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Understanding the Social and Environmental Aspects of the World Trade Organisation Dispute Settlement Procedure: Where are we Heading?

Rajesh Sehgal

Without a means of settling disputes, the rule-based system would be worthless because the rules could not be enforced. World Trade Organisation¹

Introduction

The World Trade Organisation (“WTO”) dispute settlement procedure has gained wide recognition in the last couple of years and been steadily picking up its strength. Since its inception more than 300 trade disputes have been submitted to the WTO dispute settlement body.² The evolution of dispute settlement procedure started during the Uruguay Round negotiations when member countries strengthened and broadened the scope of international trade rules without orientation to the existing international environmental law and policies.

On the other hand, international environmental law has also expanded in the last couple of decades. Indeed, the first case heard by the WTO dispute settlement body involved only an environmental dispute.³ Recently, the dispute settlement procedure of the WTO has come under attack from critics who say that it ignores environmental and social issues in regulating trade disputes. The settlement of disputes concerning environmental and social issues so far continues to suffer from a confusing and sometimes contradictory set of decisional rules.

¹ WTO, *Setting Disputes: A Unique Contribution* (2003), WTO home page.

² The total number of disputes submitted by 13 October 2003 was 302.

³ WT/DS2/AB/R, 26 April 1996.

The environmentalists feel they have been hit especially hard by the recent dispute resolution measures that undermine national environmental protection and lobbying to have trade-dispute panellists evaluated for possible conflicts of interest. The majority of panellists are trade experts, usually lawyers or negotiators, not scientists, doctors, or environmental experts in any field.

This paper will show how recent WTO Dispute Panel and Appellate Body Rulings on various trade disputes (Gasoline, shrimps, Asbestos and Hormones) conflict with environmental and health issues. Section Two of the paper provides a brief overview of the so-called conflict between free-trade and environment and various environmental considerations provided in General Agreement on Tariffs and Trade/WTO agreements. Section Three analyses how WTO dispute settlement panels have addressed the environmental and social issues and interpreted the provisions contained in (GATT) Article XX in various cases. Section Four provides the role of precautionary principle and risk assessment in the dispute settlement.

Section Five discusses some criticisms of the adjudication of the WTO dispute settlement panel. Section Six discusses the role of environmental Non Governmental Organisations as *amicus curae* and how they can help in addressing the environmental and social issues in the disputes settlement mechanism.

Though the paper will discuss several environmental interpretations of GATT/WTO agreement texts, the objective is not to reach a formal legal conclusion about the validity of those interpretations. The paper's main purpose is to survey the overall scope of the interpretation of certain international environmental law principles through the WTO adjudication system.

Environment at WTO : an overview

The fundamental issues between international environmental law and the WTO dispute settlement procedure arises from the simple fact that all nations have different environmental policies in what is an increasingly integrated world. At one end there are the industrialised or developed countries, which have rigorous laws that are vigorously enforced. On the other end, there are countries with economies still at a developing stage. These countries have equally rigorous environmental laws that are not so rigorously enforced, or have less rigorous

laws or no such laws at all.⁴ However, the WTO provides member parties ample freedom to impose regulatory measures within their own territory as long as the measures have a legitimate regulatory purpose and do not treat foreign and domestic products differently.

Still, disputes may arise when the domestic regulation has the effect of creating an unwarranted burden on market access and is prohibited by the WTO.⁵

The issue of environment was not directly included during the Uruguay Round negotiations. There are some environmental considerations provided in the WTO. The Preamble to the Marrakesh WTO Agreement includes direct references to sustainable development and to the need to protect and preserve the environment.⁶ In fact Article XX of GATT does recognise the ability of a country to place other concerns ahead of its obligations under GATT, especially, sub-articles (b) and (g).⁷ The article has been considered an “environmental exception”.

Moreover, the new Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPM) consider measures to protect human, animal and plant life and health and the environment. Both the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Services Agreements also include environment-related provisions as well.⁸

⁴ J. Bhagwati and T. N. Srinivasan, (1996) “Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?”, in J. Bhagwati and R. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for free trade?* Vol. 1 (MIT Press: Cambridge and London, 1996), pp. 159-223.

⁵ R. J. McLaughlin, “Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO”, (1999) *Oregon Law Review*, Vol. 78 Num 4 at pp 855-869.

⁶ WTO Agreement, Marrakesh, 15 April 1994, see www.wto.org.

⁷ Article XX of GATT:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

⁸ P. K. Rao, *Environmental Trade Disputes and the WTO* (Pininti Publishers: New Jersey, 1998), pp. 37-39.

Although there are clear-cut provisions towards environmental protection provided under various agreements, it is another issue whether they are actually working during the dispute resolution procedure in the WTO. In this regard the next section contains summaries of some of the leading cases handed down by the Dispute Resolution Panel of the WTO, which are specifically related to environmental protection. They will enable us to see whether the trade organisation has actually used these provisions and has real concerns about environmental protection.

Dispute settlement procedure and environment: some case studies

There are not many cases in which the dispute settlement body of the WTO has made rulings on environmental and social issues. Still those cases are important milestones in the brief history of the dispute settlement body of the WTO.

(a) The Reformulated Gasoline case

This is the first case in the history of the dispute settlement body where an environmental issue was involved. In order to protect clear air the United States of America (“USA”) amended the Clean Air Act 1990. Under the new rule only reformulated gasoline was allowed to be sold. The dispute arose from Venezuela and Brazil. The policy of the United States (“US”) stemmed from the fact that domestic refiners had three different standards that they could use to meet the requirement of the regulation, whereas foreign refiners had only one.

The issue was whether the US Clean Air Act, a law to control air pollution caused by hazardous substances contained in gasoline, was a violation of Article III (4) of GATT 1994 for the reason that it imposed a more stringent control on imported gasoline than on domestic gasoline.⁹

Both the Panel and Appellate Body ruled against the US for imposing a more stringent control on imported gasoline than on domestic gasoline. They found that the regulation

⁹ D. M. Calapai, “International Trade and Environmental Impact: The WTO Reformulated Gasoline Case”, *The Environmental Lawyer*, Vol. 3, no. 1, Sept. 1996, pp. 209-232.

must be “primarily aimed at”¹⁰ the conservation of exhaustible natural resources in order to be upheld under Article XX. The Appellate Body, on the contrary, recognised the action was “primarily aimed at” protecting the environment and should be viewed as such for Article XX(g) purposes. But it ruled the regulation of the U.S. discriminated between domestic and foreign producers.¹¹

However, in the following Shrimp-turtle dispute, the decisions between the Panel and Body were much different from this case.

(b) Shrimp-Turtle case

The Shrimp-Turtle dispute is undoubtedly the most important environmental case before the WTO. It raises a critical issue: the extent to which nations can restrict importation of products whose production threatens endangered species and harms the global environment? The dispute also requires a WTO dispute settlement panel to interpret the environmental exceptions and thus provides a litmus test of the WTO’s commitment towards sustainable development.

The Shrimp-Turtle dispute arose from a challenge by India, Malaysia, Pakistan and Thailand to US trade measures designed to protect endangered sea turtles. The US law prohibited imports of shrimps from these countries as their fishing boats were not installed with “turtle excluder devices” (TEDs). To protect endangered sea turtles the US measures required that nations that catch and export wild shrimps to the United States should be certified as having adopted conservation measures that required the use of shrimp nets fitted with TEDs.

In this dispute, the Appellate Body held that that the environmental policy incorporated in the US law fell under Article XX (g) and was exempted from the GATT disciplines. However, the Appellate Body condemned U.S. law for the reason that the United States did

¹⁰ M. Meier, “GATT, WTO, and the Environment: To What Extend Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?”, (1997) *Colorado Journal of International Environmental Law and Policy*, Vol. 8, no. 2, p. 272.

¹¹ WTO, *Appellate Body Report: United States - Standard for Reformulated and Conventional Gasoline*, Jan. 29, 1996, 35 *I.L.M.*, p. 603.

not do enough to negotiate with these countries and reach an amicable settlement through an international agreement.

In fact, initially, the Panel ruled against the US; it stated:

“When considering a measure under Article XX, we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.”¹²

This was a very bad precedent in the WTO. According to this test, whether an environmental protection action could fall under the Article XX exception or not, it should first pass the “threat to the multilateral trading system” test. In other words, under the WTO’s dispute settlement system, trade would always prevail over the environment in case of conflict.

It was also argued before the panel that migratory turtles are part of the environment of other states, and the common heritage of humankind. Thus, all states have an obligation to protect them. The panel accepted neither this argument nor the argument that countries have the right to take unilateral action to protect common heritage. Indeed, the panel report implied that the status of turtles as common heritage of mankind would reduce rather than strengthen the United States’ right to impose unilateral measures. By unduly limiting the scope for unilateral action, the panel’s ruling threatened to “chill” the development of environmental norms required to protect the global commons and to achieve sustainability.

However, the Appellate Body ruled that the Panel’s legal analysis was in error, noting that to maintain the multilateral trading system “is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX”.¹³ Finally the Appellate Body found against the U.S. on its

¹² WTO, “Panel Report: United States - Import Prohibition of Certain Shrimp and Shrimp Products”, (1998) 37 *ILM*, p. 832.

¹³ McLaughlin, *op. cit.*, pp. 880-882.

discriminatory “implementation” of the Act, but not the Act itself.¹⁴ Indeed the Body spent a full paragraph to emphasize a need to have protection for sea turtles:

“We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international organisations, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”¹⁵

It is worth noting that the Appellate Body did not explicitly prohibit US from regulating production methods for shrimp harvesting outside its own jurisdiction. So, some observers argued that this case opened the theoretical possibility for extra-jurisdictional environmental regulation to be consistent with WTO rules. However, in practice it would be quite difficult for extra-jurisdictional unilateral environmental regulation to pass scrutiny.¹⁶

By this decision the panel is attempting to isolate the WTO from trade disputes involving complex environmental and social issues. Yet these issues still continue to arise as trade and environmental interdependencies increase. The panel’s approach, by delimiting the scope of Article XX, may drastically reduce the WTO’s environmental exceptions. The panel is, in effect, interpreting WTO rules to give trade objectives even higher priority over environmental ones. In the future, countries may be denied the right to have valid environmental measures - ones without protectionist intent or effect - considered under the GATT’s environmental exceptions. As noted by the panel, measures such as the United States’ will be denied Article XX protection “irrespective of their environmental purpose.”

¹⁴ In response to the ruling the U.S. has proposed to alter the way it implements the Act but it has not changed the Act itself.

¹⁵ WTO, “Appellate Body Report: United States - Import Prohibition of Certain Shrimp and Shrimp Products” (1998) 38 *I.L.M.*, 118, para. 185.

¹⁶ For example, in the shrimp case, the U.S. would have had to engage in bilateral or multilateral negotiation with shrimp harvesting countries. Only if these had proven to be unsuccessful could the U.S. have introduced unilateral measures. These unilateral measures would need to have been designed to take account of differing conditions in different countries, to grant the same “phase-in” periods to all countries, etc. See McLaughlin, *op. cit.*

(c) The Asbestos case

Another encouraging case which involved the social and environmental issue is the Asbestos case. This is the first decision of the WTO in which a dispute resolution body confirmed a trade restriction as justified under Article XX. The issue in this case was the hazardous nature of asbestos. The Appellate Body upheld the French decree which prohibited the use and importation of asbestos primarily on the following grounds:

- asbestos and similar products which could be used as building materials were not “like products” for the reason that users of such substances (builders) were conscious of the hazards of asbestos compared with other similar substances; in judging whether asbestos and other substances were like products, this should be taken into consideration; and
- the prohibition of asbestos could be covered by Article XX (b) of GATT 1994.

Article XX (b) covers product and food safety issues. With the ruling of the Appellate Body in the Asbestos case, this provision is now probably more useful than before. Here again, however, it should be noted that environmental issues are not limited to those related to human life and health. There may be other kinds of environmental issues which cannot be characterized as hazards to life and health. Therefore, both Article XX (b) and (g) cover parts of environmental protection issues but not all.

This case was also especially important as it shows the growing importance of environmental issues even within the WTO. However, it must be noted that the Asbestos case also had some special feature that makes it difficult to transfer the results to other cases. The fact that the decision of the Appellate Body did not rely on the environmental justification should not be taken too seriously. As shown above, the Appellate Body confirmed the findings of the Panel. Furthermore, the WTO itself commented on the decision in its publication that “the ruling upheld the ban on the grounds that WTO agreements give priority to health and safety over trade”.¹⁷ This interpretation should give hope that the Asbestos Case really was the beginning of effective recognition of environmental issues in the WTO.

¹⁷ WTO, *10 common misunderstandings about the WTO* (WTO: Geneva, 2000), p 6.

A review of previous cases in which panels and the Appellate Body ruled on environmental issues reveals that the current legal instruments incorporated in Article XX of GATT 1994 and others are not sufficient to deal with them. In the light of the above, therefore, it is submitted that the WTO should consider the incorporation of a provision into Article XX of GATT which would specifically address environmental issues. Such a provision would state that measures relating to environmental protection are exempt from the disciplines of GATT 1994 on the condition that these comply with the requirements of the Chapeau.

From the foregoing we can see that under the existing WTO dispute settlement system none of the trade measures to protect the environment was successful. Although there were some environmental points or values recognised, it was far from the expectations of environmentalists. Moreover, these disputes clearly illustrate serious policy conflicts that the Uruguay Round negotiations, and the dispute settlement process it created, could not and cannot address.

Exercise of these WTO rules also has the effect of putting health, development and environmental policy decisions in the hands of trade policy makers and international jurists working behind closed doors. Above all, the manner of the WTO's settlement of these disputes could ultimately threaten the integrity of the multilateral trading system.

The precautionary principle and its relevance to social and environmental concerns

The role of the precautionary principle and its relevance to environmental and social disputes took place in the Asbestos case. As shown above, the Panel confirmed the restrictions of the European Union ("EU") as necessary for health protection. The problem occurred that there was neither certainty about dangers specifically of new asbestos products, nor evidence that these new products did not cause any harm as claimed by Canada.¹⁸

The most recent WTO case on the precautionary principle is the beef hormones disputes in the US and Canada's challenge of the EU's ban on imports of meat from animals that had been treated with growth hormones. The Panel in this dispute had to interpret the relevance

¹⁸ WTO, *Report of the Panel: European Communities – Measures Affecting Asbestos and Asbestos -containing Products*, 18 September 2000, p. 423.

of the well-set precautionary principle of international customary law not clearly embodied in the GATT/WTO agreements. This dispute addressed, not primarily the environmental issues but rather, issues of health protection even in the absence of full scientific certainty.¹⁹ But these areas are often different sides of the same coin. The results of this case can, therefore, be transferred to questions of environmental protection and trade.

The dispute was about whether the EU's ban was enacted in response to legitimate health concerns or to eliminate competition for European beef producers. The SPS agreement recognises the right of each member to adopt measures it considers appropriate to protect human, animal or plant life or health within its territory, but it also requires that these measures must be established on scientific evidence and applied only to the extent necessary to achieve the public health goals.²⁰

Whereas earlier decisions mainly dealt with general rules for the interpretation of the different parts of Article XX, the European Commission ("EC") in this dispute claimed that the EU measures were necessary as they were established according to the Precautionary Principle that had become "a general customary rule of international law or at least a general principle of law".²¹

In the evaluation of necessity according to the Sanitary and Phytosanitary Agreement – which is similar to Article XX (b) of the General Agreement²² – the Panel had to decide what amount of scientific evidence had to be gained before a restrictive regime could be introduced. The Panel concluded that the EC did not supply evidence to justify the distinction between a certain hormone that could still be used and the others that were

¹⁹ WTO, *Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones) - Canada*, 18 August 1997, p. 12.

²⁰ Craig A. A. Dixon, "Environmental Survey of the WTO dispute panel resolution decisions since 1995: Trade at all costs?", *William and Mary Environmental Law and Policy Review*, Winter 2000, pp.89-105.

²¹ WTO, *Report of the Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, p. 33.

²² WTO, *Report of the Panel, EC Measures Concerning Meat and Meat Products (Hormones) - Canada*, 18 August 1997, pp. 262-267.

banned.²³ The justification of trade restrictions would require a full risk assessment by scientific research prior to the enactment.²⁴

The Appellate Body disagreed with the decision of the Panel. Firstly, the Appellate Body did not agree with the opinion of the Panel that the SPS Agreement set a general burden of proof for the country taking sanitary measures.²⁵ The Appellate Body also disagreed with the general need for prior risk assessment. This would only apply if the complaining parties could offer substantive doubt about the reasons for the restrictions.²⁶ In this decision, however, the Appellate Body concluded that Canada and the United States had fulfilled this condition by demonstrating different treatments of similar hormones. The Appellate Body found that the EC had failed to obtain a reasonable standard of differentiation by banning the use of certain hormones totally while other substances with similar effects were still allowed.²⁷

The Appellate Body realized the attempt of the EC to act according to the Precautionary Principle but stated:

‘The Precautionary Principle cannot override our findings made above, namely, that the EC import ban of meat and meat products from animals treated with any of the five hormones at issue for growth promotion purposes, in so far as it also applies to meat and meat products from animals treated with any of these hormones in accordance with good practice, is, from a substantive point of view, not based on a risk assessment.’²⁸

In the eyes of environmentalists, the beef hormone case demonstrated how the SPS agreement undermined national health and environmental standards. The environmental

23 *Ibid.*

24 *Ibid.*

25 WTO, *Report of the Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, p. 27.

26 *Ibid.*, p 29.

27 *Ibid.*, p. 32.

28 *Ibid.*, p. 33.

NGOs (like World Wildlife Fund International) considered that the WTO disputes panel decision:

- allowed the WTO to determine the legitimacy of domestic health regulations;
- misinterpreted the provisions of the SPS text that permit countries to determine the level of appropriate risk for their citizens;
- preferred lower international standards over higher domestic standards;
- dismissed the precautionary principle as a legitimate basis for health and environmental policy; and
- de-stabilised the international trade regime by inserting itself into a dispute in which it lacked the necessary expertise and competence to adjudicate.²⁹

Unfortunately, the Appellate Body did not answer the question if the Precautionary Principle was already a customary principle of international law - which would have been an important guideline for following decisions - as it was “unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question ... and ... the Precautionary Principle, at least outside the field of international environmental law, still awaits authoritative formulation.”³⁰

Nevertheless, it seems that the Appellate Body has still not given due recognition to the Precautionary Principle as customary international law in this dispute.

Criticism of WTO adjudication to address environmental issues

There are certain reasons for criticising the WTO adjudication. The first major issue is that the panels and the Appellate Body do not have sufficient expertise to evaluate and assess

²⁹ World Wildlife Fund International, Centre for International Environmental Law (US), Oxfam-GB and Community Nutrition Institute (US), *Dispute Settlement in the WTO A Crisis for Sustainable Development A WWF International, Centre for International Environmental Law (US), Oxfam-GB and Community Nutrition Institute (US) Discussion Paper*; no date, World Wildlife Fund International Home Page, www.panda.org/resources/publications/sustainability/wto-papers.

³⁰ WTO, *Report of the Appellate Body: EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, p. 33.

environmental measures. Most of the members in these adjudication bodies tend to be trade lawyers, and the WTO secretariat has little environmental expertise to contribute in support. However, the Dispute Settlement Body does provide the panel with the ability to call on outside expertise as needed.³¹ In several earlier instances outside experts testified over technical issues relevant to the dispute,³² including issues relating to the environment.³³

Another reason is the wider issue of openness as the deliberations of the panels and the Appellate Body of the WTO are confidential.³⁴ There is provision whereby a party to a dispute may disclose statements of its own positions to the public. The argument, however, is that, behind the closed doors, the process will not be linked sufficiently to the interests of environmental stakeholders, and these stakeholders will not be able to put their views and expertise into the process. At present, DSB meetings are closed to outside observers as neither individuals nor NGOs have a right to participate in WTO dispute settlement proceedings. This is clearly opposite to the normal procedures in most public international dispute settlement processes.³⁵

Finally, the terms of reference for the disputes do not necessarily ensure that environmental measures are assessed in a manner that adequately considers the environmental rationale as their focus is on the WTO Agreements.³⁶ The DSB provides that the parties are to agree amongst themselves on the terms of reference for the panel,³⁷ but that, if they are unable to do so, then a set of standard terms of reference are to be applied.³⁸ However, it must also be

³¹ Article 13; Appendix 4 of DSU.

³² WT/DS/AB/R, 12 March 2001 (E.g., *op. cit.*, footnote 11) and WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, as well as WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000.

³³ WT/DS58/AB/R, 12 October 1998.

³⁴ Article 18(2) of the Dispute Settlement Understanding.

³⁵ E.g., the International Court of Justice, the proceedings of which are generally open to the public.

³⁶ Article 7(1).

³⁷ Article 7.

³⁸ *Ibid.*

noted that both the DSB and the Appellate Body have consistently affirmed that the WTO rules are to be interpreted in accordance with the customary principles of international law,³⁹ which can require consideration of applicable international environmental law.

Role of environmental NGOs in the dispute settlement procedure

The role of the environmental NGO as *amicus curiae* has proven controversial among WTO members. The US, EU and Canada are pressing for this while many developing countries are opposed to it. On the issue of *amicus curiae* a thoughtful article by Beatrice Chayter of FIELD⁴⁰ captures the debate on the involvement of NGOs in the WTO dispute settlement process.

However, despite the divisions among members, some NGOs and individuals have deliberately created space for themselves in the dispute settlement procedure by submitting *amicus curiae* briefs to Panel and Appellate Body proceedings, pursuant to Article 13.1. The WTO Appellate Body has also established a procedure in 2000 with criteria for accepting *amicus curiae* briefs.

Moreover, the WTO Appellate Body noted in its earlier ruling in the *Shrimp/Turtle* case that the submission of unsolicited information (in the form of *amicus curiae* briefs) is not incompatible with the provisions of the Dispute Settlement Understanding. However, in the *Asbestos* dispute, the Appellate Body outline specific procedures for the admission of *amicus curiae* briefs curtailed by the DSB/General Council. This means that for the foreseeable future, the consideration of *amicus curiae* briefs by the Panel and Appellate Body will continue to be discretionary.

In the recent *Sardines* decision, the Appellate Body permitted a WTO Member to submit an *amicus curiae* brief, even though that Member would have been entitled to intervene on the basis of the established rules in the DSU. Under the DSU review in the WTO, the EU has made

³⁹ Article 3.2 of the DSU and applied, e.g in Gasoline Case, accounted for above.

⁴⁰ C. Beatrice C., *Reforming Dispute Settlement for Sustainable Development* (FIELD: London, 2000), p. 4.

specific proposals that would lay down procedures for the submission and consideration of *amicus curiae* briefs “in potentially all cases” in line with the Appellate Body’s own proposals that *amicus curiae* briefs should be “directly relevant to the factual and legal issues under consideration by the panel or the legal issues raised in the appeal”.⁴¹ However, this proposal has been met with resistance by some developing countries fearful that it may give non-WTO Members greater rights than Members or third parties in the particular WTO dispute.

Nevertheless, the panel has the mandate to “seek information and technical advice from any individual or body which it deems appropriate”. This could be interpreted to allow panels to promote civil society participation by accepting or seeking submission of *amicus curiae* briefs. This would improve the WTO dispute settlement process, enhance its transparency and curb growing public concerns about its legitimacy.

Conclusion

The WTO dispute settlement system is the most active one today at the international level and has tremendous importance for the progressive development of international law. It has an increasingly significant role in the operation of the multilateral trading system and settling disputes amongst its member states. Whether there is conflict or not between free trade and environmental protection in theory, in practice there is controversy between the two issues which are both important to us. However, WTO is a trade organization and, so, environmentalists are concerned and disappointed with the approach of its dispute settlement system so far.

A possible way to solving the issue of environment in trade dispute is to provide the number of professional expertise in environmental protection and sustainable development disciplines in the WTO dispute settlement panellists. Such expertise could have been obtained through academic, judicial, quasi-judicial posts or other professional specialization. In the event that a dispute concerning environmental issues arises, any disputing party should be granted the right to require that an expert be selected from the pool of potential panellists.

⁴¹ TN/DS/W/1 Contribution of the EC to the Improvement of the WTO Dispute Settlement Understanding, 13 March 2002.

Moreover, the WTO member countries and environmental groups have already submitted proposals to ensure that trade rules should not be used to weaken national or international health and environmental standards, instead of encouraging environmental progress and implementation in a transparent manner. New Zealand, for example, considers that legitimate environmental concerns do need to be integrated better with international trade agreements.⁴² However, these concerns should not be used as protection against fair competition from the developing countries.

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⁴² Sierra Club, *A Fair Trade Bill of Rights* (2000), Sierra Club Home page. www.sieraclub.org/trade/ftaa/rights.asp