The International Court of Justice: A Proper Forum for the Balanced Adjudication of Trade-Environment Disputes

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DOI: 10.21827/GroJIL.10.2.1-30

Keywords:
DISPUTE SETTLEMENT BODY, WORLD TRADE ORGANIZATION, INTERNATIONAL COURT OF JUSTICE, SUSTAINABLE DEVELOPMENT, CARTAGENA BIOSAFETY PROTOCOL, PRECAUTIONARY PRINCIPLE

Abstract:
The World Trade Organization's (WTO) Dispute Settlement Body (DSB) sometimes adjudicates cases with environmental undertones while hearing trade disputes. Considering that the DSB is mainly responsible for the application of WTO international trade rules to these cases, it is arguable whether the DSB is the most appropriate adjudicatory forum on cases with environmental undertones. The article analyses four cases decided by the DSB: (1) *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin I)*, (2) *the United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)*, (3) *the European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Biotech Product's case),* and (4) *the United States – Import Prohibition of Certain Shrimp and Shrimp Products (the US Shrimp case). It also analyses* four cases with trade and environment considerations decided by the International Court of Justice (ICJ): (1) *Whaling in the Antarctic (Australia v Japan)*, (2) *Gabčíkovo-Nagymaros (Hungary v Slovakia), (3) Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* and (4) *Pulp Mills on the River Uruguay (Argentina v Uruguay).* From the analysis, this article finds that the ICJ, rather than the DSB, would be the appropriate arbiter of trade cases with environmental undertones. This article finds that, unlike the DSB, the ICJ has a history of balanced adjudication of cases with trade-environment conflict and appears a better fit to decide cases with elements of trade and environment. As such, this option would guarantee a more neutral avenue for the adjudication of trade-environment conflicts.

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I. Introduction

While settling trade disputes between WTO members, the DSB consisting of the Appellate Body (AB) and the Panel, adjudicates environmental cases with unfavorable outcomes. This article contends that the ICJ may be a better fit to adjudicate the trade and environment conundrum because: (1) going by the antecedents of the DSB in resolving trade disputes with environmental implications, the DSB seems to superintend trade rules (which they are to give effect to) over environmental concerns, and (2) the ICJ has developed a healthy body of precedents (both procedural and substantive) on environmental disputes,[1] and the review of the cases indicate that the ICJ would be far more even-minded when considering the seemingly competing goals of environmental protection and trade.

The seeming impatience by the DSB over environmental issues is understandable because the DSB is mandated to interpret and apply the WTO trade rules to cases, but the ICJ, on the other hand, is not saddled with such a limitation on applicable rules and would be neutral in the adjudication of the cases.

This article is divided into two parts and construes trade loosely to include other economic activities. Part I discusses the antecedent of the DSB and reveals a propensity by the DSB to superintend trade rules over environmental concerns. To buttress the point, the article analyses four cases decided by the DSB: The *Tuna-Dolphin I;*[2] the *Tuna-Dolphin II;*[3] *the Biotech Product's case;*[4] and *the US Shrimp case*[5] which support the claim that the DSB superintends trade rules over the environment. Part II discusses the even-handed adjudication of cases with environmental complexities by the ICJ. It analyses four cases decided by the ICJ to support this assertion. The first case, *Whaling in the Antarctic*[6] will reveal the ICJ's awareness of environmental considerations even in the face of trade interests. The second case, *Gabčíkovo-Nagymaros,*[7] demonstrates the ICJ's ability to be neutral in its adjudication of the seeming competing environmental and trade goals. Lastly, two cases, *Costa Rica v Nicaragua / Nicaragua v Costa Rica*[8] and the *Pulp Mills case*[9] will reveal the balanced approach employed by the ICJ in dealing with the competing issues of environment and trade. Based on the analysis, this article concludes that the ICJ seems the most appropriate adjudicatory forum for cases with a trade-environment conflict.

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1 Tim Stephens, 'The Settlement of Disputes in International Environmental Law' in Shawkat Alam et al (eds) *Routledge Handbook of International Environmental Law* (Routledge 2013) 175, 179-180.

2 *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin I)* (03 September 1991) WT/DS21/R - 39S/155.

3 *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)* (16 June 1994) WT/DS29/R.

4 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R.

5 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.

6 *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.

7 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

8 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665.

9 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.

II. Antecedents of the DSB indicate a propensity to prioritise trade rules over environmental concerns

Alessanda Guida opines that the protection of human health (and by extension, the environment) 'can be considered an implicit WTO goal for at least two reasons'.[10] First, the WTO's contribution to attaining United Nations (UN) Sustainable Development Goals (SDGs) aims to protect human health.[11] It is conceded that the WTO has put in place mechanisms to assist in the attainment of SDGs, including its recently released 2023 update on the WTO's Contribution to Attaining UN Sustainable Development Goals.[12] However, as shown in the 2023 update, international trade is still the main focus of the WTO and platforms such as these are seen by the WTO as avenues to primarily further international trade. As contained in the 2023 update, the WTO's interest is to review the

> contribution of international trade and the multilateral trading system to attainment of the SDGs and to development in general. The […] process therefore gives the WTO the opportunity to delve into SDGs where connections with trade have not been examined in detail up to now.[13]

Perhaps, it was in this wise that Tim Stephens opines that there 'is certainly the prospect that the WTO will be a roadblock to progressive environmental measures'.[14] Also, even if the WTO commitments to the attainment of SDGs was eco-centric, this policy statement, WTO's Contribution to Attaining UN Sustainable Development, is not on the same pedestal with the WTO Agreements which are the main tools that the DSB uses in adjudicating trade-environment cases.

Secondly, Guida further argues that

> the absence of an overriding and paramount goal also implies a lack of hierarchy between WTO objectives. After all, the lack of hierarchy between economic, environmental and social objectives represents a prerequisite to achieving the WTO goal of sustainable development.[15]

On the contrary, a careful look at the WTO/General Agreement on Tariffs and Trade (GATT Agreements) indicates that international trade is the paramount consideration of the WTO. For instance, there is no mention of the environment or health in the preamble

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[10] Alessandra Guida, *Biosafety Measures, Technology Risks and the World Trade Organization: Thriving and Surviving in the Age of Biotech* (1st ed, Routledge 2022).

[11] ibid.

[12] 'WTO's Contribution to Attaining UN Sustainable Development Goals: 2023 Update to the High-Level Political Forum' (*World Trade Organization*) <https://www.wto.org/english/res_e/booksp_e/un_hlpf23_e.pdf> accessed 8 January 2024.

[13] ibid 4.

[14] Stephens (n 1) 183.

[15] Guida (n 10) 46.

to the GATT.[16] In the words of Joel Trachtman, the WTO 'law has as its focus the promotion of a liberal trading system. The primary purpose of WTO law is not to promote environmental protection'.[17] Indira Carr corroborates this by arguing that the WTO/GATT 'primarily seemed to promote the exploitation of resources with prosperity as the objectives'.[18]

Interestingly, the decision of the DSB may be the most significant indication of the priority that the WTO accords the environment in relation to international trade. The DSB is so central to the WTO that Guida opines that while

> the agreements are at the heart of the WTO, its dispute-settlement mechanism is "the most far-reaching [consequence]" of the international trade system. The WTO dispute-settlement system […] has been described as "probably the most powerful international dispute system in the world".[19]

From the foregoing, the analysis of the trade-environment cases decided by the DSB might be the clearest revelation of how the WTO sees the environment: as a cast aside in favour of international trade. Although Trachtman argues that the DSB 'does not explicitly specify the body of applicable law that WTO adjudicators are assigned to interpret and apply',[20] on the contrary, by Article 2(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules and Procedures), the DSB is mandated to interpret and apply WTO trade rules to disputes before it,[21] in a predictable manner.[22] This makes it difficult for the DSB to give adequate consideration to environmental concerns in competition with trade. For these reasons, Jeffrey Dunoff would argue that

> many of the international conflicts between liberalized trade and environmental protection have been considered under the auspices of the GATT. However, this body has no mandate to advance environmental interests. Where conflict exists, GATT practice invariably subordinates environmental interests to trade interests.[23]

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[16] An excerpt from the preamble provides: '[r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, Have through their Representatives agreed as follows'.

[17] Joel Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58(2) Harvard International Law Journal 273.

[18] Indira Carr, 'International Trade Rules and Environmental Effects' in Shawkat Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013) 547, 550.

[19] Guida (n 10) 43-44.

[20] Trachtman (n 17) 302.

[21] 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (World Trade Organization) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s1p1_e.htm> accessed 8 January 2024. Art 2(1) provides that the DSB 'is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements'.

[22] Article 3(2) provides that the 'dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

[23] Jeffery L Dunoff, 'Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes' (1994) 15(4) Michigan Journal of International Law 1043, 1045-1046.

The article will analyse four cases: the Panel's decision in the *Tuna-Dolphin I* and *II,* the *Biotech Product's case* and the AB's decision in the *US Shrimp case* to ground the argument on the inevitability of the elevation of trade concerns over the environment since the DSB is expected to interpret and apply the WTO trade rules to disputes submitted to it.

a. Tuna-Dolphin I and II

These two cases on similar facts decided by the WTO Panel, that have profound ramifications in terms of the trade-environment conundrum, will be discussed at this point. The facts and the analyses done by the two different Panels that heard the cases were very similar and both Panels, inevitably, arrived at the same conclusion. From the foregoing, it may not serve any useful purpose to do an in-depth review of both cases. This article will give greater attention to the 1994 case (*Tuna-Dolphin II*) because it is later in time and the Panel that decided it had the benefit of the earlier 1991 decision (*Tuna-Dolphin I)* and ample opportunity to have charted a different path, if it had wished to do.

Tuna Fishermen often use dolphins to identify the location of tuna in the Eastern Tropical Pacific Ocean (ETP) because dolphins and tuna often flock together. Once dolphins are located, tuna fishermen, using purse-seine nets, will swoop on them, expecting to catch tuna incidentally.[24] This resulted in high mortality rate of dolphins such that in 1986 alone, about 133,000 dolphins were killed through this process.[25] Determined to protect, preserve, and conserve the dolphin stock, the United States (US) enacted the *Marine Mammal Protection Act 1972* (MMPA).[26] The MMPA placed an embargo on taking and exporting marine mammals generally and their products into the US (section 101(a)).[27] However, on the fulfilment of certain conditions, permits may be issued for the taking and importation of sea mammals into the US (section 104(b)(2)).[28] Sequel to these provisions, the US placed an import ban (primary embargo) on yellowfin tuna and yellowfin tuna products coming from States that used purse-seine nets to harvest for yellowfin, which incidentally catches dolphin more than the acceptable limit prescribed by the MMPA.[29] The MMPA also specified that any State, called 'intermediary nation' who intends to export yellowfin tuna or yellowfin tuna products into the US must declare and show proof that in the last six months, it had not imported prohibited products from States where the US had placed a direct ban on. Without

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24 *Tuna-Dolphin II* (n 3) [2.2].

25 ibid.

26 The Marine Mammal Protection Act of 1972 as Amended [1972] 16 USC 1371 <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf> accessed 8 January 2024.

27 It provides that there 'shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States'.

28 It provides that any 'permit issued under this section shall— (2) specify— (A) the number and kind of animals which are authorized to be taken or imported, (B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported, (C) the period during which the permit is valid, and (D) any other terms or conditions which the Secretary deems appropriate'.

29 *Tuna-Dolphin II* (n 3) [2.9]-[2.11].

such proof, these States were placed on 'intermediary ban' from taking and exporting marine mammals generally and their products into the US (section 101(2)(D)).[30]

Just like Mexico in the earlier 1991 case,[31] the European Economic Community (EEC) and the Netherlands sued the US within the WTO DSB, arguing that the import bans (both the primary and intermediate embargoes) on yellowfin tuna and tuna products were inconsistent with the provisions of Article III of the GATT[32] and Article XI of the GATT[33] and do not qualify as exceptions under Article XX of the GATT.[34] On the contrary, the US urged the Panel to find, among others, that the intermediary nation ban was in line with the provisions of Article XX(d) of the GATT, while the primary nation ban was in line with the provisions of Article XX(b) and (g) of the GATT.[35]

i. Whether the MMPA was consistent with Article III and XI of the GATT

In its analysis of the provisions of Article III,[36] the Panel observed that the essence of Article III is to afford a particular foreign product the same treatment afforded to a domestic product of the same kind.[37] That in terms of the acceptable harvesting method, the MMPA regime did not treat imported tuna differently from domestic tuna harvested from within the US, therefore, the trade embargo was consistent with Article III.[38]

On the conflict between MMPA and Article XI of the GATT, the Panel observed that Article XI forbids the imposition of any form of prohibition or restrictions on imported goods, other than duties, taxes, or charges.[39] The Panel then held that the MMPA measures were not duties, taxes, or charges but were prohibitions or restrictions, therefore inconsistent with the provisions of Article XI(1) of the GATT.[40]

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30 *Tuna-Dolphin II* (n 3) [2-12]. Section 101(2)(D) provides that the US 'shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States'.

31 ibid [3.1]-[3.2].

32 Article XIII(I) of the GATT provides that no 'prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted'.

33 Article XI(1) of the GATT provides that no 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party'.

34 *Tuna-Dolphin II* (n 3) [3.1].

35 ibid [3.2(C)].

36 For instance, Article III(1) provides that the 'contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production'.

37 *Tuna-Dolphin II* (n 3) [5.8].

38 ibid [5.9].

39 ibid [5.10].

40 ibid.

ii. Whether the MMPA measures could be upheld under Article XX(g) of the GATT

Having declared that the MMPA measures were inconsistent with the provisions of Article XI of the GATT, the Panel then proceeded to analyse whether the import bans could be upheld as exception to Article XI under the provisions of Article XX(g) of the GATT.[41] The Panel adopted a three-way analysis: (1) whether the import ban related to the conservation of exhaustible natural resources, (2) whether the measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'[42], and (3) whether the import bans were applied in a way that amounted to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[43]

ii.i. Whether the import bans related to the conservation of exhaustible natural resources

The Panel engaged in a two-prong analysis under this rubric. First, it determined whether dolphins qualified as exhaustible natural resources for the purpose of Article XX(g). Contrary to the position taken by the EEC, the US had argued that dolphins, which the import bans sought to conserve were exhaustible natural resources.[44] The Panel agreed and held that

> dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.[45]

Next, the Panel determined whether measures to converse exhaustible natural resources under Article XX(g) could apply extra-territorially. The EEC and the Netherlands had argued that conservation measures intended to satisfy the provisions of Article XX(g) could not be made to apply outside the territory of the country adopting such measures, in this case, the US. However, the US argued that the text of Article XX(g) did not provide such limitations.[46] The Panel also agreed with the US and held that there was no valid reason in support of the assertion that conservation measures premised under Article XX(g) cannot apply extra-territorially.[47]

ii.ii. Whether the MMPA measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'

The Panel proceeded to determine the second of the three questions under two rubrics: first, whether the import bans 'related to' conserving exhaustible natural resource and second,

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41 Article XX provides that 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 […] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

42 *Tuna-Dolphin II* (n 3) [5.10].

43 ibid.

44 ibid [5.13].

45 ibid.

46 ibid [5.14].

47 ibid [5.20].

whether the MMPA measures 'were made effective "in conjunction with" restrictions on domestic production or consumption'.[48]

The Panel proceeded to determine the first issue. According to the Panel, central to the determination of the first issue was the meaning of words 'related to'. The Panel defined 'related to' to mean 'primarily aimed'.[49] The Panel then analysed whether the measures under the MMPA could be 'considered to be primarily aimed at the conservation of an exhaustible natural resource, and primarily aimed at rendering effective restrictions on domestic production or consumption'.[50] The Panel observed that the US imposed (both primary and intermediate) export bans on some States and it did not matter whether those States' tuna fishing techniques did not harm dolphins, as long as those States' dolphin conservation measures were at variance with the MMPA measures, the States were banned from exporting tuna into the US.[51] The Panel then noted that the MMPA import bans were made to compel States to change their conservation measures to align with the US measures and therefore, their immediate focus could not be to further the conservation of dolphins, an exhaustible natural resource.[52] From the foregoing, the Panel held that the MMPA measures were at variance with the provisions of Article XX(g) of the GATT and having held so, the Panel refused to determine the third question that it had initially raised.[53]

First, the Panel based its determination of the second question on whether the MMPA measures 'related to' conserving dolphins, an exhaustible natural resource.[54] With respect to the Panel, the second question that the Panel set out to determine was whether the measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'.[55] Instead, the Panel segmented the issue into two and proceeded to consider the first which is whether the primary and intermediary nation embargoes imposed by the US on yellowfin tuna could be considered to be 'related to' the conservation of an exhaustible natural resource within the meaning of Article XX (g).[56] This question, in my opinion, is not different from the first question that the Panel decided in favor of the US, which is whether the measures adopted by the MMPA related to the conservation of exhaustible natural resources. Yet the Panel came to a different conclusion here.

Second, by determining the second question through the lens of whether the MMPA measures related to the conservation of exhaustible natural resources, rather than whether the MMPA 'made effective "in conjunction" with restrictions on domestic production or consumption',[57] the Panel failed to properly address the central issue for determination under question two. It is tempting to argue that if the Panel had looked at the correct issue, whether the MMPA measures were crafted to, and indeed applied equally between domestic and international dolphin farmers, the Panel probably would have come to a different decision, because the Panel had earlier admitted that the measures were applied equally between domestic and international dolphin farmers.

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48 *Tuna-Dolphin II* (n 3) [5.21].
49 ibid [5.22].
50 ibid [5.23].
51 ibid [5.23]-[5.24].
52 ibid [5.24].
53 ibid [5.27].
54 ibid [5.22].
55 ibid [5.10].
56 ibid [5.21].
57 ibid [5.21].

> The Act also prohibits the import into the United States of tuna or tuna products harvested by a method that results in the incidental killing or serious injury of marine mammals in excess of United States standards. In order to meet this requirement, the tuna exporting country must prove that it has fishing technology and a rate of incidental taking comparable to those of the United States.[58]

Third, having erroneously held as above, the Panel refused to consider the third question: whether the measures adopted by the MMPA were applied in a way that amounted to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[59] Therefore, the opportunity to determine the third question and provide further indications on how environmental issues are treated within the DSB was lost.

iii. Whether the MMPA was consistent with Article XX(b) of the GATT

Again, the Panel adopted a three-way analysis by determining whether the import bans were, first, 'to protect human, animal or plant life or health'; second, '"necessary" to protect human, animal or plant life or health'; and third, applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[60]

On the first question whether the import bans were to protect human, animal or plant life or health, parties had agreed that the import bans were to protect dolphins and could properly come under the rubric of Article XX(b) but disagreed on whether such measures could be extended to have extraterritorial reach. While the US argued that it could, the ECC argued the contrary.[61] To decide this issue, the Panel looked at the wording of Article XX(b) and noted that the text did not contain any jurisdictional limitation regarding the geographical area where living resources could be protected.[62] From the foregoing, the Panel held that the MMPA measures to protect dolphins in in the ETP met the requirements of Article XX(b) of the GATT.[63]

On the second question whether the import bans were necessary to protect human, animal or plant life or health, the Panel observed that the import bans were absolute in that they were imposed irrespective of whether the States had dolphin conservations measures or not, as long as such measures were not in consistent with the MMPA measures.[64] The Panel further observed that these import bans alone did not have the potentials to advance the US dolphin conservation objectives.[65] The Panel then concluded that import bans were measures aimed at forcing other States to adopt comparable dolphin conservation policies and therefore do not satisfy the necessity requirements of Article AA(b) of the GATT.[66] Having not met the necessity requirement, the Panel did not answer the third question, ie whether the import bans

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58 *Tuna-Dolphin II* (n 3) [5.3].
59 ibid [5.27].
60 ibid [5.29].
61 ibid [5.30].
62 ibid [5.31].
63 ibid [5.33].
64 ibid [5.36]-[5.37].
65 ibid [5.37].
66 ibid.

were applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[67]

The central issue that the Panel set out to determine under this rubric was whether the import bans were necessary to protect human, animal or plant life or health. As argued by Guida, WTO member States 'can adopt measures to safeguard human, animal or plant life as well as health only if considered necessary. Defining 'necessary' becomes, accordingly, fundamental to understanding when protective measures can be implemented in the context of such exception'.[68] But in their wisdom, the Panel deviated from that approach and instead proceeded to analyse, as presented above, the overarching nature of the measures and how it would force States to make changes to their own tuna fishing policies comparable to that of the US. This, in my opinion, made the Panel gloss over the real question that the Panel ought to have answered under this rubric. The Panel started off on a good footing when it stated that it intended to

> examine[] the second of the above three questions, namely whether the primary and intermediary nation embargoes imposed by the United States on yellowfin tuna could be considered to be "necessary" for the protection of the living things within the meaning of Article XX (b).[69]

The Panel further 'noted that, in the ordinary meaning of the term, "necessary" meant that no alternative existed'.[70] However, the Panel did not further analyse the necessity of the MMPA measures, only to conclude that 'measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b)'.[71] It could be argued that if the Panel had evaluated the necessity of the import bans, it probably would have upheld the import bans. Conversely, at the very least, an analysis of the necessity of the import bans would have enriched the jurisprudence under this rubric.

Furthermore, after its finding that the import ban did not meet the necessity requirement under Article XX(b), the Panel did not see the need to analyse the third question it had identified.[72] It may be argued that by basing its conclusion on a wrong premise, the Panel arrived at a wrong decision, which in effect, led to the loss of a rare opportunity to have had a pronouncement on the three question under Article XX(b).

iv. General comments

Although the Panel in the 1994 case did not elaborate on this point, one of the reasons that the Panel in the 1991 case refused to uphold the conservation measures of the MMPA was because the US was not able to show that these measures were necessary and having explored all other options, there no alternatives to them. The 1991 Panel had pointed toward international cooperation as one viable option that the US could have explored to conserve

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67 *Tuna-Dolphin II* (n 3) [5.29].
68 Guida (n 10) 49.
69 *Tuna-Dolphin II* (n 3) [5.34].
70 ibid [5.35].
71 ibid [5.39].
72 ibid.

dolphins.[73] International cooperation certainly presents a viable conservation option, but there are challenges with international cooperation, as international cooperation is not a magic wand.

First, the 1994 Panel noted that the US had pioneered and initiated, alongside Costa Rica, the creation of the Inter-American Tropical Tuna Commission (ITTC) in 1949 towards the conservation of tuna. In 1976 and 1986, the focus of the ITTC was broadened to include dolphins.[74] Despite this, the 1994 Panel observed that an estimated 133,000 dolphins were needlessly killed in the process of fishing for tuna in 1986 alone.[75] This is indicative that more than international cooperation is needed to conserve dolphins.

Second, this article concedes that another window that could open through international cooperation could be by way of negotiating a treaty to conserve dolphins. However, successfully negotiating a treaty might prove increasingly difficult today because of vested interest and political leanings of States. For instance, developing States often feel that the environmental agenda is a means to slow their development.[76] According to Ruth Gordon, 'environmentalism came at a particularly inauspicious time for the Global South, which feared environmentalism would slow its development',[77] as such, the '[G]lobal South continued to insist on development as its main priority'.[78] From the foregoing, leaving dolphin conservation to future treaty-making may not seem viable. Furthermore, there may not be much zeal for treaties to conserve dolphins as many States are experiencing treaty fatigue due to the existence of too many treaties with corresponding obligations to fulfil.[79] It may therefore be problematic to nudge States towards negotiating a treaty which means domestic measures to conserve dolphins as exemplified the MMPA seems such a viable alternative.

The decision in this case did not come as a surprise because the DSB is set up to apply and uphold trade agreements against environmental norms and, as such, the Panel's interpretation of these trade-enabling agreements is done through the GATT's lens. Tim Stephens argues that in 'more recent decisions panels have not been quite so willing to look beyond the strictures of the WTO agreements themselves'.[80] This was evident in the case under review as the Panel did not shy away from declaring 'that the dispute settlement procedures cannot add to or diminish rights of contracting parties under the General Agreement'.[81]

From the decision, it seems that the DSB has developed at least three mechanisms to achieve this aim. First, the DSB has developed the jurisprudence around a narrow interpretation of Article XX of the GATT, which in effect, lowers the threshold for environmental agenda by making it harder for environmental consideration to scale through the requirement of Article XX of the GATT.[82] The Panel declared that

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73 *Tuna-Dolphin I* (n 2) [5.28].
74 *Tuna-Dolphin II* (n 3) [2.3].
75 ibid [2.2].
76 David Boyd, *The Environmental Rights Revolution* (UBC Press 2012) 34.
77 Ruth Gordon, 'Unsustainable Development' in Shawkat Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 50, 52, 65.
78 ibid.
79 Donald Anton, '"Treaty Congestion" in Contemporary International Environmental Law' in Shawkat Alam et al (eds) *Routledge Handbook of International Environmental Law* (Routledge 2013) 651.
80 Stephens (n 1) 184.
81 *Tuna-Dolphin II* (n 3) [5.43].
82 Carr (n 18) 553.

> [t]he long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would [not] be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.[83]

Second, the DSB seems to deliberately dab environmental questions with a trade brush, to be able to subjugate and interpret environmental questions from a trade lens. For instance, in the case under review, the Panel decided that the

> issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction.[84]

With respect to the Panel, the issue was as much about the US' conservation objective as much as anything else. That was why the Panel 'consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g)'.[85] The Panel even noted the US pioneering effort with Costa Rica in creating the ITTC in 1949 to conserve tuna and later, dolphin.[86] With the deliberate framing of the question this way, putting the emphasis on the import bans, instead of the conservation of exhaustible natural resource, the Panel deliberately took the sting away from conservation and therefore made it easy for the Panel to decide the case from the lens of trade as against the clearly environmental agenda of conserving dolphins that are going extinct.[87]

Third, there seems to be a pretense within the DSB that there is no hierarchy between environmental norms and trade rules, ie that both are on an equal footing, to give a façade of balanced adjudication of these competing goals. For instance, the Panel 'noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement'[88] and that 'the relationship between environmental and trade measures would be considered in the context of preparations for the World Trade Organization'.[89] For a casual onlooker, this platitude could give the impression of a balanced adjudication between the competing environmental and trade goals. However, as seen in the decision, trade goals seem

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83 *Tuna-Dolphin II* (n 3) [5.26].
84 ibid [5.42].
85 ibid [5.20].
86 ibid [2.3].
87 ibid [5.42].
88 ibid.
89 ibid [5.43].

to trump environmental considerations, and it seems that this is not about to change in the foreseen future. Guida puts it succinctly thus,

> [k]eeping this implicit pre-eminence of trade interests "will continue to skew WTO outputs in favour of trade and commercial interests to the potential detriment of social justice and other non-trade interests". Further, this imbalance renders it unlikely that the WTO goal of sustainable development can be achieved.[90]

Because of this trade-furthering mindset of the DSB, experts fear that the WTO will use its trade agreements to stifle national environmental efforts as seen in the case. On this, Trachtman argues

> that WTO law relating to trade and environment is not internally coherent. Its anti-discrimination prohibitions seem to apply to invalidate good faith regulatory action. In connection with its related environmental exceptions, the Appellate Body has failed to follow its own doctrine which calls for authentic balancing of trade and environmental values.[91]

Unfortunately, the trade furthering mindset of the DSB has been extended to international environmental efforts. As argued by Guita, State parties to the WTO 'can be prevented from implementing international law obligations not related to trade interests'.[92] This seems to be the case with the Panel's decision in the *Biotech Product's case* which is the focus of the next segment of the article. But all these may be indicative that another international adjudicatory body, preferably the ICJ, should adjudicate trade-environment cases. This seems a much fairer and neutral approach.

b. Biotech Product's case

The propensity to prioritise trade over the environment played out in the *Biotech Product's case*. The US, Canada and Argentina lodged complaints with the DSB, against an alleged general moratorium placed by the European Union (EU) and the country-specific moratoria placed by five individual EU member States on the importation of certain genetically modified products (GMOs) from their respective States. They contended that the EU's actions were contrary to several provisions of the WTO trade agreements. A Panel was constituted to hear the consolidated complaints.[93]

i. Analysis by the Panel

The complainants argued that the suspension by the EU of the process for approving the importation of GMOs and the additional measures put in place by some EU States constitute moratoria.[94] The EU in its defense denied the claim. However, it acknowledged a delay in approving the importation of GMOs into its territory due to the fact that its regulatory framework was based on the precautionary principle of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the Biosafety Protocol) which allows case-by-case

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90 Guida (n 10) 64.
91 Trachtman (n 17) 275.
92 Guida (n 10) 64.
93 *Biotech Product's case* (n 4) 1-5.
94 ibid 19.

analysis of GMOs products and their potential risks to human health and the environment.[95] The EU argued that in line with the precautionary principle, its approach was to identify, assess and prevent the 'risks to human health and the environment from each of these GMOs'.[96] The EU argued that the delay was not in conflict with the WTO trade rules.[97]

To determine whether there were moratoria, the Panel looked at (1) whether there was an interim freeze on approval of GMOs, and (2) whether such an interim freeze was deliberate.[98] On the first ambit, the Panel considered, among others, the fact that during the contested period of October 1998 to August 2003, the EU did not give any approval for placement of GMOs in its territory, despite various applications.[99] Also, the Panel reviewed the actions of individual EU member States and observed that despite the EU's approval concerning the placement of MS1/RF1 oilseed rape (EC-89) and MS1/RF2 oilseed rape in the market, France for instance, failed to give its consent since June 1997 and 'did what was within its power to prevent these products from being approved'.[100] The Panel, therefore, concluded that there were moratoria in the EU. On the second ambit, the Panel reviewed documents and statements from EU's highly placed officials, confirming that there was a general freeze on further approval for GMOs.[101] The Panel therefore held that there was, indeed, moratoria in the EU.[102]

ii. Is moratoria challengeable within the WTO?

Having established that there were moratoria, the Panel proceeded to determine if the moratoria were consistent with the WTO trade rules, from two angles. First, the Panel took cognizance of the EU's argument that its procedure for approval for GMOs was not challengeable under the WTO because it was a practice and not a measure.[103] Second, the Panel also noted the fact that, apart from the general *de facto* moratorium placed by the EU, there were country-specific moratoria placed by five EU member States.[104]

Regarding the first angle, the Panel held that acts or omissions include *de jure* as well as *de facto* measures and therefore EU's measure is challengeable within the WTO trade dispute mechanism.[105] On the second limb, the Panel noted that measures challengeable under the DSB could be an amalgamation of various measures and held that 'the mere fact that the moratorium is the result of the application of separate decisions by the Group of Five countries and the Commission does not prevent it from being a challengeable measure'.[106] The Panel therefore concluded that the moratoria were challengeable within the WTO trade rules.[107]

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95 *Biotech Product's case* (n 4).65.
96 ibid.
97 ibid 66.
98 ibid 462.
99 ibid 443.
100 ibid 559-560.
101 ibid 426.
102 ibid 462.
103 ibid 617.
104 ibid 31, 618. The States are France, Germany, Austria, Italy, Luxembourg, and Greece.
105 ibid 618.
106 ibid 618-619.
107 ibid 619.

iii. Is the moratorium inconsistent with the first clause of Annex C(1)(a) and Article 8 of the *SPS Agreement?*

In its analysis, the Panel used one GMO application, in this case, MS8/RF3 oilseed rape as a test case, to determine if the EU had delayed making a decision on allowing its importation into EU territory. The Panel noted that between March 2000 and October 2002, the EU did not summon a meeting of its Regulatory Committee in furtherance of the application processes and that such a period was 'unjustifiably long, and that it can reasonably be inferred from surrounding circumstances that the Commission's inaction was a consequence of the general moratorium on approvals'.[108] Consequently, the Panel held that the deliberate undue delay was a breach of the EU's commitment within the meaning of the first clause, Annex C(1)(a) of the SPS Agreement.[109]

As regards Article 8 of the SPS Agreement, the Panel had established that its breach is tied to the breach of the first clause of Annex C(1)(a) of the SPS Agreement. The Panel, therefore, held that since the EU had breached the provision of the first clause of Annex C(1)(a) of the SPS Agreement, it necessarily followed that the EU had also breached the provision of Article 8.[110] From the analysis, especially with the inability of the Panel to give vent to the provisions of the Biosafety Protocol, it seems an uphill task, within the DSB mechanism, to achieve equal considerations for environmental concerns with trade issues, because the DSB primarily interprets and applies trade rules to disputes before it. This decision reinforces the argument that the DSB may not be a suitable platform to adjudicate on trade matters with environmental implications.

c. US Shrimp case

Sequel to its Endangered Species Act, 1973,[111] the US issued a regulation in 1987 mandating the use of permitted turtle excluder devices (TEDs) on shrimps harvesting vessels.[112] On 21 November 1989, the policy was applied universally with the enactment of section 609 of Public Law 101-162[113] which, among others, placed an import ban in the US on shrimps harvested without these turtle conservation techniques.[114] The legislation further provided an exception to States who would apply for and obtain certification from the US regarding their inability to comply with the provisions of section 609.[115]

In 1991, two types of certification processes were put in place for States desiring to obtain certification from the US.[116] The certification framework was further revised via the

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[108] *Biotech Product's case* (n 4) 680. Annex C(1)(a) provides that parties 'shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products'.

[109] ibid 681.

[110] ibid 683. Article 8 provides that parties must 'observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement'.

[111] Public Law 93-205 [1973] 16 United States Code 1531.

[112] *US Shrimp case* (n 5) 2.

[113] Public Law 101-162 [1989] 16 United States Code 1537.

[114] ibid section 609(b)(1).

[115] ibid section 609(b)(2).

[116] *US Shrimp case* (n 5) 2.

1996 guideline,[117] stipulating the attestation on a Shrimp Exporter's Declaration form that the imported shrimp into the US was harvested in compliance with section 609.[118] Additionally, the 1996 Guidelines put in place different sanctions for non-compliance with section 609.[119] While the 1991 regulations had exempted some States from the import ban for three years for failure to comply with section 609,[120] the 1996 guideline took away the privilege and applied the ban worldwide.[121]

Malaysia, Thailand, Pakistan and India[122] lodged complaints before the DSB on the ban and a Panel was constituted to determine the complaints.[123] The panel held among others, that the US import ban on shrimp harvested without the TEDs was in conflict with the provisions of articles XI:1, XX and the chapeau to Article XX of the GATT 1994.[124] The ban was subsequently declared a 'threat to the multilateral trading system'.[125] The US appealed the decision to the AB, contending among others, that the Panel was wrong in holding that section 609, which seeks to conserve sea turtles, an endangered species, was outside the contemplation of both Article XX of the GATT 1994 and its chapeau.

i. Analysis by the AB

The AB proceeded to decide if sea turtles qualify as an exhaustible natural resource, within the contemplation of Article XX(g) of the GATT 1994.[126] The AB noted that Article XX(g) of the GATT covers both non-living and living natural resources because what

> modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible to depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.[127]

Consequently, the AB held that sea turtles were exhaustible living resources.

The AB proceeded to find out whether sea turtles were under threat of extinction and noted that the 'exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of […] CITES' and 'may be affected by trade'.[128] It therefore concluded that sea turtles come under

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[117] The 1991 Guidelines (10 January 1991) 56 Federal Register 1051; the 1993 Guidelines (18 February 1993) 58 Federal Register 9015; the 1996 Guidelines (19 April 1996) 61 Federal Register 17342.

[118] *US Shrimp case* (n 5) 3.

[119] 1996 Guidelines (n 118) 17344.

[120] *US Shrimp case* (n 5) 4.

[121] ibid 5.

[122] ibid 1-2.

[123] ibid 2.

[124] ibid.

[125] ibid 6.

[126] ibid 47. Article XX(g) of the GATT 1994 provides that 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: relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[127] ibid.

[128] ibid 50.

the ambit of Article XX(g) of the GATT 1994.[129] The AB then proceeded to determine if section 609 is a measure seeking the conservation of an exhaustible natural resource.[130] Having noted its turtle conservationist agenda, the AB concluded that within the contemplation of Article XX(g) of the GATT 1994, section 609 qualifies as a measure to conserve a depleted natural resource.[131]

Unfortunately, trade consideration superseded conservation measures as the AB, in the final analysis, held that although section 609 was a measure to conserve a depleted resource, it was applied discriminately on States contrary to the provisions of the chapeau of Article XX, and therefore inconsistent with Article XX of the GATT 1994.[132]

Despite the overwhelming evidence of the threat of extinction of sea turtles, because of the unrestricted trade and the mandate of section 609 to rein in this unrestrained trade, unfortunately, the AB's decision seems to further unrestrained trade on sea turtles. Like the *Biotech's case*, this case reveals that trade considerations will always be given paramountcy over environmental concerns within the DSB as the DSB is mandated to apply the WTO trade rules to its dispute settlements obligations. The way out may well be to embrace the ICJ in the adjudication of the trade cases with environmental implications.

III. ICJ's even-handed adjudication of cases with environmental complexities

One factor that indicates that the ICJ would be a better forum to adjudicate on matters involving the environment would be the fact that the ICJ has developed a healthy body of precedents involving disputes with environmental considerations and so is already schooled in the nuance of environmental adjudications.[133]

This article will look at four of such cases decided by the ICJ, which may indicate ICJ's even-handedness in the resolution of the trade and environment conflict. They are the *Whaling in the Antarctic,* the *Gabčíkovo-Nagymaros,* the *Costa Rica v Nicaragua/Nicaragua v Costa Rica* and the *Pulp Mills case.* The cases are discussed below.

a. Whaling in the Antarctic

Before the ICJ, Australia instituted proceedings against Japan, contending that Japan's Whale Research Program (JARPA II) under Special Permit in the Antarctic, is inconsistent with Japan's obligation under the *International Convention for the Regulation of Whaling 1946* (ICRW) or under other international instruments aimed at conserving aquatic mammals and the marine ecosystem.[134] Consequently, Australia sought, among others, an order asking Japan to desist from the execution of JARPA II.[135] New Zealand intervened and contended, among others, that by virtue of the provision of Article VIII of the ICRW, whaling was only allowed

[129] *US Shrimp case* (n 5) 51.
[130] ibid.
[131] ibid 53-54.
[132] ibid 75.
[133] Stephens (n 1) 179-180.
[134] *Whaling in the Antarctic* (n 6) 234.
[135] ibid 238.

for exclusive scientific purposes but that JARPA II was not for scientific research, rather, it was an excuse to engage in large-scale commercial whaling.[136]

The ICJ narrowed down the issue for determination to the question whether Japan's JARPA II contravenes the provisions of the ICRW for which Japan is a signatory?[137] To determine the issue, the ICJ had to first interpret the provisions of Article VIII(1) of the ICRW which creates an exception for whaling if it is for exclusive scientific purposes.[138] The ICJ noted that the provision must be interpreted in accordance with the overall objective of the ICRW which is to ensure the conservation of all species of whales while allowing for their sustainable exploitation.[139]

i. Construing JARPA in the light of Article VIII of the Convention

The ICJ proceeded to determine if JARPA II qualifies as an exception under Article VIII of the ICRW.[140] The ICJ noted Japan's use of a lethal instead of non-lethal method to catch whales 'on a relatively large scale'.[141] There was evidence that the lethal method yields more catch than its non-lethal counterpart. The ICJ also noted Japan's admission that it could use non-lethal method to catch whales and still achieve the same scientific purpose and held that if 'this JARPA II research objective can be achieved through non-lethal methods, it suggests that there is no strict scientific necessity to use lethal methods in respect of this objective'.[142] The ICJ further observed that the actual catch of whales was far more than what was stated as being needed for the research and that this 'cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research'.[143] The ICJ noted that for the fin and humpback whales, the decision on numbers to be caught was not scientifically determined but 'a function of political and logistical considerations' and this 'further weakens the purported relationship between JARPA II's research objectives and the specific sample size targets for each species'.[144]

Furthermore, JARPA II did not have either a tentative or definite end date with the ICJ noting that 'with regard to a programme for purposes of scientific research, as Annex P indicates, a "time frame with intermediary targets" would have been more appropriate'.[145]

In addition, the ICJ observed the scant research output from JARPA II. For instance, despite the completion of the first phase, Japan could only present two publications from JARPA II and they did not even 'relate to the JARPA II objectives'.[146] The ICJ concluded

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136 *Whaling in the Antarctic* (n 6) 242.

137 ibid 246.

138 Article VIII(1) of the ICRW provides that '[n]otwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted'.

139 *Whaling in the Antarctic* (n 6) 251.

140 ibid 260.

141 ibid 290.

142 ibid 289.

143 ibid 290.

144 ibid.

145 ibid.

146 ibid 291.

that in the 'light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited'.[147]

Based on these, the ICJ held that 'the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention'.[148]

ii. Advancement of whales conservation over trade

In this case, it could be argued that the ICJ considered conservation measures in contention with trade in whales. To protect and conserve the whale mammal from exploitation, ostensibly for trade purpose, the ICJ readily applied the provisions of the ICRW

> which was prompted by concerns over the sustainability of the whaling industry. This industry had increased dramatically following the advent of factory ships and other technological innovations that made it possible to conduct extensive whaling in areas far from land stations, including in the waters off Antarctica.[149]

This decision boosts confidence in the ability of the ICJ to give due consideration to both conservation measures and trade. As demonstrated in both the *Biotech Product's* and *US Shrimp cases,* it is doubtful if the DSB would have come to a similar outcome, if it heard the case, with its penchant for elevating trade interests over environmental concerns.

b. Gabčíkovo-Nagymaros

The dispute in this case arose out of the failure to implement, and the subsequent termination by Hungary, of the 1977 Treaty between Hungary and former Czechoslovakia, which was for the joint building and utilisation of the Gabčíkovo-Nagymaros Barrage System to be constructed in the Danube River.[150] The Barrage System, in which each party was expected to fund the project in its territory, was geared towards 'the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding'.[151]

By Article 1 of the Treaty, two locks were to be built, one at Gabčíkovo in Czechoslovakia and the other at Nagymaros in Hungary, with both locks designed to constitute 'a single and indivisible operational system of works'.[152] Hungary, out of environmental concerns, abandoned the project and failed to construct the Nagymaros phase.[153] With work in advanced stage in the Gabčíkovo end, Slovakia (now successor to Czechoslovakia) decided to go alone and conceived another project (Variant C) to utilise the facilities already built in Gabčíkovo.[154] Hungary objected to this and consequently terminated the Treaty.

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147 *Whaling in the Antarctic* (n 6).
148 ibid 293.
149 ibid 246.
150 *Gabčíkovo-Nagymaros* (n 7) 11.
151 ibid 18.
152 ibid 20.
153 ibid 31.
154 ibid 31-33.

i. Analysis by the ICJ

The ICJ had to determine if Hungary was justified in abandoning the project.[155] Having noted that by abandoning the project, Hungary had either suspended or rejected the Treaty, the ICJ proceeded to decide if Hungary was justified to breach the Treaty provision on grounds of protecting the environment.[156] Although the ICJ agreed with Hungary that environmental concerns constituted an essential interest and reiterated 'the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind',[157] however, the ICJ declared that the project's impairment to the environment was not imminent and certain.[158] Moreover, the ICJ noted that Hungary had the capacity to avert the occurrence of the impairment to the environment while still honoring its Treaty obligation.[159] Finally, the ICJ noted that by virtue of the provisions of Articles 15 and 19 of the Treaty, which allows for a review of the project specification, Hungary could have discussed with Slovakia regarding its environmental concerns and sought ways to vary the project.[160]

From the foregoing, the ICJ concluded that the doctrine of *pacta sunt servanda* applied to the case and declared that Hungary's termination of the Treaty had no legal effect.[161] On Slovakia's operation of the Variant C, the ICJ noted that the project was already in an advanced stage at Slovakia's end when Hungary withdrew from the project, in the circumstance, Slovakia was justified to explore other alternatives.[162] However, it noted that Slovakia's operation of Variant C was at variance with the Treaty provision and held that Variant C should be made to comply with the Treaty provisions.[163]

ii. Sanctity of an economic treaty over the environment: pacta sunt servanda

What tipped the scale against Hungary was the recognition and application by the ICJ of the principle of *pacta sunt servanda*.[164] Indeed, the ICJ acknowledged the considerable impact of the project on the environment and was

> mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[165]

The ICJ was also aware of the negative impact of trade on the environment by admitting that all through the ages, mankind has, for economic and other reasons, constantly interfered with nature' and that this 'was often done without consideration of the effects upon the environment […] and to a growing awareness of the risks for mankind – for present and future generations'.[166]

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155 *Gabčíkovo-Nagymaros* (n 7) 29.
156 ibid 39.
157 ibid 41.
158 ibid 42–43.
159 ibid 43-45.
160 ibid 68.
161 ibid 82.
162 ibid.
163 ibid 79.
164 ibid 78-79.
165 ibid 77-78.
166 ibid 78.

The ICJ then recommended the concept of Sustainable Development as a panacea for a balanced and middle-of-the-road approach to trade and environmental concerns thus, the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.[167] The ICJ, therefore, enjoined the parties

> to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.[168]

The conclusion that could be drawn from the decision is that the ICJ was not willing to superintend environmental concerns over an economic treaty, despite clear evidence of negative environmental impact. Those parties should respect economic agreements they willingly enter and if there are concerns, should seek agreement variations as unilateral actions are not acceptable. This decision is indicative that the ICJ would be more even-handed in deciding cases with both trade and environmental concerns than the DSB.

C. Costa Rica v Nicaragua

In the first of the two cases involving the same parties and subject matter, Costa Rica instituted proceedings complaining about Nicaragua's violation of its territorial sovereignty through Nicaragua's occupation and subsequent dredging of the San Juan River in Costa Rica.[169] Costa Rica also complained, among others, that the dredging caused damage to its wetland and ecosystem.[170] In the second suit filed by Nicaragua, Nicaragua alleged the violation of its sovereignty and the causing of environmental harm following the construction of a major road in the border area along the San Juan River by Costa Rica.[171]

i. Issues in the Costa Rica v Nicaragua's case

The major issue in the dispute was the issue of sovereignty over the disputed territory which will determine the aggressor. The ICJ relied on the *Treaty of Limits 1858*, entered by both parties regarding the disputed area and upheld Costa Rica's sovereignty over the disputed area, it then declared that Nicaragua's occupation of the disputed area and the subsequent activities it carried out breached Costa Rica's sovereignty, therefore Nicaragua was liable for 'reparation for the damage caused by its unlawful activities'.[172]

ii. Violations of international environmental law

The ICJ proceeded to find out if Nicaragua had breached both procedural and substantive international environmental norms.[173] On procedural obligations, the ICJ noted the obligation to carry out an Environmental Impact Assessment (EIA) under international law, especially in zones with common environmental interest but held that from the evidence, Nicaragua's

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[167] *Gabčíkovo-Nagymaros* (n 7).
[168] ibid.
[169] *Costa Rica v Nicaragua / Nicaragua v Costa Rica* (n 8) 673.
[170] ibid 680.
[171] ibid 674.
[172] ibid 703.
[173] ibid 705.

activities were not enough to provoke momentous transboundary injury to necessitate Nicaragua to carry out EIA.[174] On Nicaragua's failure to notify and consult Costa Rica on the dredging of San Juan River, the ICJ held that because there was no international duty on Nicaragua to conduct EIA, therefore, there was equally no duty to notify or consult.[175]

On substantive obligations concerning transboundary harm, the ICJ noted the decrease in the water flow in San Juan River but held that there was no evidence signifying that the dredging was the cause of this, because

> other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period. In any event, the diversion of water due to the dredging of the Lower San Juan River is far from seriously impairing navigation on the Colorado River.[176]

The ICJ, therefore concluded that based on available evidence, there was no proof that the dredging had caused any transboundary harm to Costa Rica.[177]

iii. Issues in Nicaragua v Costa Rica

Here, the ICJ employed the same method used in the first case by first considering if there were breaches of both procedural and substantive international environmental obligations by Costa Rica.[178] On breach of procedural obligations, the ICJ first considered if Costa Rica had an obligation to conduct EIA.[179] The ICJ then proceeded to restate the principle of law that the duty of due diligence that a State owes to others, entails the prior ascertainment of the

> risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity.[180]

To determine if Costa Rica owed Nicaragua an obligation to conduct EIA, the ICJ proceeded to determine if the road project had posed any transboundary risk to Nicaragua. To determine this issue, the ICJ looked at the dimension of the road project and the background surrounding its execution.[181] On the dimension, the ICJ discovered that the road project was massive, spanning about 160 km in length out of which 108.2 km of it was along the San Juan River and that the road will either pass through or closer to wetland of international importance in both States 'heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive'.[182] From the foregoing, the ICJ held that there was significant risk of transboundary harm arising from the road project warranting the conduct of EIA, as such, the failure by Costa Rica to conduct an EIA, before

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174 *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 8) 705-707.
175 ibid 708-710.
176 ibid 712.
177 ibid.
178 ibid 718.
179 ibid 720.
180 ibid.
181 ibid 720.
182 ibid 720-721.

embarking on the road project on the border between the two States, constituted a breach of obligation to carry out a risk assessment of significant movement of transboundary harm.[183]

On the breach of substantive obligations, Nicaragua argued that the construction of the road caused significant damage to the San Juan River, through among others, the pollution of the river by sediment from the road construction.[184] The ICJ noted that from evidence, sediments deposited into the river as a result of the road construction was very negligible and held that 'the road is contributing at most two per cent of the river's total load. It considered that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads'.[185]

Nicaragua had also argued that the road project had harmed the river's ecology and impaired the water quality, but the ICJ dismissed the allegation on grounds of lack of evidence to substantiate the allegation.[186] In the final analysis, the ICJ held that Costa Rica had violated its obligation to conduct EIA[187] but since there was no evidence indicating any link between the road construction and any substantial transboundary injury, Nicaragua's allegation that Costa Rica had violated its substantive duties arising from customary international law regarding transboundary harm was dismissed.[188]

iv. ICJ's balance of environmental protection with the right to development

From the ICJ's decision, it may be inferred that the ICJ was not prepared to superintend environmental consideration over development which would have been the case if the ICJ had halted the road construction project on grounds of environmental impairment. Having admitted the economic impact of the road on Costa Rica, the ICJ decided that the minimal environmental impact of the road project was not enough to scuttle the construction of the road.[189] By this, the ICJ seems to elevate the right to development above minor environmental inconveniences and this may indicate a disposition towards a balanced approach to the adjudication of disputes with environmental considerations as against the attitude of the DSB which is a consistent bias in favor of trade.

d. Pulp Mills case

In the *Pulp Mills case*, Argentina instituted proceedings against Uruguay, contending that Uruguay had breached a joint treaty, the *Statute of the River Uruguay* 1975, specifying how to jointly utilise the resources in the River Uruguay. Argentina complained that by unilaterally building two pulp mills on River Uruguay, Uruguay breached various procedural and substantive provisions of the Treaty.[190]

On procedural breaches, Argentina contended that Uruguay did not comply, among others, with the Treaty's procedural obligations on the construction of both the ENCE (CMB)

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[183] *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 8) 722.
[184] ibid 729.
[185] ibid 729, 731.
[186] ibid 736.
[187] ibid 739.
[188] ibid 737.
[189] ibid 720.
[190] Uruguay and Argentina, Statute of the River Uruguay (signed 26 February 1975 and registered 17 December 1982) No. 21425.

and Botnia (Orion) Mills.[191] The ICJ noted that Article 1 of the Treaty provided for procedural obligations including the duties to inform, notify, and negotiate, on the part of any State initiating projects that seeks the utility of shared resources.[192]

By Article 7 of the Treaty, the initiating State must inform the Comisión Administradora del Río Uruguay (CARU), which is the administrative body set up by the Treaty to regulate such projects, so that CARU could look into the potential of the project to cause transboundary environmental harm in the territory of the other party.[193] The ICJ noted that Uruguay did not communicate to CARU, despite repeated requests for information by CARU, on the projects, rather, Uruguay proceeded to issue EIA for both projects without the involvement of CARU.[194] On the basis of these findings, the ICJ held that Uruguay breached the provisions of Article 7 of the Treaty.[195]

On Uruguay's obligation to notify Argentina of the plans to construct the mills, the ICJ noted that the initiating state, by virtue of Article 7 of the Treaty, must inform the other party of its plans to cite any project, which is likely to cause transboundary environmental harm, along the border and such information should be accompanied by an EIA.[196] The essence of the notification, as provided in Article 8 of the Treaty is to enable the notified party to also participate in the conduct of the EIA.[197] The ICJ observed that Uruguay only notified Argentina after its internal conduct and approval of the EIA to construct the mills.[198] On the basis of the above, the ICJ concluded that Uruguay breached its procedural duty to inform Argentina as provided in Article 7 of the Treaty.[199]

On substantive obligations, Argentina contended, among others, that regarding the Orion Mill, Uruguay breached its obligation under Article 41(a) to prevent pollution and preserve the aquatic environment, since Uruguay in operating the mill, was discharging substances from the mill into the river. These discharges had not only made the river stagnant, but it had also reversed its flow.[200] The ICJ, however, observed that the discharges complained about were not significant when compared with 'the receiving capacity and sensitivity of the waters of the river'.[201] From the foregoing, the ICJ held that 'in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute'.[202]

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[191] *Pulp Mills case* (n 9) 40.

[192] ibid 51.

[193] Article 7 provides that '[i]f one Party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party'.

[194] *Pulp Mills case* (n 9) 57.

[195] ibid 58.

[196] ibid 59, 60.

[197] ibid 60. Article 8 provides that the 'notified Party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification'.

[198] *Pulp Mills case* (n 9).

[199] ibid.

[200] ibid 40. Article 41(a) provides that without 'prejudice to the functions assigned to the Commission in this respect, the Parties undertake: (a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies'.

[201] *Pulp Mills case* (n 9) 86.

[202] ibid.

Argentina had also argued that Uruguay had breached its substantive obligation by failing to consult those leaving within the vicinity of the mills, before embarking on the projects. But the ICJ observed in the contrary that before and after the conduct of the EIA, Uruguay had consulted extensively, the affected communities in both States and had conducted at least 80 meetings.[203]

On the production technology used in the Botnia Mill, Argentina argued that Uruguay had failed to prevent pollution from the plant as a result of Uruguay using inferior technology in the operation of the mill, which is a breach of Article 41(a) of the Treaty.[204] The ICJ noted that the duty of due diligence which involves not only averting pollution but also guarding and conserving the marine ecosystem around the River Uruguay necessarily

> entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment.[205]

The ICJ observed that the mill uses the bleached Kraft pulping technology which is the leading technology with over 80 per cent of the mills in the world currently using the same, as such, 'there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced'.[206]

On the effect of the mills on biodiversity, Argentina asserted that Uruguay had breached its obligation under Article 41 of the Treaty by its failure to adopt procedures to safeguard and conserve biological diversity within the River Uruguay.[207] The ICJ noted parties' treaty obligations under Article 41 of the Treaty, to safeguard the marine environment, to respect international commitments to conserve biodiversity and protect habitat and maintain water quality by refraining from discharging effluent into the river but held that from available evidence, Uruguay did not breach its duty to conserve the marine ecosystem.[208]

i. Accommodation of environmental and economic concerns, through sustainable development

The above decision may indicate the disposition of the ICJ which is to strike a balance between the competing economic and environmental goals through the concept of sustainable development. Of note is the fact even though the ICJ re-affirmed the customary international environmental norms of prevention and due diligence,[209] the ICJ proceeded to hold that there is the need not only to

> reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development.[210]

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[203] *Pulp Mills case* (n 9) 87.
[204] ibid 88.
[205] ibid 88, 89.
[206] ibid 89.
[207] ibid 99.
[208] ibid 100.
[209] ibid 56.
[210] ibid 74.

Expatiating further, the ICJ observed that the

> attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other.[211]

The ICJ found support for its position in the provision of Article 27 of the Treaty and held that the provision 'embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.[212] The appraisal of these decisions seem to suggest ICJ's propensity to determine each matter on its merit as against the DSB's predisposition to superintend trade and economics over the every other consideration.

ii. Recommendation

There is the likelihood that the DSB will continue to subordinate environment to trade in carrying out its adjudicatory responsibilities.[213] Despite this, some experts are of the view that the ICJ is not the proper forum to adjudicate on the trade-environment disputes for the reasons including: first, that the ICJ would not be neutral in handling the competing environment – trade disputes. Dunoff argues

> that neither trade bodies, like the GATT […] nor adjudicatory bodies, like the ICJ […] ought to resolve these issues. Instead, trade-environment conflicts should be heard before an institution that recognizes the interdependent nature of global economic and environmental issues and that has a mandate to advance both economic development and environmental protection.[214]

However, at the risk of reopening the argument already made in Part II of this article, contrary to the assertion, as shown in the four cases analysed, the ICJ has displayed a sensitivity to the issues in a way that does not only recognise the interdependence of trade and environment but has actually emphasised the significance of all the sectors.

Second, it has been argued that a satisfactory adjudication of the cases involving trade and environment would require accessibility of expert opinions which is not readily available to the ICJ. In the circumstance, a body primed to access expert opinions is more suitable to adjudicate on these cases than the ICJ.[215] Patricia Birnie et al present a slightly different argument. According to them, the

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[211] *Pulp Mills case* (n 9).

[212] ibid. Article 27 provides that the 'right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in articles 7 to 12 when the use is liable to affect the regime of the river or the quality of its waters'.

[213] Dunoff (n 23) 1046.

[214] ibid.

[215] ibid 1046.

> principal potential weakness of the ICJ and the ITLOS as forums for the settlement of some categories of environmental disputes lies not in their comprehension of international law relating to the environment but in their limited ability to handle scientific evidence and technical expertise.[216]

However, these arguments seem to downplay certain practices of the ICJ. For instance, Article 34(2) of the Statute of the International Court of Justice (ICJ Statute) mandates the ICJ to ask and receive expert opinions in its adjudicatory processes.[217] In addition, Article 57 of the Rules of the International Court of Justice also allow parties before the ICJ to rely on expert opinions in the conduct of their cases before the ICJ.[218] The ICJ usually considers and applies these expert opinions in the adjudication of cases before it. For instance, in the *Whaling in the Antarctic*, the ICJ wrote to remind parties of their rights under Article 57 and requested that they call expert witnesses.[219] Australia and Japan took the opportunity to call expert witnesses to support their respective cases and the witnesses were examined by adverse parties.[220] The ICJ then placed reliance on the expert opinions in its adjudication of the case, especially in construing the meaning of 'scientific research', which was central to the case.[221]

Third, it has been argued that the ICJ is not suitable to handle trade-environment cases because the ICJ does not have the ability to enforce its decisions. According to Jeffrey Dunoff, the ICJ has been held back by 'a perceived lack of bite' and proceeded to give the following examples:

> However, on several occasions, nations have refused to comply with Court directives. For example, in the Anglo-Iranian Oil Co. Case, Iran refused to obey the ICJ's order forbidding the nationalization of a British corporation until the Court's final judgment. Similarly, in the Fisheries Jurisdiction Case, Iceland disregarded the Court's order not to enforce a fifty mile fishing zone pending the Court's disposition of actions filed by the U.K. and West Germany. More recently, in the United States Diplomatic and Consular Staff in Teheran Case, Iran refused to comply with the Court's Interim Order and Final Judgment to release U.S. citizens taken hostage at the U.S. Embassy in Teheran, Iran.[222]

This argument does not take into consideration the workings of the ICJ. It is not within the mandate of the ICJ to enforce its judgment. That remit is actually with the UN Security

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[216] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, Oxford University Press 2009) 255.

[217] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993. Article 34(2) of the ICJ Statute provides that the ICJ 'may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative'.

[218] Rules of the Court (adopted 14 April 1978, entered into force 1 July 1978). Article 57 provides that 'each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party'.

[219] *Whaling in the Antarctic* (n 6) 14.

[220] ibid 14, 15.

[221] ibid 34.

[222] Dunoff (n 23) 1090-1091.

Council by virtue of Article 94(2) of the UN Charter, if the judgments of the ICJ are not being obeyed, it is the UN Security Council that ought to be held responsible and not the ICJ.[223] Besides, non-compliance with judgments is not peculiar to the ICJ because the DSB has also suffered the same fate. For instance, two years after the final decision in the *US Shrimp case,* the US did not comply with the decision, and this necessitated another round of litigation leading to the setting up of another Panel to begin compliance proceedings in order to get the US to implement the judgment.[224] The fact of State sovereignty and the absence of an international enforcer would make enforcement challenging for any international adjudicatory body. The UN probably has more devices to enforce ICJ decisions than any other adjudicatory system.

Fourth, it is argued that the delay in hearing and disposing of matters by the ICJ makes it unsuitable to adjudicate trade-environment disputes which would require urgent disposition of cases. Dunoff opines that parties who desire their cases

> resolved quickly will find the [ICJ] […] "uninviting" […] a long time passes before the Court renders a decision […] the Court took eight years to reach a decision in the Barcelona Traction Case and six years in the South West Africa Cases.[225]

It is conceded that trade-environment disputes ought to be decided with dispatch because the issues are time-sensitive but slow adjudicatory processes is not peculiar to the ICJ. Even the DSB has suffered from a comparatively worse fate. From 10 December 2019, the AB could not sit to determine appeals from the Panel because it has not been able to form a quorum.[226] By Article 2(4) of the Rules and Procedures, members of the AB are selected by the consensus of the WTO members.[227] The US has become increasingly critical of the decisions handed down by the DSB and has used it veto to prevent fresh selection of members to the AB.[228] The tenure of the last appointed member of the AB expired on 30 November 2020, since then, the AB has been totally grounded.[229] This impasse is not likely to be resolved soon as the presidency of Joe Biden in the US has continued to maintain the veto which started during the presidency of Barack Obama and continued through the presidency of Donald Trump. According to Guida, 'the WTO judiciary is […] undergoing a profound crisis ignited by both Trump and Biden administrations, which has paralysed the WTO's ability to resolve trade disputes between countries by blocking new appointments to the Appellate Body'.[230]

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[223] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Article 94(2) provides that if 'any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ] […] the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

[224] 'United States — Import Prohibition of Certain Shrimp and Shrimp Products' (*World Trade Organization)* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm> accessed 8 January 2024.

[225] Dunoff (n 23) 1091.

[226] 'Appellate Body Annual Report for 2019-2020' (*World Trade Organization* July 2020) 7 <https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2019_e.pdf> accessed 8 January 2024.

[227] 'Appellate Body Rules and Procedures' (n 21). Article 2(4) of the Rules and Procedures provides when 'the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus'.

[228] 'The WTO Appellate Body Crisis – a Way Forward?' (*Clifford Chance*, November 2019) 2-3 <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf> accessed 8 January 2024.

[229] 'Dispute Settlement-Appellate Body' (*World Trade Organization)* <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 8 January 2024.

[230] Guida (n 10) 6.

For these reasons, the ICJ seems a better fit than the DSB to adjudicate on trade-environment disputes. Making a pitch for the ICJ, it has been argued that

> [t]he primary judicial forum for resolving international legal disputes is the ICJ. The Court is 'the principal judicial organ of the United Nations,' and all members of the United Nations are parties to the ICJ Statute. The ICJ is competent to decide environmental disputes, and commentators have repeatedly called for greater use of the Court to resolve international environmental disputes.[231]

Another reason in favor of the ICJ adjudicating on the trade-environment cases is because these cases sometimes conflate other areas of law and would require adjudication by a forum with a broader mandate than the DSB. According to Patricia Birnie et al:

> Moreover, it is not easy to identify what is an environmental case. Cases may raise environmental issues, whether legal or factual, but they rarely do so in isolation. The Gabčíkovo-Nagymaros Case, for example, is as much about the law of treaties, international watercourses, state responsibility, and state succession, as it is about environmental law. Much the same could be said about the Pulp Mills litigation. In these circumstances the parties need a generalist court, not a specialist one.[232]

From the subject-matter perspective, the ICJ would have jurisdiction to try these cases since, as provided by Article 36(2) of the ICJ Statute, the ICJ is a multi-purpose court with unlimited jurisdiction including the construction of WTO instruments.[233] On party jurisdiction, the ICJ has a wider jurisdiction than the DSB. By Article 93(1) of the UN Charter, all the members of the UN are automatically parties to the ICJ Statute[234] and currently, the UN has 193 members.[235] In addition, there could be a situation where a party is not a member of the UN, but such a party will still have standing before the ICJ by virtue of Article 35(3) of the ICJ Statute which provides that a non-State member of the UN could still invoke the jurisdiction of the ICJ if such a party agrees to contribute to defray the expenses the ICJ will incur in respect of the matter.[236] Conversely, as at 29 July 2016, the WTO had 164 members and only WTO members would be subject to the DSB's jurisdiction.[237] From a jurisdictional point-of-view, the ICJ would be competent to adjudicate on trade-environment disputes.

IV. Conclusion

This article exposes the unsuitability of the DSB to preside over cases with environmental elements on grounds that trade will always be prioritised over environmental concerns. This

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[231] Dunoff (n 23) 1086.

[232] Birnie et al (n 216) 255.

[233] ICJ Statute (n 217) 135. Article 36(2) provides that the ICJ has jurisdiction to hear all matters relating to 'a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation'.

[234] UN Charter (n 223) 141. Article 93(1) provides that all UN members 'are *ipso facto* parties to the Statute of the International Court of Justice'.

[235] 'About Us' (*United Nations*) <https://www.un.org/en/about-us/> accessed 8 January 2024.

[236] ICJ Statute (n 217) 135.

[237] 'Members and Observers' (*World Trade Organization*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 January 2024.

may be inescapable since the DSB is mandated to interpret and apply WTO trade rules in the settlement of disputes before it. As argued by David Park, 'the very premise of the WTO, that of free-trade, directly conflicts with environmental preservation and protection'.[238] In essence, the DSB seeks to elevate trade over other considerations, however, this disposition has its drawbacks, which includes the bringing of 'trade and environmental interests into conflict'.[239] Perhaps, it was for these reasons that the WTO Committee on Trade and Environment 'has recommended that, where possible, disputes concerning multilateral environmental agreements are settled under these agreements, rather than through the WTO'.[240]

On the other hand, the ICJ is not encumbered by these issues and as revealed by the trade-environment cases it has decided, has a propensity to be neutral. While the exact meaning and breath of sustainable development is up for debate,[241] the ICJ leaves no doubt that the middle-of-the-road approach which balances the economic and environmental concerns through the concept of sustainable development is an effective way to reconcile the trade and environment objectives. This approach is a more plausible one, as against the one-sided approach developed and sustained by the DSB. Indeed, we are already walking a tightrope and the signs are ominous as far as the global environment is concerned. We are on the verge of what Carmen Gonzalez terms a global environmental catastrophe, with the warning that 'the global economy has already transgressed four of the nine planetary boundaries critical to the planet's self-regulating capacity'.[242] With this, it may be timely for a deliberate balancing of environmental consideration with trade and economic interests and the DSB is not set up to deliver on this mandate.

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[238] David Parks, 'GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation' (1997) 15(2) UCLA Journal of Environmental Law and Policy 151, 152.

[239] Paul Cough, 'Trade-Environment Tensions: Options Exist for Reconciling Trade and Environment' (1993) 19(2) EPA Journal 29 <http://www.ciesin.org/docs/008-065/008-065.html> accessed 8 January 2024.

[240] Birnie et al (n 216) 261.

[241] Christian Becker, *Sustainability Ethics and Sustainability Research* (Springer 2012) 9.

[242] Carmen Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32(2) Pace Environmental Law Review 407.