formed by the GC. In this context, when the GC acts as DSB, applying the DSU rules, its limited interpretative functions come into play. Similarly, when the GC (and MC) act pursuant to art. IX of the WTO Charter, undertaking its interpretative or waiver-granting function, or treaty amendment (pursuant to art. X), the wider powers apply, subject to specific rules of procedure applicable to each case (see art. IX and X, WTO Charter; also art. 2(4), DSU). Bearing these in mind, it is possible to conclude that the ‘political’ body (i.e., the GC and MC, however they act) has certain ‘pre-eminence’ over the *de facto* ‘judicial’ organ (i.e., panels and AB).

Within the WTO constitutional structure there are four possible ways in which an ‘environmental’ approach could be undertaken:

- The DSB – in both its ‘juridical’ and ‘political’ phases –, acting on a case-by-case basis and subject to its limited interpretative powers, can consider a trade-restrictive measure based on certain environmental standards as covered by GATT/WTO’s art. XX(b) or (g) exceptions;
- the MC and GC can undertake their interpretative role pursuant art. IX(2) with wide powers to include certain environmental standards in the exceptions covered by art. XX(b) and (g);
- the MC can undertake its waiver-granting function pursuant to art. IX(3)

and (4), and include certain environmental measures as non-violatory of GATT/WTO law; and

- pursuant to art. X, the MC can undertake treaty-law amendments extending (or clarifying) the wording of art. XX exceptions, in order to include specific ‘environmental’ parameters.

Clearly the scope of the effects of each of these choices varies: the DSB decisions have *ad hoc* effects, while the MC and GC decisions have more holistic effects. It is still not very clear whether – and in what measure – the DSB will influence and set parameters for the MC and GC decision-making functions regarding a possible future environmental approach. It is believed that subsequent WTO practice will provide the answer.

JURISPRUDENTIAL APPROACHES

There have been some previous ‘interpretative’ jurisprudential approaches relevant to the trade-environment discussion. In these, the dispute settlement organs have had to confront the difficult task of interpreting treaty wording, specifically, that of art. XX(b) and (g) of the GATT (*WTO, The Results of the Uruguay Round of Multilateral Trade Negotiations; The Legal Texts*, GATT Secretariat, June 1994, p. 519). Within the vast number of cases already carried out by the GATT/WTO dispute settlement mechanism, there are some useful examples in which relevant interpretative problems have found ‘jurisprudential’ importance for the environmental sphere.

The meaning of the word ‘necessary’ within art. XX(b) has been defined by previous GATT/WTO Panels on more or less consistent grounds. In 1990 it was established that for a trade-restrictive measure to be covered by that exception and, therefore, to be admitted as a valid restriction to trade, it had to be the ‘least restrictive alternative’ available. In the *Thai Cigarettes* case of that year, the Panel noted that:

‘... the import restrictions imposed by Thailand could be considered to be ‘necessary’ ... only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.’ (*Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel adopted 7 November 1990 (DS10/R), at para. 75).

In this case, the Report makes reference

to a previous panel approach regarding the term ‘necessary’ in the context of art. XX(d) (at para. 74 of the Report.) According to the Panel’s remarks Thailand could have employed other measures less inconsistent with the Agreement (P Sands, *Principles of International Environmental Law*, Vol. 1, Manchester University Press, UK, 1995, p. 6934).

In 1991 the GATT Panel interpreted the word ‘necessary’ more broadly than previous panels, including in its meaning requirements such as predictability, unavailability, non-discrimination and the use of measures non extra-jurisdictionally. The unadopted Report of the *Mexican Tuna* case of 1991 made reference to the previous *Thai Cigarettes* case and went even further, stating that even when an import prohibition is the only measure reasonably available:

‘... the conditions adopted were too unpredictable to be regarded as necessary to protect the health or life of dolphins’ (P Sands, at p. 697).

Furthermore, the Panel held that accepting the extra-jurisdictional application of the US measures would deviate from the purpose of the GATT.

The GATT/WTO Panels have also considered the definition of the wording ‘relating to’. Initially, for a trade-restrictive measure to be covered by the art. XX(g) exception, it had to be ‘primarily aimed at the conservation of an exhaustible natural resource’. In the *Mexican Tuna* case the Panel adopted this view and rejected the US argument on the same grounds, more or less, as for the analysis of the ‘necessity’ of the measure. A detailed analysis of the Panel Report can be found at *US Restrictions on Imports of Tuna*; Report of the Panel (DS21/R). See also Sands, at p. 697 and Arthur Appleton, *GATT Article XX’s Chapeau: A Disguised ‘Necessary’ Test?* and the WTO Appellate Body’s Ruling in *United States v Standards for Reformulated and Conventional Gasoline*, 6(2) RECIEL (1997), at p. 131.

Most recently the WTO DSB has given a broader meaning to the term in the *Reformulated Gasoline* case of 1996 (Appleton has already noted this approach by the WTO Appellate Body) (but without repudiating the earlier approach). In this case the Appellate Body found that:

‘... given th[e] substantial relationship, the baseline establishment rules [(the measure in question)] cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the US for the

purposes of Article XX(g).’ (*United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, at <http://www.wto.org/wto/dispute/gasoline.wp5>).

As Appleton pointed out, this new approach ‘might constitute a reinterpretation of what “primarily aimed at” means, and how the “relating to” test is to be applied’ (at p. 132). In other words:

‘... [i]f the relationship between the trade measure at issue and the stated conservation goal is “substantial”, the “relating to” requirement would be satisfied. A measure that is “merely, incidentally or inadvertently” aimed at the conservation of an exhaustible natural resource would not satisfy this requirement.’

THE EXTENT OF INTERPRETATION

In cases such as the 1991 *Mexican Tuna* case, the measures in dispute had been applied unilaterally outside the framework of a binding international environmental agreement. The relevant question now is whether a trade-restrictive measure – *prima facie* contrary to GATT/WTO rules – applied pursuant to an international environmental agreement can be understood as covered by art. XX(b) or (g) exceptions. Ernst-Ulrich Petersmann has expressed the view that as far as the relations among parties to an environmental agreement is concerned, art. XX may ‘not stand in the

(1993), p. 71). Moreover, it has been said that:

‘... if environmental standards recognized as ‘necessary’ in such *inter se* agreements become general ‘GATT practice’, they might also be of legal relevance for the interpretation of Article XX *vis-à-vis* third GATT Member countries...’ (Petersmann, at p. 71).

The question – currently debated in a WTO Panel in the *Shrimp/Turtle* case – poses, nonetheless, difficult interpretative problems of both GATT/WTO law, and of general international law. Furthermore, the constitutional limitations to the DSB interpretative functions may also become relevant – as long as rights of members may be affected – leaving the decision for consideration of the WTO ‘political’ body through its decision-making faculties.

CONCLUSIONS

The extent of the interpretative function varies within the WTO system. It would seem that the WTO ‘political’ body has both constitutional and functional tools for including environmental standards in WTO practice, with holistic effects. The DSB seems more limited in this respect. Nonetheless, the ‘political’ body also has important limitations. As T J Shoenbaum pointed out, the work of the Committee on Trade and Environment (CTE) ‘does little to inspire confidence that the CTE will be able to formulate concrete recommendations for reconciling the important issues at stake’ (*International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91(2) *AJIL* (1997), at p. 269); and that:

‘... [t]he difficulty the CTE has had in coming to a decision can be attributed in part to the decision-making process of the WTO’ (at p.270).

For those reasons, it seems then that the clear current alternative for including environmental standards in the WTO practice is, today, that of action by the DSB, where adoption of reports is easier to reach due to the ‘negative consensus’ formula. If true that this approach would only have ad hoc effects, and that it would be subject to the interpretative limitations

THE SHRIMP/TURTLE CASE

In the *Shrimp/Turtle* case, since the process of harvesting shrimp harms an internationally recognised endangered species both by treaty law (CITES) and probably by customary law (see J Cameron, F Darroch *et al*, *WWW Amicus Brief to WTO Shrimp-Turtle Dispute*, ed, C Arden-Clarke, WWF, September 1997, at p. 1327), it has been argued that the Panel should consider this as sufficient grounds for accepting environmental standards as non-violatory of GATT/WTO law. This, however, seems unlikely to happen. Nonetheless, the Panel may still set an important precedent if it agrees to refer the case for analysis by a group of experts. When this article went to press, the Report of the Panel had not been issued.

detailed above, it is believed that it can set a clear precedent to the ‘political’ body, where holistic approaches could be taken, and where different levels of development and trade interests exist. Furthermore, this could also open the door for the DSB and the parties to the WTO to deal with other important international environmental problems, such as those covered by global instruments on the danger to the Earth’s ozone layer (Montreal Protocol), the trade in endangered species (CITES), toxic waste (Basle Convention), climate change (UNFCCC), etc.

Finally, it is important not to forget that:

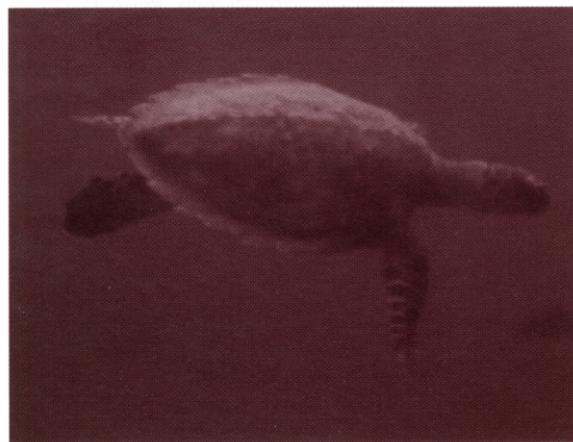
‘... [d]ispute settlement procedures assist in making rules effective, adding an essential measure of predictability and effectiveness to the operation of a rule oriented system in the otherwise relatively weak realm of international norms.’ (J H Jackson, S P Croley, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 90 *AJIL* (1996), p. 193)

Dispute settlement also assists in achieving the aims of justice, ensuring judicial certainty and, therefore, confidence in international interaction. 

Erasmó A Lara-Cabrera LLB (UNAM), LL.M (Cantab)

MPhil/PhD student, IALS, School of Advanced Study, University of London.

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way of measures which are internationally agreed to be ‘necessary’ for protecting life, health or ‘exhaustible natural resources’ in the parties to such an agreement’ (*International Trade Law and International Environmental Law; Prevention and Settlement of International Environmental Disputes in GATT*, 17(1) *Journal of World Trade Law*