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Is there a dominance of liberal environmentalism in international organizations?

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The case of the WTO environmental agenda's development

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Abstract

Considering the growing importance of environmental issues on the international political scene, the question arises as to how these issues are incorporated into the agenda and procedures of international organizations (IOs) and institutions. The World Trade Organization (WTO) - one of the largest IOs – has to handle a strong mandatory connection to global trade as well as an increasing environmental workload, which in turn, displays the general environment-trade conflict. Based on the theory of environmental liberalism and the concept of legalization, five WTO dispute cases are analyzed to discover the change in the WTO's environmental agenda and the wider implications of this change. This study finds that there is a propensity towards less precise legal statements as well as a mounting number and significance of pro-environment outcomes. Yet, the fragmentation of international law (epitomizing institutional complexity) and the unresolved WTO-internal discordance amid trade and health/environment directives, display an inestimable development in progress upon which no final conclusion can yet be prepared.

Key words: WTO, legalization, institutionalism, liberal environmentalism, soft law
Words: 9995

List of acronyms and abbreviations

AB	Appellate Body
ACTA	Anti-Counterfeiting Trade Agreement
BSP	Cartagena Protocol on Biosafety of the Convention on Biodiversity
DSB	Dispute Settlement Body
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EC	European Communities
ECJ	European Court of Justice
EFTA	European Free Trade Area
EMIT	Group on Environmental Measures and International Trade
FIT	Feed-in-Tariff Program
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IGO	International Governmental Organization
ILO	International Labour Organization
IO	International Organization
IPE	International Political Economy
IR	International Relations
KPCS	Kimberley Process Certification Scheme
MEA	Multilateral Environmental Agreement
MERCOSUR	Mercado Común del Sur ("Common Market of the South")
MMPA	US Marine Mammal Protection Act
MNC	Multinational Corporation
NGO	Non-governmental Organization
OECD	Organization for Economic Cooperation and Development
PPM	Process and Production Method
PPP	Polluter Pays Principle
SCM	Agreement on Subsidies and Countervailing Measures
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	The general Agreement on Technical Barriers to Trade
TEDs	Turtle Excluder Devices
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property
UIA	Union of International Associations
UNCTAD	UN Conference on Trade and Development
WTO	World Trade Organization

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1 Introduction

"*Globalization can only be reversed at prohibitive cost. We must learn to manage and direct this rich source of opportunity, not seek to suppress it. To do so we need more international cooperation.*"

"(…) social, political, economic and environmental challenges facing market-based economies. These challenges need to be addressed. But blaming trade for that for which it is not responsible, (…) would only undermine confidence in and commitment to trade."

- WTO Panel on Defining the Future of Trade, report 24. April 2013[1]

As becomes obvious from these extracts, the World Trade Organization (WTO) faces a two-folded challenge today; both keeping in line with its original mandate to further free trade but also incorporating environmental concerns in its assessments. This widened "critical nexus" is similar for other environmental organizations; yet in the case of the WTO it has manifested most prominently, exemplified in a variety of disputes and respective recommendations.[2]

The WTO legal framework offers both free-trade-promoting articles as well as the option of environment-related exemptions to trade promotion. Both inclinations are expressed in the verdicts of the DSB. [3] The hypothesis being that there is a dominance of liberal ideas in environmental policy-making, the rulings by the Dispute Settlement Body (DSB) will be the empirical focal point of this case study to establish a trend. This essay will focus on liberal environmentalism[4] as the theoretical fundament placed in conjunction with concepts of institutional legalization to condition answers to the following questions:

How has the WTO's environmental agenda changed over time, both explicitly in its legal phrasing and in the normative reach thereof?

In connection with this the degree of legalization in WTO verdicts will be addressed: How have quality (more or less precise verdicts) and content (e.g. health, animal protection, climate-change issues) of the environment-related decisions changed and what are attainable reasons for that?

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[1] WTO Panel on Defining the Future of Trade, report 24. April 2013. Pp. 17, 19

[2] More detailed observations on the trade-environment conflict and economic measures in chapter 2.1

[3] In detail, the results of these clashes, the reasons for the results, and the possible consequences for future rulings are the focus of the empirical section.

[4] It shall deliberately refrain from incorporating other aspects (e.g. coalition building and political trench warfare) to avoid a blend of political motivations and legal effects.

Furthermore, are we seeing a liberalization of environmentalism or rather a "greening" of the WTO, respectively, does the agenda change support the hypothesis?

To understand the context in which this topic is sited one has to view the historical developments first.

The growing complexity of international institutions and organizations (IO) is as vast and intricate study-field. Since the 1950s, we have seen an impressive growth in IOs; their numbers rising from barely one thousand in the 1950s to over seven thousand in the beginning of this century.[5]

Meanwhile, the numbers of environmental problems and concerns have grown parallel to the awareness/framing[6] and (attempted) administration of them.[7] The 1960s/70s bore the beginning of an emergent environmental discourse that was manifested in the much-recited *Club of Rome* reports[8]. These ideas were followed in other milestones, like the Brundtland report (1987), and the Agenda 21 (1992). At the same time the discourse grew in complexity, while new institutional arrangements reflected the need for action.[9]

Yet, these phenomena have to be understood within a more holistic reality. [10] Political, social, economic, legal, and technical issues all play a role on the stage of international relations (IR).

This thesis shall principally focus on two of those issues in conjunction with the environment. Between the activities of interdependent actors and beyond the curtain of agreement-disputes and political statements one can inspect the influence of thickening international law, as well as an omnipresent, steadily consolidating undercurrent of liberal economic principles. Both interact with each other and with environmental policies.[11]

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[5] See *Union of International Associations UIA, Yearbook of International Organizations*. The exact numbers for conventional IOs are: 1951: 832 NGOs, 123 IGOs; 2005/6: 7306 NGOs, 246 IGOs. Only conventional IOs (according to the UIA definition) have been regarded for the purpose of clarity. Furthermore, the numbers serve only to enunciate the general tendency rather than detailed observations. The growing complexity within and in the relations between institutions is an important ambient factor in this thesis.

[6] The framing of environmental norms has significantly changed since the 1960s. See Bernstein's evolutionary model, chapter 2.1.

[7] See http://keelingcurve.ucsd.edu/ for the "Keeling Curve" and http://www.universityofcalifornia.edu/news/article/29377 (accessed 25. April 2013) for a discussion of it. For example, the CO2 concentration in the air has risen from 280 ppm before the Industrial Revolution to almost 400 ppm today, which serves as an impressive reminder of the extent contemporary developments like population growth, consumption levels, and industry contribute. The general realities of environmental degradation are presupposed as understood by the reader for this essay. The numbers signify a trend not a definitive causation. Many factors play a role here and trade/industry is one of them.

[8] See Meadows Donella H. et al, 1972.
The issue "Limits to growth" held true to its title in prophesising the end of population and economic growth by 2030 while simultaneously calling for forceful environmental protection measures. Without going into further detail, the point shall be made here that it initiated a global and on-going debate between experts of numerous disciplines, such as economics, law, and sociology.

[9] Hajer, Maarten A., 1995. pp.1-7

[10] Carter, Neil. 2007. pp.3-5

[11] See Rhodes et al, 2006 (Moran, chapter 9): It has to be remarked that the development of markets is seen as dependent on the state's regulatory framework, at least in the beginning. Thus follows: new economic

The WTO embodies the nexus of law and trade like no other IO - highly legalized and vested with a clear-cut trade-related mandate. Since its reformation from GATT into the WTO in 1995, it has also become a point of convergence for the issue-areas of health and environment, matters in which neither the mandate nor the legalities are so clear-cut anymore.[12] These facts make the WTO an interesting subject of somewhat counter-intuitive research. As the introductory citations show, there is a definitive acknowledgement of the widened scope of engagements even within the WTO's own understanding of the trade-environment relationship. This however, coexists with a strong tendency towards emphasizing the principles of global free trade. Although this is hardly surprising giving the WTO's origins, there is a need for modulation brought upon it by changed global realities.[13]

The diverse realities of (environmental) policy-making warrant a tidily established backdrop of facts and discrimination of concepts. A more detailed examination of global environmental institutional settings, growing legalization in IR, and the WTO's environmental arm is followed by a concise overview over the methods chosen for this work.

This, in turn, will lead over to the theory section, where the main theories and concepts are explained, discussed, and set in the context of this thesis.

Subsequently, an empirical analysis of past and contemporary cases signifying the issues between trade, environment and law as well as the development over time follows.

Finally, the conclusions will sum up the major points and display the findings of this work in respect to the research questions stipulated earlier.

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instititutionalism puts emphasis on these frameworks, expressed in institutions, and organizations are bodies that take advantage of those institutions to further their cause. Feedback-loops to their actions foster institutional development. Although Moran does not include environmental actions/issues in its writing, they are subject to the same processes.

[12] Bernstein, Steven. 2002. p.1.

[13] The report reflects in many ways this inner disjointedness and a palpable insecurity, particularly eying the fairly instable global economic recession and the continuing downturn of the Euro zone. Most of it focuses on these issues, environmental and sustainability points are barely treated in it.

1.1 IOs, international institutions, legalization, and the WTO's environmental side – the background

1.1.1 The institutional scenery and legalization of international politics

To fully appreciate the immensely complex system of international institutions, especially in regard to multilateral environmental agreements (MEAs), working definitions of *international organization* and *international institution* are in order.

After the 1950s, the expression *international institution* had been primarily used to describe formal IOs of highly organized structure (e.g. UN) that displayed capabilities of true-life importance (peace-keeping, vaccination programs, etc). In more abstract terms, international IOs hold agency and agenda-setting powers and have, to a certain extent, the capability to form social norms[14].

From the 1970s onward, the need to further explain the gulf between these formal arrangements and the actual international political scene became apparent as "rules, norms, principles, and procedures that focus expectations regarding international behavior"[15] had to be explained. The terms *international regime* and *global governance* entered the vocabulary, becoming the semantic hubs of deliberations revolving around a more unified framework.

Gradually, the term *institution* began to describe a set of rules for international cooperation. Depending on the definition[16] *institution* can include the shaping of behaviour, activities, and expectations or simply ignore them.[17]

For this essay, both regimes and international institutions will be treated as a set of rules that can exert normative power and the distinction between international institution and IO will not be overly stressed as it would not contribute to the analysis of the WTO case[18].

The change in perception and nomenclature reflects an overall growth in institutional complexity over the decades. In no other area is this complexity better represented than within the jungle of multilateral environmental agreements (MEAs). MEAs are a constant point of friction with WTO free-trade agreements. At the time of writing, over 1100 MEAs[19] are in existence. They are extremely

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[14] The ideal of a democratic world order by the world's governments as the basic rationale of the UN is an example for such norm-setting power.
[15] Krasner, 1983 in Carlsnaes Walter et al, 2009.
[16] Mearsheimer, 1994/95 and Keohane, 1989:3 in Carlsnaes et al, 2009, pp.6, 7.
[17] Carlsnaes et al, 2009, pp.1-7.
[18] Since the WTO yields legislative power and especially with an eye on soft law and its normative side, many of the arguments used apply to both IOs and institutions rendering a re-occurring distinction somewhat less meaningful in this context. However it is important to have treated the formal definitions as a basis of understanding.
[19] See IEA Database Project, 2002-2013, statistics on http://iea.uoregon.edu: Their numbers have more than doubled since 1990, further underlining the complexity growth mentioned above. Furthermore, there are an

different in their content, their functional mechanisms, their semantic code, and often interdependent in their issue areas[20]. This adds to the increasing fragmentation of international law regarding such cross-cutting effects.[21] Disputes, overlaps, and contradictions are the order not the exception. Prominent examples feature the Basel Convention[22], the CITES program[23], or the Cartagena Protocol on Biosafety[24].[25]

IOs have to play their role within the framework of international law. International dispute settlements, like that of the International Labor Organization (ILO) or the WTO, and consequential rule-making are exemplary in fostering both international stability as well as domestic adoptions of created policies.[26]

International law is pluralistic and not a one-off phenomenon. It is "deeply intertwined" with international politics as "politics permeate(s) international law and limit(s) its authority"[27]. Legalization, which is bluntly put the process of legally codifying issues, is a phenomenon of such gravity that it exerts influence on the evolution of international norms. It furthermore displays the ability to become internalized in domestic law, and acts as a focal point around which international cooperation can grow.[28]

This legalized milieu permeates all matters in contact with it. The overlap of MEAs and trade-regulations is the arena in which the WTO comes into play.

1.1.2 The formation and setup of the WTO's environmental section

In 1947 the General Agreement on Tariffs and Trade (GATT) came into being as a consequence of the Breton Woods accords[29] to regulate global trade. Mainly tariff reductions were addressed and the overall system lacked any specific focus in conjunction with environmental issues[30].

Moreover, the GATT employed a "non-binding arbitration system"[31]; meaning it was inconsequential in its non-binding terms issued. The only hint at an

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additional 1500 bilateral and 250 other environmental agreements listed, doing little to ease the accessibility to this topic but add their own distinct importance to the subject at large. See chapter 3 for a short discussion of MEA vs unilateral developments.

[20] E.g. technology, trade, social issues, species protection, etc.

[21] Zelli, 2007, pp.24ff.

[22] Specifying toxic waste exports and specifies import and export regulations, as well as allowances for import bans on environmental grounds.

[23] Banning the trade of endangered species, specifying quotas and permits for species on the brink of being endangered.

[24] Regulating the import of genetically modified organisms, etc.

[25] UNEP Handbook, 2005, chapter 2.4.4.

[26] Petersmann E.-U., 2004., pp.5, 6.

[27] Abbott et al, 2000, p.455.

[28] Goldstein et al, 2000, p.15.

[29] At Bretton Woods the GATT was agreed upon next to other organizations such as the World Bank and the International Monetary Fund.

[30] See http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm. 8. May 2013.

[31] Goldstein et al, 2001, p.32.

environmental connection came in the form of the Group on Environmental Measures and International Trade (EMIT, 1972), which however was not convened until requested by members of the European Free Trade Area (EFTA) twenty years later.[32] The general environmental agenda before the WTO formation in 1995 remained as theoretical as it was inconsequential. However, the GATT system had been "instrumental to the functioning of the world trade system for more than half a century"[33] [34]

With the conclusion of the Uruguay rounds, the WTO formation comprised a gain in the scope of duties and a definitive "victory for legalists"[35] with dispute settlement procedures now set in clear legal rules and bestowed with the power to set binding verdicts[36]. The WTO's work is based on a rule system, containing over 60 agreements collected in six major 'divisions'[37]. Today 159 nations claim membership and over 20 nations and dozens of IGOs are bestowed with an observer status[38], facts that make the Geneva-based WTO one of the largest international organizations ever and the only one regulating global trade.

With this expansion, environmental concerns now were moving closer into the spotlight. Already the WTO agreement's preamble states the importance of sustainable development and the need for protection and preservation of the environment[39]. From the inception of the WTO, the Committee on Trade and Environment (CTE) was included in the structure, supported by the Trade and Environment Secretariat Division. According to its official mandate, it shall promote sustainable development through identifying the relation between trade and environmental measures and make recommendation for the multilateral trade system in line with the non-discriminatory principles.[40] Nonetheless, the CTE has elicited critical views partly due to inaction on the environmental front and a "trade bias"[41], partly owed to constraints set by its mandate.[42] [43]

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[32] See Zelli, 2007, p.9 ff: Also a working group on trade an hazardous substances was set up in 1989.
[33] Footer 2010, p.242.
[34] "The World Trade Organization (WTO) deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible." This signifies the economic focus and self-picture of the WTO clearly.
[35] Goldstein, et al. 200, p.5.
[36] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm, 9. May 2013
[37] The divisions are: The Agreement Establishing the WTO, goods, services, intellectual property, dispute settlement, and reviews of governments' trade policies.
[38] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. And http://www.wto.org/english/thewto_e/igo_obs_e.htm. 6. April 2013.
[39] WTO – WTO Agreement, 1994, preamble.
[40] Exemplary work topics are: Transparency of trade measures used for environmental purposes, how environmental measures affect market access, the export of hazardous waste. See http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm. 8. May 2013.
[41] McMillan, 2001, p.14.
[42] See Zelli, 2007: The CTE has no competency to develop their own agenda and is dependent on consensual decisions in its reports.
[43] See http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm: Most items can be read in such fashion that the premise of the CTE's work is to assess the impact of environmental measures on free trade, thereby tendering to the liberal side of the trade/environment dichotomy.

Of particular importance to the handling of environment and trade are the trade-related non-discrimination clauses[44], which are expressed in two major principles: The *Most Favoured Nation* principle (MFN)[45] states that all trading partners have to be treated equally while the *National Treatment* principle[46] [47] aims at equivalent treatment of imported and domestic products. When viewed against the environmental exceptions from non-discriminatory clauses stipulated in Article XX[48] the conflict between these poles of ideology become apparent:

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

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

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

Article XX is the one legal factor all environmental exceptions hinge on. It becomes something of a counter-point to trade laws within this thesis. For example, when is an import ban on a like product justifiable under Art XX and what consequences does this have for extra-territorial influence of states and free trade unions?[49] [50]

The WTO dispute settlement concerns itself with both trade and environmental disputes. It is set-up in the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) comprised of the Dispute

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[44] For other fundamental WTO principles see: ttp://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm. 8. May 2013.
[45] WTO - GATT, 1986, Article 1.1: "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.".
[46] WTO – GATT, 1986, Article 3.2: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.".
[47] Both principles are also included in the General Agreement on Trade in Services (GATS); Article II, XVII.
[48] WTO – GATT, 1986: These two paragraphs are the relevant ones for environmental rulings and disputes based on prior discrimination. Overall, this is the major stepping stone for initiating any environment/trade dispute leading to the DSB and AB procedures.
[49] Art XXIV, paragraphs 8a and 8b mention specifically the Art XX exceptions under which the establishment of free trade unions and the elimination of import duties and similar measures would be limited. Otherwise liberal economy is the explicit main goal, along with free trade and elimination of custom duties (see paragraph 4).
[50] The unclear expression of *like products* appears in both principles, which begs the question for a clear definition of "like". Which are the factors making products *unlike*, respectively what are the consequences? Further and more detailed analysis of the wording problems in connection with actual cases will be made in chapter 3; the shortly addressed issues should become clearer when viewed in existent cases.

Settlement Body (DSB)[51], an improved version of the old GATT dispute system, which was inherently flawed with non-binding commendations to the GATT council[52] [53].

The DSB allows for an initial extra-curiae settlement period. Only if this step fails, a panel is formed that starts an elaborate legal procedure of hearings, rebuttals, reviews, and a final report disclosing the ruling. This ruling can be appealed by one or both parties[54], at which point the Appellate Body (AB) is formed. It can modify, uphold, or reverse the panel's original proclamation.[55] This power seems considerable at first glance; however, there are critical limitations to it: the DSB can deny the adoption of the findings and consequences upon unanimous decision to do so.[56]

Other key aspects are: The AB has the ability to call upon expert review groups and other relevant sources. This widens the circle of involved third parties which might be of consequence of environment-related decisions.[57] Also, both panels and the AB can only act when called upon, which critically limits their agenda-setting power.

The DSB is at the core of the WTO's operations and the importance of the DSB/AB dynamic is consequently acknowledged: "The dispute settlement system is an integral part of the WTO. A rule-based system cannot survive if its rules are not capable of being interpreted and adjudicated. This is the institutional contribution of the Appellate Body, within the scheme of the Dispute Settlement Understanding."[58] This clearly signifies the importance of legal procedures as the basis for all WTO actions and deliberations. Moreover, WTO rules have implications for other international laws, too.[59]

So far, this reliance on law would not constitute a major abnormity in a large IO, yet the equal stress put upon both *adjudication* and *interpretation* hints towards procedural uncertainty, an issue that will resurface later in this essay.

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[51] See WTO – DSU, Art 2: Here the DSB is legally established.
[52] McMillan, 2001, pp.14-17.
[53] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm 26. April 2013: Even the WTO itself admits various shortcomings that called for improvement under GATT 1994: The dispute settlement "had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively.".
[54] Though this is fundamentally a bilateral dispute settlement system, observing parties are allowed.
[55] The AB's legal basis is set up in DSU Article 17; among other things impartiality is central here: the seven members must be unaffiliated with states, not involved in other dispute settlement activities and free of any prejudice in the case.
[56] WTO – DSU, Art.17.14.
[57] See Haas, 2004. The influence of epistemic communities is a factor not be underestimated when it comes to the precautionary principle and the general diffusion of traditional state authority.
[58] WTO – Appellate Body, 2013. p.6.
[59] See Zin et al, 2011: In legal studies, there has even been constituted an influence of WTO law on international law, albeit in a 'one-way' manner, since DSB jurisdiction is bound by WTO law framing, yet the DSB is free to employ international sources of law in interpretation of conflicts. This adds to a mutually evolutionary process between the WTO and international law at large.

1.1.3 A short outline of methods

In this treatise, the content of various WTO dispute settlement cases and consequent rulings by the panels and the Appellate Body will be perused to portray the change in the WTO's environmental agenda.[60] Under the term environment fall issues of health as well as climate-related and, to some degree, development; in other words the term environment is being used in a fairly wide sense so as not to needlessly restrict the analysis to one very specific topic. This also offers the chance of comparison between differing fields of environmental concern in the conclusion, which will lend more credibility to the underlying analysis of liberal environmentalism.
However, connected issues (e.g. the consequences of the rulings, the North-South divide, political alliances for and against environmental protection, business involvement and lobbying, etc) are not engaged in to concentrate on the underlying ideological trend. To integrate these wider political issues – though they may carry significance in terms of policy-making input – would distract too much from the legal focus. Furthermore, each of these issue areas has its own frame of rationales and mechanisms; integrating all of them would stretch the physical boundaries of this essay and integrating some of them would not be objective. Therefore, a singular phenomenon needs to be concentrated on to establish a coherent picture.

Owing to the constraints of a B.A. thesis a representative array of five DSB and AB proceedings has been chosen. This may only allow for a limited view on a trend per se but the cases chosen are important to the subject, comprehensive in their content[61] and cover a timeframe of over two decades to demonstrate the development over time. Since the DSB and AB rulings are connected to both trade rules and exemptions that are based on Article XX (environment, health, etc.) they promise to exemplify the conflicts and tendencies inherent in the WTO system best.

The theory of liberal environmentalism serves as the basis on which this author considers the influence of (neo-) liberal economic tendencies on the WTO environmental agenda. Although it does touch on political orientations in connection with the environment (e.g. market liberalism[62]) it is relatively open to application and interpretation. To counter this arbitrary trait in the theory, the cases have been analyzed the following way: Any of these cases is comprised of hundreds of pages of legal text and to establish a clear trend also within the case, the focus has been moved to expressions in these texts signifying the reasoning

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[60] To clarify the use of the term agenda: little can and should be said about individual goals of state actors or WTO executives, for example. A distinction shall be made here so that the reader can assume a focus on the institutional output (in from of written rulings and legal statements) of the WTO rather than the ideological "agenda" or a behaviouristic approach forming the centre of research attention.
[61] The first two cases basically represent the initial formation of WTO environment-related decisions, while the latter three will serve to display examples of rulings in the fields of human health, recyclable material, and climate-change. Therefore, both the general agenda development and the content should become clear.
[62] See Clapp et al, 2005. chapter 5.

and rationales in making the legal argument. That means, not only have the pure outcomes been listed but the process of arriving there is interpreted as well in the analysis. This should provide the reader with an understanding of the detailed deliberations signifying the prevalence or lack of liberal environmentalism.

Frequently set in conjunction, are concepts of legalization. As progressing legalization is a strong trend in international politics as well as the means to an end[63] it needs to be addressed in this context. Thereby, a more distinct scrutiny of said development becomes possible and the research questions can be answered more effectively. Without doubt, this concept is limited to the legal terms and their effect; it has little meaning for other spheres, e.g. individual motives, public pressure. However, it must be seen as indispensible for this analysis, since legalized terms are ultimately the expression of the WTO agenda.[64]

Such developments can be operationalized when phrasings of words becomes less precise, for example if a legal text would build conditions on "should" instead of "shall" or similarly softened semantic turns. The following table classifies the most relevant WTO's legal articles:

Free trade promotion, liberalism	Environmental exeptions
Art I Art III Art V Art XI	Art XX GATS Art XIV

Table 1 [65]

In short, legalization is the manifestation of liberal and environmental motives. This manifestation is best visible in the (often conflicting) verdicts passed by the DSB. The point is to lead over from the underlying ideology via the legal manifestation to an interpretation of the importance and consequences connected to these verdicts. In turn, it should become clearer if environmental liberalism is really a growing force behind the modus operandi of the WTO. Since the verdicts are passed on a case-to-case precedence system, the main focus will have to lie on the outcomes and specific deliberations within the cases.

Therefore, the study is principally qualitative and descriptive in character and the development of liberalism and legalization are often displayed intertwined. Overall, this research setup is bound by the cases and narrow focus on the WTO

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[63] E.g. settling disputes and reaching consensus over compromises.

[64] Generally speaking, assuming a trend bearing the (frictional) interplay of hard and soft law, which in turn yields factual and normative effects, this case study is a combination of analysing the phraseology of law to both effects. In other words, hard empirical evidence (the law as it is written with all its explicit demands and rules) derived from text analysis is intertwined with "between-the-lines" effects that arise from both low-precision phrasing as well as an implicit pressure to comply.

[65] Except GATS Art.XIV all other Articles stem from GATT 1994. Other agreements sometimes play a role, too, however this table features only the most important and re-occurring basic legal Articles to operationalize the trend of environmental liberalism and gain understanding of the principles behind the verdicts. Other agreements will be listed in the final case-by-case analysis, when relevant. For a summary see page 21.

(no other agencies, organizations or similar forms of agreement-making are addressed here) rather than being unnecessarily constrained by rigid theory[66]. The shifting and often contradictory realities of global trade[67], trans-national environmental negotiations, sovereignty issues, and all that lies in the overlaps between them should best be viewed through a set of theories and concepts attempting to comprehend a pluralistic reality rather than sorting facts into immovable columns of knowledge.[68] In the following a theoretical and conceptual framework will be introduced that meets these requirements.

[66] See Wohlmeyer, 2002, chapter 1 and 7: The overall expansion and increased complexity that is brought to the table of the WTO by increased free trade and specialization often bears with it a raised cost for sustainable development, complex system competition (welfare vs. laizzes faire). Free trade also incurs costs on social standards and ecological standards. For this essay the focus on the rulings has to suffice when pointing out the change in agenda, simply because the overall circumstances are much too large and complex to comprehend, let alone being displayed on a few dozen pages. The loss of precision would render this effort pointless.

[67] See MSF, 2012. A good example for the interdependency of issue areas is ACTA, which, intended for countering media piracy, would have had an impact even on the global medical community. *Medicins Sans Frontieres* had issued a paper warning of the negative effects of copyright regulations on their humanitarian work (e.g. international accessibility of drugs).

[68] This author follows a general tendency to describe reality in more relative terms (as opposed to the often criticized realist school), though without losing sight of scientific objectivist demands set, not in the least, by the topic itself.

2 The theoretical framework

2.1 Liberal Environmentalism

"The norms of liberal environmentalism predicate international environmental protection on the promotion and maintenance of a liberal economic order."[69]

This is the bottom line of liberal environmentalism, summing up the relationship between nature (in the widest sense of the term) and the global economic aspiration (in the most unbiased sense of the term). Bernstein goes on to elaborate and further clarify the "compromise of liberal environmentalism"[70], starting with its historical development:

Since norms are epitomized in the public perception of law they become fundamentally important to the institutionalization of policies, which in turn makes them central to governance per se. The transformation of international environmental norms[71] is laid out using three respective key moments in the history of said institutionalization.

The 1972 United Nations Conference on the Human Environment in Stockholm set the base line, which was followed by the World Commission on Environment and Development WCED[72] (1987), while the United Nations Conference on Environment and Development UNCED[73] (1992) marked the advent of liberal environmentalism.[74]

In Stockholm the essence was a weak compromise between acknowledging concerns about growth and environment, yet simultaneously seeing economic development and environmental protection as different, competing tasks. The Brundtland report raised the bar significantly, introducing *sustainability* and growth management as the focal points of future efforts. Economic growth was linked with environmental protection, signifying a fundamental quality when viewed against the further development of this credo. In Rio '92, the focus was set on Liberal Environmentalism, which in practice contains technical approaches to controlling and handling the economy-environment intersection. The polluter pays

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[69] Bernstein, 2002. p.1.
[70] Bernstein, 2002. p.1.
[71] From *environmental protection* via *managed sustainable growth* to *liberal environmentalism.*
[72] Informally called the Brundtland report. Expressions will be used interchangeably.
[73] Informally called the Rio '92. Expressions will be used interchangeably.
[74] The matrix is rounded with the use of three indicators assessing the change in certain areas: 1. State sovereignty and liability, 2. Political economy of environment and development, and 3. Environmental management.

principle, the precautionary principle, and the general (neoliberal-derived) disfavour of market-distortions[75] where brought to paper as the basis for institutionalized environmentally-sound global free trade. Environmental concerns had now been firmly framed within the economic order.

Practices and institutions elaborate on this basis: The World Bank accentuates private property and the linkage between economic growth and environmental protection, and the prevalence of win-win situations.[76]

IOs like the Organization for Economic Cooperation and Development (OECD) and UN Conference on Trade and Development (UNCTAD) have sponsored research on incentive-based policy instruments, and international protocols (e.g. the Montreal Protocol on ozone depletion[77]) have been put into operation.

Most significantly, the aforementioned Agenda21, the ever-growing and updated UN sustainable development roadmap for the 21st century[78], is focussing on market instruments for regulation efforts, certification and labelling in order to create market signals, and stressing the state's sovereignty over resources.[79]

Particularly the Rio principle 12[80] is the basis for the WTO's focus on the amity of trade, international cooperation, and the environment.

The core of Bernstein's theory of liberal environmentalism builds upon the inherent friction between the norm-complexes of trade/economy on one side and the environment on the other. In his eyes, the framing and understanding of these issues (and all related cross-sections) is the basis of international environmental governance. The difficulties consequently arising - both in theory and in practice - are explicitly acknowledged.

Despite these difficulties, the framing of environmental issues against the backdrop of the economical order remains the prevalent modus operandi of

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[75] E.g. subsidies, import customs, protected branches, etc.

[76] See Mäler et al, 2005. chapter 23. There are model-dependent variations of reaching a growth-environment equilibrium in economic theory. Generally though, much depends on the mentioned win-win implementation, since productivity and abatement costs, respectively diminishing returns, are closely and inversely connected. To attain a social optimum regulations have to be placed infringing on the free market (e.g. emission taxes, investment subsidies, etc), which is realized through the assignment of property rights and consequent obligations and rights regarding the dual treatment of economic growth and environmental protection. Revenue created from environmental taxes can then be used to lower so-called distortionary taxes, which affect only parts of the population or goods in circulation (e.g. income taxes, specific product taxes etc.). This necessary compromise deviates from rigid economic liberalism demanding a "night-watchman" state, and from complete laizzes-faire policies. This displays the major distinctions of liberal environmentalism policy, which seeks a more reciprocal equilibrium.

[77] See UN Ozone Secretariat for detailed information (http://ozone.unep.org). This particular protocol is a much-recited example of international cooperation, being ratified by 197 countries and revised seven times for updates and controlling purposes.

[78] Agenda 21 has been modified at the Rio +5 (1997), Rio +10 (2002).

[79] See Bernstein 2002, p.7: Bernstein states that the sovereignty over resources is generally recognized as "the foundational norm of international environmental law".

[80] See UN, DESA, 2000: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development (…)". By this formulation the UN clearly stresses the need for free trade as a centre stone of environmental protection.

policy-making. The historical framing plays a large role in the persistent applicability of the theory throughout the decades. Even after a retreat of state authority in the 1980s, global influence diffusion to the lower stratospheres of power (i.e. NGOs, etc) has been met with state-centric reactions; institution-building remains therefore in the "confines of traditional sovereign-state diplomacy"[81].

The setting of cooperative actions within *inter-alia* accepted licensed norms is the most promising way to achieve adequate international policies (e.g. Kyoto protocol). On the other hand, purely market-rooted mechanisms can also lead to problematic situations in the absence of long-term goals and mechanism (e.g. the failure of a global forest protection scheme due to the short-sighted nature of certification logic).[82] Bernstein reveals further inherent contradictions within liberal environmentalism, such as the contradiction of the precautionary principle with free market ideals. While the environmental mechanisms of internalizing costs and the polluter pays principle (PPP) would be coherent with the precautionary principle it would simultaneously remove the burden of proof from the government, which could now discriminate between imported products on the grounds of health and safety uncertainties. That in turn, would stand in opposition to free market models requiring non-discrimination. Again, Bernstein uses the WTO as an example, citing the uneasy relationship between the BSP protocol and the SPS agreement.[83]

Notwithstanding some inherent paradoxes, global governance is being channelled towards liberal environmentalism through the normative character of institutions.[84] This character enables the integration of technical market solutions within the more intangible sphere of environmental protection. Therefore, liberal environmentalism creates market responses to environmental issues and simultaneously, constrains market values with trade-off solutions catering to the vital ecological effects.[85]

Viewed against the more rigid position of bioenvironmentalism, the character of liberal environmentalism becomes clearer. Bioenvironmentalists would stress a somewhat bleak view of inevitable global ecological collapse owed to the voracious human nature pushing the eco-system beyond its carrying capacity. Furthered growth and technological progress would not contribute to mending these problems, rather perpetuate them. Though this view acknowledges the need for a certain level of institutionalism to counter the "tragedy of the commons"[86],

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[81] Bernstein, 2002. p.10.
[82] Bernstein, 2002. pp.12, 13.
[83] The BSP builds upon the precautionary principle while the WTO's SPS agreement demands scientific proof. See also Zelli, 2007, p.15. See also chapter 3 – asbestos case, this essay.
[84] See Bernstein pp.13,14: Bernstein explicitly remarks here on the shortcomings of realism, which truncates the realities of institutions by merely focussing on their design while taking values and promoted norms as a given.
[85] Bernstein, 2002. p.14.
[86] See Clapp et al, 2005, chapter 1: A term coined by Garrett Hardin in 1968, describing the eventual ecological demise of the majority caused by the egocentric, profit-maximizing actions of few people.

the liberal economic system is not the solution to the problem as it aggravates the situation through rising consumption in spite of finite resources.[87]

Nevertheless, liberal environmental policy reactions are nestled within the economic system and have developed in conjunction with legitimate grounding in the broader social context, making them so successful.[88] Liberal environmentalism as a policy-making-basis holds the highest compatibility level with the global realities.

Bernstein's theory is, in a wider sense, discourse analysis, focussing on the interchange of international institutions, nation-states, global environmental problems and how this interchange is expressed between the lines of debate. It does not go as far as Ecogovernmentality[89], for example, which concentrates on the (national) discourse level in policy-making and the analysis of how social relations with nature are managed and regulated. Both theories are certainly connected in their wider context but sit at different analytical levels of perspective. Liberal environmentalism does not explicitly touch on issues below e.g. the nation-state level, specific environmental conventions or individual behaviourist models; both pure discourse- and realist models are somewhat united to a border-crossing theory touching a bit on both spheres. It provides an opinionated, comparative sight on the issues and refrains from stating definitive or objective solutions. The theory provides both pros and contras for the point being made but remains decidedly undecided.[90] These particularities set it apart from pure discourse analysis usually laden with absolutely relative point of views.[91] Also, non-state actor participation is discounted off-hand in context of institution-building[92], which echoes reductionism as it does not take into account the precursory input and lobbying efforts by NGOs or private actors that can initiate such processes.

Then again, it is because of these idiosyncrasies that liberal environmentalism seems most befitting to the context of the WTO as it permits paradoxes and ironies inherent in the clash of economical growth and environmental degradation.

Others who have contributed to the field of critical international political economy (IPE) are, for example, Peter J. Newell, who has focussed on the intermingling of business and government (lobbying, new public management, international influence mechanisms between MNCs and states, etc.) [93] and Matthew Paterson with works on climate change in conjunction with policy

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[87] Clapp et al, 2005, pp.9-11, 115-117.
[88] Bernstein, 2002. p.8.
[89] See Luke and Rutherford in Darier, 1999 for the original thoughts on it: Ecogovernmentality is based of Focault's concepts of governmentality and biopower, which are applied to a state's inception of certain norms through shaping the discourse in its favour (e.g. EIAs).
[90] See Bernstein, 2002. p.11: "No claim has been made that liberal environmentalism is the optimum solution...".
[91] Liberal environmentalism does aim at the tangible realities as well s their expressions while (post-) modernist discourse analysis would concentrate on the expressions only (e.g. Michel Focault, Maarten Haajer, etc.).
[92] See Bernstein, 2002. p.10: This probably has to be understood in the context of the time of writing where governance issues where not as prevalent as they are now.
[93] Newell, et al, 2004.

models and market responses (post hegemonic structuring, carbon markets, ecological modernization, etc.) [94].

One critical view that needs to be addressed here is held by Robyn Eckersley. Since much of the present and future effort in the works on combating environmental degradation is done through MEAs, their legal status opposing the power of the WTO is of great importance. As things stand at the moment, so Eckersley, the MEAs have little legal margin to set up environmental rules independent from the trade focus and authority of the WTO. The WTO's Committee on Trade and Environment (CTE)[95] has so far only acted as a discussion forum but has failed to provide significant environmentally friendly trade rules. In case of doubt, the free trade regime gets the right of way; the WTO can challenge any MEA based on trade rules but not vice versa. That in turn, has lead to a "Big Chill"[96] effect, which is manifested in legislative impotence of MEAs.[97]

Whatever the view, the earlier mentioned normative side of liberal environmentalism manifests in legalization as it can be explained through the concept of *soft law*.[98]

2.2 Legalization, hard and soft law

To understand the WTO on has to turn to the system of international law. The following concepts will be used to analyze the cases and help with the operationalization, i.e. pointing out the change in the quality of decisions signified through their phrasing.

International law is fundamentally important to the fostering of regulated global cooperation and the civilized resolving of discordant situations. There is uncertainty though, connected to analyzing a state's motives behind international cooperation, either driven by straight-forward power politics or game-theory oriented opportunism to disengage cooperation, respectively free-rider states. All of these factors are contributed to realist thinking, while the institutionalist (and constructivist) side tends to analyse the outcomes of these interactions, i.e.

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[94] Paterson, 1996 and 2001.

[95] See Eckersley, 2004. p.25: Eckersley claims that the CTE follows its mandate in choosing the option, which is least infringing on free trade rights and proceedings over the environmentally sound one. She views liberal environmentalist control functions as inherently "disciplinary neoliberal" (emphasis in original).

[96] Eckersley, 2004. p.26.

[97] See Eckersley, 2004. p.27: This is apparent in a trend towards carefully truncating MEAs so as not to arouse legal conflict, self-censorship within the MEA negotiations, and a frozen discussion within the CTE on creating progress on the issue.

[98] See Bernstein, 2002. p.13: Bernstein mentions "new ideas (…) that may yet reveal and take advantage of contradictions in order to push for change." This can be seen as an implicit connection to the growth of soft law, as will be explained in more detail in the following.

international treaties, seeing them as more promising in giving answers.[99] Such, the focus on law, respectively legalization, unlocks a diagnostic tool, a conceptual brace with which global interaction through (environmental) policy-making can be explored and qualified.

Abbot, et al[100] define the concept of legalization in context of international relations. The level of legalized organizational association is expressed in three components: obligation, precision, and delegation. These components are variable in their reach (from low to high)[101]; and in detailing them, the vital importance of international law in general becomes clear.

Obligation describes the matter of conformity with international law, based on the principle of *pacta sunt servanda*[102]. Their implementation is based on *good faith*, while breaches of agreements are seen as creating *legal responsibility*. This responsibility can have different consequences, for example, reparations (by the breaching party) or self-help (withdrawal of concessions by the other party). The levels of obligation oscillate between unconditional, highly binding (e.g. The Vienna Convention on Diplomatic Relations) and, at the other end of the scale, non-legally-binding treaties (e.g. sustainable forest management conventions).[103] This indicator hints to some of the tensions between EMAs and trade rules regarding their compliance-strain.

Precision denotes the quality of phrasing and the available latitude in interpretation. This quality can range between rules and standards. A rule would be clearly defined and lead to a certain *ex ante* behaviour and reliance upon its gravitas. The higher the precision, the more confidence in its connotations will be set unto it (e.g. speed limits, building standards, etc.). A standard would tolerate a higher rate of *ex post* evaluations, stating more broadly a normative goal and allowing for interpretation and case-dependent variation. The Treaty of Rome is an example for employing both rules (to set binding market-pricing rules) and standards (allocating leverage to handle insecure future conduct, e.g. distortionary agreements).[104] In the context of international interaction, the relatively high level of imprecision is owed to the lack of judicial and administrative units, though in the case of the WTO (which is a strong international judicial body) there is a frequent use of imprecise terminology, nonetheless.

Delegation refers to the level of representation of an actor (in the WTO context mostly states) by a third party (e.g. court, arbitrator, administrations)[105]. The WTO is an actor expressing this evolvement legitimizing decentralized

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[99] Carter, 2007, pp.241 ff.
[100] Abbott, Keohane et al., 2000 in Goldstein et al, 2001, "Legalization and World Politics".
[101] See Goldstein et al, 2001, p20. (Figure 1): obligation can reach from non-legal to binding; precision from vague principle to highly elaborate; delegation from diplomacy to IO, respectively international courts.
[102] From Latin: 'agreements must be kept' (directly translated: 'served'). It means legalized international agreements are of binding character.
[103] See Goldstein et al, 2001, pp.24-28, and p26 (table 2) for the scale of obligation.
[104] Goldstein et al, 2001, pp.28-31.
[105] The higher the level of legal representation, for example through a binding dispute settlement court, the more evolved the level of legalization.

sanctions by states or simply ranking them, thereby creating considerable normative influence.[106] It automatically plays a role in the inception of environmental guidelines and standards in a disunited yet interdependent international community. Therefore, precision is the important factor in the analysis.

Abbott and Snidal have established the idea more detail[107], the role that hard and soft law can play in international governance: Legal reality is constituted by both covenants and contracts[108], a claim they build upon the progressional devolution of hard to soft law. If any of the three indicators is lessened in its absolute quality (which is the state where law is the 'hardest') the legal expression is 'softened' and its factual and normative powers altered. Vitally, the switch, or alteration, is not a binary matter, rather than a gradual process.[109]

The general assumption is that hard law is the basis for international law; it is of contractual nature, binding, credible, lowering transaction costs, and assuring parties in creating abovementioned ex ante reliance. The WTO DSB is named as an example for reducing enforcement cost, which is a major advantage of hard law regulations. In fact, the GATT system, which was characterized by relatively soft setup (provisional, containing a "lenient withdrawal clause"[110], and lacked comprehensive institutions) was upgraded to the WTO system precisely because of the advantages of hard(er) law.

However, there are downsides to hard law rules as well. International law is established to grant system reliability. Yet, it influences national law (e.g. CITES, European Court of Justice (ECJ))[111] and calls forth issues of sovereignty[112], content overlap[113], and distributional controversies[114] as it delegates the negotiations to the legal sphere; often incomplete contracts and long-term negotiations are the results as contracting costs are significant.[115]

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[106] Goldstein et al, 2001, pp.31-35.
[107] Abbott et al, 2000.
[108] The authors build their conceptualization on game and contracting theory and deliberately refrain from naming it a full-blown theory of law. For them the interest-rationales in creating (hard) laws (contracts) are interwoven with normative consequences (covenants) beyond the original motives. They oppose the antithetical character attributed to these terms by realists.
[109] See Abbott et al, 2000, p.424: The authors confer the notation of (O,P,D), respectively diminishing qualities in small letters (O becomes o) or absent ones in (-). For this thesis, that scheme is adopted only in meaning rather than copied directly. This is to avoid a blurring with their work as well as put focus on the tendencies and trends.
[110] See Abbott et al, 2000, p.436.
[111] See Abbott et al, 2000, pp.437/8: This infringement on state sovereignty often finds its expression in the "democratic deficit" or is personalized in the "faceless bureaucrats".
[112] See Barnett et al, 2004, chapter 1.II: The delegated, moral, and expert authority held by IOs constitutes the basis for their autonomous action, above and beyond their conferred mandate. This can lead to unforeseen and unwanted results for the delegating party. IOs can create circumstances in which states are forced along a path using e.g. NGOs as allies or can create new normative preferences for the state's future actions.
[113] Many issue areas overlap in content, particularly environmental ones (technology, sociology, law, trade, etc.).
[114] In other words, who regulates what and how is security provided. This issue is closely connected to the one of sovereignty.
[115] Abbott et al, 2000, pp.430-436.

Consequently, soft law is employed to alleviate some of these matters. Abbott and Snidal argue for soft law being a rational adaption to uncertainty over the future and/or the contemporary situation. It allows for "'easy' gains"[116] at the time of negotiation and shorter negotiation periods. Since soft law regulation foregoes detailed and precise phrasing, the need for both central adjudication and highly delegated mechanisms is reduced. It also furthers individual and collective learning processes in providing a basic framework upon which new information can be processed and legislation can be hardened when the time is right.[117] Especially if the degree of divergent ideas and motives is high, soft law fosters compromise. Furthermore, if a country's legalized infrastructure is under-developed, as is often the case in developing countries or transitional economies, a soft standard can guide through a phase-in interlude.[118]

In short, the imprecision is deliberate to handle divergent ideas and uncertainty as well as foster discourse (e.g. WTO services agreement[119]). This has led to a trend of soft law phrasings creeping into elaborately legalized organizations, a trend that Mary Footer has elaborated on in more detail.[120]

As Abbott's and Snidal's conceptualization offers only relatively abstract levels of analysis, Footer allows for the legal perspective on more concrete cases of soft law within the WTO at large. In detail, she provides a more practical basis to understand the influence of legalization in the WTO's environmental agenda with a wide-ranging definition of soft law, encompassing substantive (legal soft law), as well as procedural soft law (results from DSB, council, committee meetings)[121]. She explicitly relates her analysis of the "'twilight' between law and politics"[122] to Abbott and Snidal's functionalist concept and consequently identifies five different reasons/functions for soft law to appear in the WTO:

Firstly, it provides elaboration on hard law treaties and therefore guidance on the interpretation of them. It can act as precursor to hard law, as well as it helps with the normative framing of the hard rules. Thirdly, the exogenous "rule-sourcing" is pointing at the interdependency of WTO law and international treaties.[123] Soft law can be vital in abating the impact of hard law rules to bridge

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[116] Abbott et al, 2000, p. 444.
[117] See Abbott et al, 2000, p. 443: e.g. the Vienna Ozone Convention. However it is important to understand that soft law does not necessarily exist as a precursor to hard law only. It can continue to exist in its imprecise state.
[118] Abbott et al, 2000, p. 440. Prominent examples for soft(er) treaties are the OECD's Financial Action Task Force (issuing recommendations, peer reviews), the SALT treaty (highly binding but displays minimal delegation), and even NATO (lower level of precision and delegation in arrangements).
[119] Abbott et al, 2000, p. 454.
[120] Footer, 2010.
[121] See Footer, 2010, pp.244-247: Generally, legal scholars often resort to divide law into primary and secondary character. Primary soft law would be, for example, a recommendation by the ministerial conference to all members, while secondary soft law would be the specific case-dependent comments on the application of primary norms (e.g. DSB rulings). However, Footer resorts to not making such distinction and neither shall it be adopted in this essay to avoid complication of the subject. The trend in terms of IR is not reliant upon this legal typology.
[122] Footer, 2010, p.246.
[123] This is primarily important when viewing the earlier mentioned MEA developments in regard to WTO power and a harmonization process between the two.

the gap between members created by treaty obligations (e.g. ACTA), a so-called constraining effect[124]. Finally, issues of responsibility of formulations, and conflictual consequences of such (e.g. conflict diamonds and WTO exceptions for banning their trade[125]) are raised.[126]

Overall, Footer argues that soft law has been existential in creating GATT and then, after a trend towards hard law, has made are return to the WTO regulations.

Legalization, as has become clear now, is not a concept that can be laid aside when analyzing the workings of the WTO. All of the decisions are to varying degrees bound to political decisions and consequences; and the liberal traits of the WTO environmental agenda are ultimately expressed through legal terms (both hard and soft).

[124] Today, the ACTA treaty has been rejected be EU members due to much public protest regarding its questionable consequences for civil liberties.
[125] See Footer, 2010, p.274: Based on the non-binding *Kimberley Process Certification Scheme* (KPCS), members can ban the import of conflict diamonds, creating the precedent of a direct clash of normative and prohibitive law (GATT 1994 Art I (MFN) and Art XI:I and XIII (quantitative restrictions)).
[126] Footer, 2010, pp. 264-274.

3 The WTO cases and patterns – the empirical analysis

All examples will be scrutinized under the premise of abovementioned theoretical and conceptual brace. For every case, a table will be presented displaying the main articles involved in the dispute, their relation to an ideology/theory, and the result of the verdict (including the general level of precision in the texts, from low 1 (soft law) to high 5 (hard law).[127] This should enable the reader to follow the significance of liberal environmentalism more easily. For the sake of accessibility, most of the legal formulations are to be found (underlined) in the footnotes so as not to distract from the central trains of deliberation. For the sake of comprehensiveness, it shall be mentioned that the WTO is explicitly connected to environmental concerns in various treaties and legal principles, including and beyond the cases analyzed.[128]

3.1 Tuna-Dolphin 1 – 1991 (GATT case DS21/R - 39S/155)

Although it was handled under the old GATT rules of dispute settlement, the Tuna-Dolphin 1 case is almost a classic opener for any analysis aiming to understand the WTO environmental agenda, since it put the trade and environment issue on display like no other process before.

In 1991, the US, in their view legitimized by provisions[129] of the US Marine Mammal Protection Act (MMPA, 1972[130]), embargoed the import of tuna from

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[127] See basics, Table 1. The indicator of precision of used to denote the general quality of phrasings within the verdicts and deliberations leading up to them. It marks the level of ambivalence when the DSB unites trade laws and environmental exemptions: The higher the precision, the more clearly are the verdicts stated, while low precision points to an (often incongrous) attempt to abate the trade-environment conflict in the verdicts. For example, if the verdict is based on trade rules and the precision is high it is a clear indicator for liberal environmentalism, pointing to a prioritization of economy over nature.

[128] There are general non-discrimination exceptions and environment- and health-protection goals/methods listed in: GATS Art XIV, GATT Art. XX, TRIPS 27.2 (regarding patents and biological exclusions to protect life), SPS Agreement - SPS 2 (balance between trade and protection of life), TBT (conformity assessment procedures regarding life), The Agreement on Subsidies and Countervailing Measures (exemptions for developing countries), The Agreement on Agriculture (food donations in the context of subsidies and tariffication). The WTO structural make-up treated in chapter 1.1.2 is often, particularly in respect to the inherent Art. XX and Art. I, III, XI conflicts, the basis for understanding many of the cases evaluated below.

[129] Domestic provisions stated by-catch quotas of 20,500 dolphins per year.

Mexico[131], caught in the Eastern Tropical Pacific Ocean. Due to certain fishing techniques[132] prohibited by the MMPA, fisheries would cause the demise of numerous dolphins when harvesting tuna. Mexico appealed to the WTO, based on inconsistencies (mostly) with GATT Art III.4[133], stating the import ban being a quantitative restriction and therefore unwarranted. The US, in turn, argued for consistency with Art III.4, the ban being an internal regulation, and, moreover being covered by the environmental reasons for exception stipulated in Art XX (b) and (g).

Significantly, the first half of the legal battle was mostly concerned with Arts. III and XI, while Art XX followed as a 'second line of defence' of US justification. The panel ruled in the following approach and logic:

1. The provisions stipulated in Art III, particularly the Annex Note regarding Art III.4[134], were understood in a manner that the US was inconsistent with its approach and the Mexican argument of a discriminatory import ban was sustained. It was argued that tuna (and the respective fishing techniques) was not regulated as a product in the MMPA but only as a technical matter of harvest extraction, a process. [135] [136] The direct import ban was clearly identified as a non-internal affair and thus unjustified.

2. The panel furthermore ruled that the MMPA restrictions were corresponding to Art XI.1[137], which denotes the definition of restrictions between member countries. Therefore, neither the Mexicans nor the intermediary countries could be justifiably held under embargo.

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[130] See US - MMPA, 1972, 16 U.S.C. 1385: The 2007 revised version of the 1972 act now features clearer definitions on tuna as a product as a consequence to the uncertainties of this case.

[131] Intermediary countries, i.e. concerned with processing of Mexican tuna, were also involved: Costa Rica, Italy, Japan, and Spain, and earlier France, the Netherlands Antilles, the United Kingdom, Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations.

[132] This regards the ban of *pure seine* fishing, where a boat encircles the fish school and draws up the net of confused fish. Since dolphins swim often above a tuna school, basically acting as a marker for tuna, they are at particular risk of being captured to no further end than death.

[133] WTO - GATT, 1994, Art III.4: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." (Emphasis added for relevant parts, as will be done consequently through underlining.).

[134] WTO - GATT, 1994, Annex Ad Art III.4, excerpt: Any internal tax or other internal charge, or any law, regulation (…) which applies to an imported product (…) is nevertheless to be regarded as an internal tax or other internal charge (…) and is accordingly subject to the provisions of Article III.

[135] WTO - Report of the Panel (DS21/R - 39S/155), 1991, paragraphs. 5.2-5.19.

[136] See http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm: Consequently, this issue set precedence for the product – process differentiation.

[137] WTO – GATT, 1994, Art XI.1: "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.".

3. As far as Art XX was concerned[138], paragraph (b) was not an appropriate exception, because the measure was not 'necessary' for two reasons: there was an alternative in an international dolphin protection agreement and the MMPA restrictions were based on US catching levels, creating an unreliable compliance demand for Mexico[139]. In addition, paragraph (g) was rendered ineffective, since a WTO-wide implementation of such extra-jurisdictional standards as proposed by the US would mean that "each contracting party could unilaterally determine the conservation policies"[140] for others who would have to follow. Yet, any measures have to be applied in the domestic sphere only.

Overall, the panel report, which was never adopted due to old GATT rules[141] and Mexico not pressing for it, was a lost one for environmental protection. Despite the fact that the panel recognized dolphins as an exhaustible resource (Art XX (g)) it concentrated on the legalities of trade restrictions and distributional issues, i.e. the incompatibility of extraterritorial action with GATT law.

Liberal Environmentalism	Environmental protection	Precision	Verdict based on
Art III Art XI	Art XX	5	Art III Art XI

Table 2

3.2 Shrimp-Turtle – 1998 (WTO case 58, 61)

The Shrimp-Turtle case can be seen as the first proper trade-versus-environment ruling enacted under the DSB system and deliberately framing judgement around Art XX. The US executed an import ban of shrimps from India, Pakistan, Malaysia, and Thailand. Their harvesting of shrimp was carried out without protective Turtle Excluder Devices (TEDs) and such, the embargo was legally based on the aim of protecting endangered sea turtles (US Endangered Species

[138] WTO - Report of the Panel (DS21/R - 39S/155), 1991, paragraphs. 5.22-5.24.
[139] Ibid, para.5.28: The panel referred explicitly to "incidental dolphin rates" being set as a base line by the US. The Mexicans could not know of the right or wrong of their quotas.
[140] Ibid, para. 5.32.
[141] The WTO members had not had the duty to accept the panel's recommendations within a given time frame (nor at all, for that matter, as it is the case under the new DSB system). Such, the paper lingered in the netherworlds of bureaucratic channels until the parties settled out of court; mostly signifying the shortcoming of GATT dispute settlement rules. All the references made to GATT 1994 are to be found here since the old and new rules were fused in the GATT 1994 paper. GATT and WTO are used interchangeably as it is done on the WTO documents regarding the case.

Act, 1973[142]) and followed by the import restrictions stipulated in US public law section 609[143]. The targeted countries appealed (based on violation of Art XI:1) and the US resisted (based on Art XX). The DSB panel found the following answers:

1. The panel found that both Art I (MFN) and Art XI (quantitative restrictions) were indeed violated (a clear import restriction and not a tax) and the US action inconsistent with it.[144]

2. Further, judgement on the use of Art XX (b) (g) exemptions was passed in favour of the appealing nations. The panel decided to utilize the chapeau of Art XX – "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries" – to emphasize the discriminatory nature of the US import ban, which had only been enacted against some member countries. The 'environment paragraphs' (b) and (g) were hence not considered.

Consequently, the US appealed the case to the AB, which, though not sustaining the appeal[145], ruled with various remarkable alterations of the interpretation of the original DSB verdict.

1. Importantly, the AB illuminated the flaws of the panel's findings, namely a misunderstanding of the WTO's primary premise to upkeep the global trading system as something obligatory in interpreting and overruling Art XX.[146]

2. The Art XX chapeau and is set in equal relation to its paragraphs and the decision on what to refer to must be done in a case-by-case manner.[147]

3. The AB highlighted the section 609 demand for initiating international turtle protection agreements, giving a normative as well as mandatory frame to the Secretary of State.148 Such the connection of US law regarding MEAs to WTO framework had been made. Further, "environmental measures addressing transborder problems should, as far as possible, be based on an international

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[142] See US – Endangered Species Act, 1973. Sec 11 e, (4)(A) "All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.".
"'Take' means harassment, hunting, capture, killing or attempting to do any of these" See: http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm 14. May 2013.

[143] See US – Public Law 1989. 101-162, Section 609 (b) (1): "In General. - The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991 (…)".

[144] See WTO – Report of the Panel (WT/DS58/R), 1998, pp. 286, 287: "The embargo applied by the United States on the basis of Article 609 constitutes a prohibition or restriction on the importation of shrimp or shrimp products from the complainants and is not in the nature of a "duty, tax, or other charges" within the meaning of Article XI:1.".

[145] The US was still to be found involved in discriminatory measures, i.e. country-selective embargoes.

[146] See WTO - Appellate Body, 1998, WT/DS58/AB/R. p.43: "Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX.".

[147] Ibid, para. 159: "The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.".

[148] Ibid, para. 167.

consensus" and the respect to the shared goals between WTO and MEAs in general should be recognized.[149] In establishing the meaning of the term 'exhaustible natural resource' (Art XX (g)), the AB deliberately drew upon heavy-weight MEAs[150] to help with the interpretation of WTO law with international law. This step is done to avoid conflict and elaborate with softer law.[151]

4. Based on Art 23 of the DSU, the AB stretched the panel's duties to now receive also unsolicited advice from third parties (e.g. technical advice) in the form of so-called *amicus curiae*[152] briefs.[153] This essentially opened the door to NGO contributions in proceedings; however they are limited in influence, since the panel can still reject them. At least, it moved accountability politics into focus, concerned with exerting normative pressure on the policy-making body.[154]

Later on, the implementation of the multilateral agreement protecting sea turtles, which had been demanded from the US was appealed; the panel ruled in favour of the US, since they only had demanded 'negotiations' rather than an established agreement.[155] All in all, the AB principally acknowledged the right of member countries to impose 'environmental sanctions' of that kind as long as they were not of discriminatory nature between different countries. The language and interpretation was softened-up, the focus laid on (preferably) multilateral consent, and the AB underlined what had not been stated but rather lingered between the lines: nature and endangered species should be protected and the international community should work together on this.[156] However, one should not lose sight of the normative frame here: the wording of Art XX (b), specifically the word "necessary", is aimed at establishing the least trade restrictive environmental measure in context of WTO trade policy. [157] [158]

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[149] Ibid, para. 168. (emphasis added) These formulations signify quintessential soft law recommendation in connection with environmental cases.
[150] E.g. Agenda 21, Convention on the Conservation of Migratory Species of Wild Animals.
[151] Footer, 2010, p.262.
[152] From Latin, meaning "friend of the court".
[153] Ibid, paras. 33, 66, 79, 81.
[154] McMillan, 2001, p.89 ff. McMillan understands accountability politics as a sort of checks and balances system between governments and non-governmental actors. The ability for NGOs to participate in or at least overview the proceedings of IOs grants them certain leverage in holding the policy-makers morally accountable. Simply put, they act as a connector between the people and the governments of the world, IOs, etc.
[155] See http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm. 15. May 2013: Again, we witness a soft formulation being instrumental in shaping future discourse and action.
[156] Ibid, para. 185: "In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.".
[157] See Zelli, 2007, p12-15: Paragraph (g) does not contain such demand for a test, opening questions about applicability and consistency of both paragraphs.
[158] See Charnovitz, 1991 in McMillan, 2001: Since there is no warrant in drafting history for the interpretation of the article, as well as other implementation problems; logically, the future might hold different deductions from Art XX (b) by the DSB.

Liberal Environmentalism	Environmental protection	Precision	Verdict based on
Art I Art XI	Art XX	2	Art XX

Table 3

3.3 Asbestos case – 1998 (WTO case DS135)

Almost simultaneously with the turtle case events, France had banned asbestos and asbestos-containing products being imported from Canada[159], calling forth a dispute that involved the European Communities (EC) as a whole. Canada, feeling wronged in an economically important branch, filed for inconsistency with Articles 2 and 5 (SPS Agreement)[160], Article 2 (TBT Agreement)[161], and Articles III, XI, and XIII[162] (GATT 1994).[163] On the whole, the import ban would violate MFN principles as well as differential like-products treatment under the abovementioned regulations. The EC defended its actions with the damaging long-term effects of asbestos exposure, acting in a prototypical appreciation of the precautionary principle. Legally, the EC argued that the decree was not encompassed by SPS and either compatibility with GATT Art III: 4[164] or the exception of Art XX (b) (human health protection) would sustain their argument. Concisely summarized, the panel argued that:

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[159] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:147E:0223:0224:EN:PDF. 15. May 2013: Legally based on decree No. 96-1133 of 24 December 1996 (issued, pursuant to Labour and Consumer Code).

[160] See WTO – SPS, 1994. Art 2: "Basic Rights and Obligations"; particularly concerning the non-discrimination clauses in 2.3: "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade." And Art 5 " Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection".

[161] See WTO – TBT, 1994. Art 2: "Preparation, Adoption and Application of Technical Regulations by Central Government Bodies"; particularly 2.2: " In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products." and 2.5: " Whenever a technical regulation is prepared (…) it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.". A rebuttable presumption is fixing the terms of argument pro-actively; the law is assumed to be carrying unless proven otherwise.

[162] See WTO – GATT, 1994. Art XXIII "Nullification or Impairment": This regarded Canada's claim for impaired benefits due to the ban.

[163] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm. 15. May 2013.

[164] Ibid, Art III: 4: Regarding the no-less favourable treatment of like products imported from member countries.

1. The decree did only fall partially under the TBT agreement, since the panel viewed the import ban as a non-technical issue. The exceptions of the ban, however, did constitute such 'technical regulation' but as Canada did not file for claims regarding these exceptions the TBT relation was not pursued.[165]

2. There was a violation of Art III (chrysotile asbestos fibres and fibres are like products, being a substitute substance[166]) and also that at "the 'risk' criterion cannot be included among the criteria applicable to the determination of likeness"[167]. This represented a definitive blow to the health-based assessment prepared by the EC, which was based on potential risks as a decisive factor.

3. Since, however, the health risks of asbestos were internationally acknowledged by science and IOs alike, Art XX (b) as well as its chapeau were carrying. Human health was at risk and the ban therefore justified under said Article XX.[168]

4. Furthermore, in reference to claimed nullified Canadian benefits (Art XXIII) the panel put the burden of proof on the side of Canada, referring to certain *a priori* knowledge of issues connected to asbestos in general.[169] Again, there is an explicit mentioning of special (Art XX) circumstances overruling international trade motives.

Following a Canadian appeal, an AB was established in 2000, which went even further in its declarations[170]:

1. The AB upheld the general panel's ruling in favour of the EC argument, albeit with modified interpretative breadth. The dispute should have been analyzed under the TBT agreement since the measure is comprised of both prohibitive and permissive elements and such has to be seen an "integrated whole" and the ban as a technical measure.[171]

2. The examination of the likeness of products was up-rated to include the health risks posed by asbestos fibres. This is a very important step as the AB deliberately aimed its words beyond aspects of commercial competition as it is stated as a prerequisite for any likeness of purpose in GATT Art III: 4. The panel had solely focussed on these commercial aspects and therefore concluded likeness and consequent discrimination between them. The AB insisted on stating the

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[165] See WTO – Report of the Panel (WT/DS135/R), 2000. paras 8.63, 8.71, 8.72, 8.73.
[166] Ibid, para. 8.150.
[167] Ibid, para 8.149.
[168] Ibid, para 8.241: In the light of the above, the Panel concludes that the provisions of the Decree which violate Article III:4 of the GATT 1994 are justified under Article XX(b).
169 Ibid, para 8.278: "We conclude that, with respect to its claims of non-violation, Canada bears the primary burden of presenting a detailed justification for its claims" and para 8.282: "(…) because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b)".
[170] WTO - Appellate Body, 2001, WT/DS135/AB/R.
[171] Ibid, paras 66-71.

criteria of likeness only being instruments and that the whole set of criteria and evidence needs to be considered in analyzing likeness.[172]

3. The panel ruling regarding Art XX was upheld.

Critically, in this case the analysis of like-products is based on principles established by the *Working Party on Border Tax Adjustments* report[173], building on a case-to-case approach.[174] This, in turn, can be viewed as another example for the elaborative function of soft law, which, despite causing much disagreement, enables to clarify meanings and guide the interpretation of contract conventions.[175]

Both SPS and the TBT, with their PPM focus on labelling and demand for scientific proof of health and environment risks, "safeguard the interests of exporters"[176]; yet the AB ruling in respect to framing like-products beyond their commercial scope gives way to integrating into the analysis the factor of fear. This fear certainly would have to be founded on scientific evidence or standards but it would nonetheless contribute to establishing the precautionary principle as a contributing factor to commerce-environment disputes. Also, the burden of proof was laid unto the importing side[177], which is, as Canada has to proof the non-harmfulness of its products, another indicator for leaning towards said principle.

Liberal Environmentalism	Environmental protection	Precision	Verdict based on
SPS Art 2 TBT Art 2 GATT Art III Art XI Art XIII	GATT Art XX	3	Art XX

Table 4

3.4 Brazil tyres – 2005 (WTO case DS332)

In 2005, the EU launched a complaint to the DSB regarding a Brazilian import ban on retreaded tyres[178], which, so their argument, violated non-discrimination

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[172] Ibid, para 113.
[173] See WTO - Working Party on *Border Tax Adjustments* report, 1970, BISD 18S/97, para. 18.
[174] The four principles/criteria are: the properties, nature and quality of the product; the end-uses of the products; consumer's tastes and habits; and the tariff classification of the products.
[175] Footer, 2010, p.261.
[176] Zelli, 2007, p.34.
[177] WTO - Appellate Body, 2001, WT/DS135/AB/R, paras 118 ff.
[178] See Flapper et al, 2005. Pp.119-125: These are tyres that have been re-furbished with a new layer of rubber, saving up to 80 percent of material and being sold for roughly half the price compared to new tyres. This is a

and import-fine regulation clauses in Articles I:1, III:4, XI:1 and XIII:1 (GATT 1994). The ban excluded MERCOSUR imports of retreaded tyres[179.] Brazil argued for the ban being valid under Art XX (b) to "avoid the generation of unnecessary dangerous waste and reasonably deal with the disposal challenge".[180] The panel's ruling contained the following key factors:

1. In regard to Art XI[181] and Art III: 4[182]: the measures (fines, import prohibition) were deemed inconsistent with non-discrimination clauses.
2. The MERCOSUR exception under court conjunction was not arbitrary, since it did not undermine the objective of health protection. The amount of imported tires was regarded too low.[183]
3. In regard to Art. XX (b)[184]: Since the import ban and the fines constituted arbitrary or unjustifiable discrimination, not covered by the chapeau of Art XX[185], its use was deemed inconsistent as a valid exception. However, paragraph (b) was still important insofar that the measures were deemed 'necessary'.

After the EU had appealed, the AB's interpretation of the situation led to somewhat altered postulations once again:

1. The AB took an objective-based approach to judging arbitrary discrimination in used-tyre imports rather than a trade-based quantitative approach (panel). [186]
2. The decision to not find Art XX applicable as justification was upheld[187] but also gave the chapeau the upper hand over the following: the MERCOSUR exception resulted in discrimination[188] and the import of used tyres must be seen as a discriminatory factor of the import ban.[189]

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classic example of recycling that is both environmentally efficient as well as economically interesting. It is a process mostly applied to commercial vehicles and aircraft tyres.

[179] See WTO – Report of the Panel (WT/DS332/R), 2007, paras 2.13-2.16: Brazil was bound by an earlier MERCOSUR ruling (MERCOSUR Decision 22/2000), a presidential order (Decree 4.592 of 11 February 2003), and Brazilian law (Portaria SECEX 14/2004).

[180] Ibid, paras 4.3-4.7. For example, the tyres can be seen as cancerous waste and, left in the open, are a breeding ground for dengue-fever transmitting mosquitoes.

[181] Ibid, para 7.368.

[182] Ibid, para 7.447.

[183] Ibid paras 7.293-7.295.

[184] Ibid, paras 7.388-7.390.

[185] Ibid para 7.379: " the import ban falls within (…) paragraph (b) of Article XX, it cannot be justified under Article XX because it is applied inconsistently (…) under the chapeau".

[186] WTO - Appellate Body, 2007, WT/DS332/AB/R. para 244: "(…) from the point of view of the protection of human life or health, there is no difference between (…) a retreaded tyre produced in the European Communities and (…) a retreaded tyre produced in Brazil from a casing imported from the European Communities.".

[187] Ibid para 252: "(…) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings (…) that the Import Ban is not justified under Article XX of the GATT 1994.

[188] Ibid para 258 (ii): "the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX".

[189] Ibid para 258 (iv): "(…) the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX".

Significantly, the Panel decision is linked to the principles of the Basel convention[190] regarding the treatment of hazardous waste[191], bridging the gap to MEAs.

The AB's verdicts seem contradictory but have interesting connotations. Despite the essentially correct application of Art XX, Brazil did simply *not do enough* to cover its environmental and health protection scheme. It disregarded a complete ban (due to MERCOSUR contractual obligations[192]) and therefore discriminated. The "way of right" was such given to trade law; however, the implementation was environmentally significant after all:

Brazil was granted "a reasonable period of time"[193] to implement the WTO rulings, which is, in essence, programmatic soft law phrasing[194], aiding in the administration of technical schemes and developing domestic laws under implicit pressure to comply. By requiring the import ban to be total, the AB actually raised the importance of the environment issue over the free trade agenda, as well as putting emphasis on a total evaluation of facts in health questions.

The panel's and the AB's leaning towards holistic approaches[195], can be seen as preparatory soft law as well as an open door to measures that have effects, which are not immediately observable[196]; again, the precautionary principle might gain momentum.

Liberal Environmentalism	Environmental protection	Precision	Verdict based on
Art III Art XI Art XIII	Art XX	3	Art XI Art III

Table 5

[190] In full: "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal". See UNEP - Basel Convention, 1992.
[191] See WTO – Report of the Panel (WT/DS332/R), 2007, paras 7.81, 7.100.
[192] There is in fact a part in MERCOSUR law (Article 50(d) of the Treaty of Montevideo) that is similar to GATT Art XX, pointing out exemptions to protect human, animal or plant life and health. However Brazil has not applied it in its MERCOSUR negotiations, which raises questions about the environmental sincerity of the ban aimed at the EU.
[193] WTO – Arbitration, 2008, WT/DS332/16.
[194] See also Footer, 2010, pp. 272, 273. I n the Brazil case, the reasonable period expired in Dec 2008, yet Brazil had no harsh consequences to fear and complied eventually nine months later. This is an example of how soft law can work in preparing the ground for adaption.
[195] See WTO – Report of the Panel (WT/DS332/R), 2007, para 126: " the Panel might have opted for a more holistic approach to the measure (…) and whether that combined measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b)". and para 182: "The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.".
[196] Wiers, Jochem, 2009.

3.5 Renewable energy – 2010/11 (WTO cases DS412, 426)

In 2010, Japan argued for Art III. 4, 5[197] and TRIMs Art 2.1[198] violations concerning a Canadian domestic favour of products connected to the renewable energy production sector. Electricity was promised to be bought (by the Canadian state) at a premium as long as mostly Canadian-sourced technology was used, disadvantaging foreign imports. In 2011, the EU jumped aboard with a similar complaint targeting the Feed-in-Tariff Program (FIT).[199] In the following, the environmentally significant rulings are listed:

1. From the beginning the panel linked its analysis to international customary law[200] and the Vienna Convention[201].
2. The FIT was within the limits of the SCM agreement and a beneficial character of measures was not sufficiently established by Japan and the EU. [202] [203]
3. At the same time, though, Canada was found in breach of Art III GATT 1994 and TRIMs Art 2.1 Hence, the verdict was divided but generally the panel recommended Canada to amend it breaches.[204]

Upon consultation, the AB did not dwell on the SCM as a revolving point of commentary[205], following the panel's line of argument:

1. The favours awarded by the Canadian government where benefits and the panel ruling regarding those (see above point 3) is valid.[206]
2. The panel's line of declaring the FIT program being "direct funds" was reversed and seen as inconsistent with the SCM.[207] However, due to empirical shortcomings, a complete legal analysis was not continued.[208]

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[197] See WTO – GATT, 1994. Art III.5: This paragraph concerns the negation of internal (reads domestic) quantitative restrictions and the binding use of PPMs sourced from domestic manufacturers.
[198] WTO – TRIMS, 1996. Art 2.1: "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.".
[199] Both cases were concerning the same initial problem and handled by the same AB and are such treated in conjunction here.
[200] WTO – Report of the Panel (WT/DS412/R and WT/DS426/R), 2012, para 7.1: "(…) the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law" (emphasis in original).
[201] UN –The Vienna Convention on the Law of Treaties, Vienna, 23 May 1969.
[202] WTO – SCM, 1999. The SCM contains definitions of subsidies (particularly Art 2), important to this case.
[203] WTO – Report of the Panel (WT/DS412/R and WT/DS426/R), 2012, para 7.328.
[204] Ibid, paras 8.2-8.9 .
[205] WTO – Appellate Body, 2013, (WT/DS412/AB/R • WT/DS426/AB/R). Paras 5.246, 5.7, 5.8: "The Panel opted to commence the analysis with the claims under the GATT 1994 and the TRIMs Agreement. We see some practical value in following the same sequence as the Panel. Therefore, we decline Japan's request that we commence our evaluation with the allegations of error relating to the SCM Agreement.".
206 Ibid, para 6.1 (b): "the FIT Programme and related FIT and microFIT Contracts (…) are inconsistent with Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT 1994".

The important issue here is that the AB acknowledged the beneficial character of domestic financial aid, even if disguised as government's direct purchase. Particularly in the renewable energy sector, where competition is traditionally fierce, this verdict has considerable market-liberal connotations, since it moves the whole branch out from under the protective wing of subsidies and domestic market protection.[209] A government's agency in buying electricity ("with a view to commercial resale"[210]) is declared not to be covered by Art III.8(a) and therefore to be treated like any other business.[211] The government's power is therefore severely limited to public services.

As to how far the implementation of the panel recommendations will be adopted remains to be seen at this point.

Liberal Environmentalism	Environmental protection	Precision	Verdict based on
Art III TRIMs Art 2	---	5	Art III

Table 6

[207] Ibid, paras 5.79, 5.80: Particularly the interpretation of Minimum Domestic Content Levels is crucial as it dissects the technology from the product. Again, a process/product interpretation sets the basis for a legal verdict.

[208] Ibid, para 6.1 (d.1): The reason for this is that a direct transfer "negates the possibility that a transaction may fall under more than one type of financial contribution".

[209] EU trades spokesman John Clancy commented on the decision: “It has been made clear that the use of quality, cost-effective technologies should not be hampered by protectionist measures” and the promotion of renewable energy "must be done in a manner consistent with international trade rules.” See http://designbuildsource.com.au/canada-loses-wto-renewable-energy-appeal. 9. May 2013.

[210] WTO – Appellate Body, 2013, (WT/DS412/AB/R • WT/DS426/AB/R). Para 5.84

[211] Ibid, para 5.74: "Furthermore, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions. On the contrary, Article III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm's-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm's length.".

4 Conclusions

It has been established, that the environmental agenda of the WTO has developed in a straight way. From the onset little in its respect was visible, planned or executed in GATT; the regulations in general were of softer character to establish a functioning global trade system, first and foremost.
The 1991 Tuna case exemplifies the efforts to mitigate distributional issues infringing on sovereignty and calming the waves of international trade conflict. Any environmental concerns were not of considerable consequence and Bernstein's warning of the inaction of liberal environmentalism in the face of tough regulation rings true.[212]

With the establishment of the WTO the pro free-trade mandate was legally set in stone, yet at the same time, so were the exemptions to the discrimination clauses. Consequently, the rulings have become more fragmented and ambiguous; often containing recommendations (i.e. soft law) to unite different economic perceptions and political agendas. In the newest cases, a tendency to be pro-active, respectively precautionary in regard to (looming) environmental problems has become visible.

The seat turtle case contained some remarkable rulings by the AB. It allowed for (limited) NGO participation through amicus curiae briefs, opening the door for accountability politics. Furthermore, the explicit disentanglement of the WTO's major economic guidelines and the Art XX exemptions can be seen as a somewhat ground-breaking decision. At the same time, the normative focus was also laid on the symbiotic relation between multilateral economic and environmental solutions

The asbestos case shows a relatively extreme bias towards the precautionary principle and respective ruling. Since the detrimental effects to health are widely acknowledged any form of specific discrimination between products were foregone in favour of a total decree following a (perhaps politically) motivated fear of cancerous substances. Even the clear discrimination (under Art III) was laid aside in favour of the Art XX exception. This case made visible the importance of a case-by-case interpretation of established legal rules, as was

[212] Bernstein, 2000, p.14: The warning is founded on the notion that a focus on economical gains in the environmental liberalist agenda can suppress action if tougher trade-offs between the market and environmental protection are seen as generally detrimental.

shown in laying out the meaning of like-products, the attention to precautionary ruling, and the shift of burden of proof towards the importing party.

Brazil's situation, being caught up between international laws is exemplary of the general problems international environmental protection schemes have to face. The fragmentation of international law and the organizations behind this fragmentation find themselves in the role of having negative influence on trade policies as well as environmental-protection schemes. This is mostly due to the fact that there is no overruling IO, which could clear up such legal contradictions.[213]

The fact that the AB qualified the approach to environmental objectives and justifiable action in conjunction with the objective rather than employing a quantitative focus (i.e. trade-related; taken by the panel) is a clear sign of macerating hard law. In this case, the environmental concerns dominated the growth of trade.

It being the first WTO case involving a recycled product, it set precedence for future rulings in this branch.[214] It is noteworthy, that he panel's decision is deliberately connected to the most inclusive waste management MEA - the Basel Convention, underlining its demand for more holistic approaches.

Though the AB has made progress in defining the chapeau of Art XX more clearly, the Article still remains somewhat of a legal enigma as to its potentially limiting abilities on international trade as it is still interpreted case-by-case.

The ruling in the Canada/EU case in favour of an open global renewable energy market comes at a time when Europe ponders imposing large import customs on dumping-price photovoltaic panels from China. It should be expected that the precedence set in this case could have serious implications for future cases concerning renewables and climate issues. Perhaps this is a sign of a thaw in the Big Chill; climate issues are moving back onto the agenda. Surely, there is no explicit mentioning of environmental reasons, yet, along the lines of Bernstein's theory, the encouragement of a liberal economy does indeed predicate environmentalism – the state's regulatory power is strictly infringed. In this case, it is an implicit normative construct in the form of factual demands for free trade of environmental technology.
This is as a clear sign for underlying traits of liberal environmentalism as the economical decision, based on non-discriminatory free trade also happens to support environmental effects by raising competitiveness (subsidies as the mother of all free-trade malice). Interestingly enough, Art XX was not even mentioned,

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[213] UNEP could function as such a regulatory umbrella organization, as can bee seen in the establishment of the international ozone agreements. Yet, so far it seems caught in the process of finding its definitive role burdened by the lack of a mandate backed up with long-reaching, binding institutional arrangements. See also Carter, 2007, chapter 9.

[214] This is in line with Footer's analysis (on health and human rights issues) becoming increasingly of programmatic character. See Footer, 2010. p. 274, ff.

let alone applied in this case.[215] The quantitative restrictions treated in Art III[216] and the AB ruling regarding the SCM were the lynchpin of this proceeding.

In summary, the overall agenda has changed in favour of environmental protection, a fact that is underlined by the increasing use of softer regulations to achieve the gains stipulated by Abbot, Snidal, and Footer. Also, the interwoven character of hard law stipulation with their wider normative association is definitely to be found, making it a complex venture to distinguish between written law and implicit standard. Yet, the motivation seems to sway between market ideals and environmentalism, as the DSB's verdicts are passed ad hoc.[217] What can be scoped is a certain politicization of legislation as precautionary specifications are increasingly manifested in the verdicts. Also, different fields of topic are addressed differently: while health issues have been in the focus for along time (and the most change was visible in this field), the area of animal protection has lost significance over time. Climate change regulation, which is the preeminent one regarding the complexity of issues involved, had almost disappeared from the agenda, at least until the ruling in the Canada-Japan/EU case.

Institutional fragmentation (contradictions of international law and jurisdiction) is mirrored here, as well as inherent contradictions of liberal environmentalism, which is a definitive underlying theme. Liberal Environmentalism, though substantially rooted, is definitely not the only trend, with its raison d'être limited to grander schemes of economic regulation. It clashes with verdicts that have been passed in favour of environmental protection disadvantaging free trade, both explicitly so and setting a normative frame. Though they have been passed connecting to trade rules they sometimes overruled them based on environmental ideals.

Moreover, increasing legalization presents its own merits[218] and pitfalls[219] to the environmental agenda. If one includes the particular legal uncertainties regarding the WTO-internal conflict of regulating the disputes, the picture becomes even less clear. To pass a definitive verdict on the hypothesis of liberalization of environmentalism would be uncorroborated by the facts and resemble, at worst, an approach based on guesses and projection. Future research needs to shed more light on other factors, such as the involvement of individuals, hidden political agendas, and the translation of normative frames into factual compliance. To establish a comprehensive picture of a holistic reality, a conflation of different points of views and researches needs to be achieved. Moreover, it shall be explicitly acknowledged that to focus on only five cases (though

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[215] Possibly the stretch to natural protection or human health would have been too precarious to sustain in court.
[216] The following agreements and legal texts were cited in this dispute: GATT 1994: Art. III:4, III:5, XXIII:1 Subsidies and Countervailing Measures: Art. 1.1, 3.1(b), 3.2, Trade-Related Investment Measures (TRIMs): Art. 2.1.
[217] As the legal system of the WTO is reliant on precedence cases there are always older rulings and deliberations being cited. The case-by-case decisions are coloured by these precedence but the ultimate decision is ad hoc.
[218] The increasing fundament of hard and soft law has proven helpful in establishing clearer lines of reasoning.
[219] Particularly the clash of different international laws is not making it easier to establish trends.

representative) may not be sufficient to establish a solid trend. Therefore, more cases should be analyzed[220] in view of their outcome and consequent implementation to substantiate these findings.

As to the future of the WTO, the outlook is equally uncertain. With the ascension of the Brazilian Roberto Azevêdo as the next Director-General the cards are dealt anew and softer legislation might gain prominence.[221]

With the circulation of a proposed list[222] of future DSB items containing over fifty percent environment-related issues and Argentina simultaneously filing a dispute claim regarding biodiesel imports and marketing by the EU[223], one thing seems for certain - the trade-environment conflict as such is permanent.

[220] It could be interesting to perform such an analysis based on quantitative data. That way, many more cases would be surveyed and the qualitative opinion could be supported (or refuted) by the result.

[221] The developing countries are supposedly going to contribute over half of the global trade from this year and a newly set conference for December 2013 might see a departure from the all-or-nothing consensus approach the WTO has run in the DOHA rounds to bridge the North-South divide. This might have far-reaching implications for an environmental agenda, since the developing countries are traditionally lobbying for a more-encompassing environmental approach.

[222] WTO - WTO/AIR/4124, 2013.

[223] The list was circulated May 14th and the dispute claim on May 15th, 2013. The list is a collection of topics and the regard to possible environmental significance is estimated thereupon (e.g. European Communities – measures affecting the approval and marketing of biotech products: Status report by the European Union (wt/ds291/37/add.64)).

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