Trade, Environment and Sovereignty:

Developing Coherence between WTO Law, International Environmental Law and General International Law

PhD Thesis

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Summary

This thesis analyses the consistency of WTO law with international environmental law and general international law in the field of trade and environment. GATT obligations require trade measures to comply with national treatment (Article III) and most-favoured-nation treatment (Article I) and to prohibit import and export restrictions (Article XI). GATT exceptions permit measures to protect human, animal or plant life or health (Article XX(b)) and to conserve exhaustible natural resources (Article XX(g). This thesis analyses the consistency of unilateral and multilateral environmental measures with these GATT obligations and exceptions. It argues that the Article XX exceptions should be interpreted according to the proximity of interest between the country using trade restrictions and the environmental problem. It argues further that Article XX should be interpreted in accordance with customary international law regarding sovereign equality, non-intervention and the doctrine of necessity. Applying the principle of sovereign equality to WTO rights, this thesis proposes that WTO provisions be designed and interpreted to compensate for the economic inequality of WTO members in order to ensure equal access to WTO rights. Moreover, the principle of non-intervention should be applied in the WTO context to prohibit economic coercion. Unilateral environmental trade restrictions fail both tests. They use economic coercion to intervene in the internal affairs of sovereign States and are available in practice only to countries with significant market power. However, the doctrine of necessity may be invoked to excuse the non-observance of WTO and other international obligations to permit the use of trade restrictions to address urgent environmental problems with which the enacting country has a jurisdictional nexus.

Certificate

This thesis is submitted to Bond University in fulfillment of the requirements for the Degree of Doctor of Philosophy.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgment is made.

Signature: ..... Date: .....

For my family, Kip, Cathy, Brenda, Wayne, Cecil, Jennifer, Adam, Tionne, and Jaiden.

Contents

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'Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?' (2002) 9 *Tulsa Journal of International and Comparative Law* 533.

'Reconciling Trade and Environment: A Legal Analysis of European and North American Approaches' (2000) 8 *Cardozo Journal of International and Comparative Law* 1.

'NAFTA and Environment: A Trade-Friendly Approach' (1994) 14 *Northwestern Journal of International Law and Business* 528.

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Chapter 1

Trade, Environment and the Evolution of WTO Law

I. Introduction

The academic debate in the field of trade and environment is a relatively recent phenomenon. The early 1970s saw significant international legal developments regarding the intersection of trade and environmental issues, notably the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES').[1] International efforts to address environmental concerns on a global basis also began in this period, the most notable being the *Declaration of the United Nations Conference on the Human Environment*.[2] Prior to this period, international environmental protection efforts generally took the form of agreements to conserve exhaustible natural resources for their economic value, rather than their ecological value.[3] Thus, in 1947, the *General Agreement on Tariffs and Trade* ('GATT')[4] made room for the conservation of exhaustible natural resources by providing a general exception to GATT obligations in

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[1] *Convention on Intern ational Trade in Endangered Species of Wild Fauna and Flora* (Washington), opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975).
[2] *Declaration of the United Nations Conference on the Human Environment* (Stockholm), (1972) UN Doc. A/CONF/48/14/REV.1.
[3] See for example *Convention for the Protection of Birds Useful to Agriculture* (Paris), (1902) 102 BFSP 969 (entered into force 20 April 1908); *Treaty for the Preservation and Protection of Fur Seals* (Washington), (1911) 104 BFSP 175 (entered into force 15 December 1911); and *International Convention for the Regulation of Whaling* (Washington), (1946) 161 UNTS 72 (entered into force 10 November 1948).
[4] *General Agreement on Tariffs and Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

Article XX(g). However, the wording of this GATT provision did not limit the exception to conservation for economic value alone.

Article XX(g) was not tested in a modern environmental context until a GATT dispute occurred between Mexico and the United States over an American ban on Mexican tuna imports that was meant to protect dolphins from Mexican tuna fishermen.[5] This case raised a host of issues regarding the proper interpretation of GATT Article XX(g), as well as Article XX(b) (which permits measures necessary to protect humans, animals and plants). The GATT panel struck down the American measure as a violation of GATT obligations and ruled that it did not fit either exception. This 1991 decision, together with the numerous academic articles the dispute spawned,[6] marks the beginning of sustained academic interest in the trade and environment debate.[7]

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[5] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted).

[6] The following research on trade and environment was published from 1990 to 1992: K Anderson and R Blackhurst (eds), *The Greening of World Trade Issues* (1992); J Adcock and J Kildow, 'Environment and the Trading System' (1992) 16 *Fletcher Forum of World Affairs* 55; Barr, Honeywell and Stofel, 'Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement' (1991) 14 *Houston Journal of International Law* 1; P Bergeijk, 'International Trade and the Environmental Challenge' (1991) 25 *Journal of World Trade* 105; S Charnovitz, 'Exploring the Environmental Exceptions in GATT Article 20' (1991) 25 *Journal of World Trade* 37; E Christensen and S Geffin, 'GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System' (1991-92) 23 *University of Miami Inter-American Law Review* 569; GATT Secretariat, *Trade and the Environment* (1992); J Jackson, 'Dolphins and Hormones: GATT and the Legal Environment for International Trade after the Uruguay Round' (1992) 14 *University of Arkansas at Little Rock Law Journal* 429; S Kass and M Gerrard, 'International Trade (Environmental Developments)' (1992) 207 *New York Law Journal* 3; C F Knight, 'Effects of National Environmental Regulation on International Trade and Investment - Selected Issues' (1991) *UCLA Pacific Basin Law Journal* 212; J McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order* (LL M Thesis, Faculty of Law, Lewis & Clark University, Oregon); T McDorman, 'The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles' (1991) 24 *George Washington Journal of International Law and Economics* 477; T McDorman, 'The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts' (1992) 17 *North Carolina Journal of International Law and Commercial Regulation* 461; M McKeith, 'The Environment and Free Trade: Meeting Halfway at the Mexican Border' (1991) 10 *UCLA Pacific Basin Law Journal* 183; K McSlarrow, 'International Trade and the Environment: Building a Framework for Conflict Resolution' (1991) 21 *Environmental Law Reporter* 10589; P Menyasz,

A central issue in the trade and environment debate concerns the use of trade barriers by one country to induce changes in the environmental policies of another. Such trade barriers might be used in the context of a multilateral environmental agreement ('MEA'), such as CITES, which requires restrictions on trade in endangered species, or the *Montreal Protocol on Substances that Deplete the Ozone Layer*,[8] which requires signatories to restrict trade in ozone-depleting chemicals.[9] When such trade barriers are applied to other signatories of the same MEA, their use is not controversial. However, when trade barriers are imposed unilaterally by one country to induce another country to

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'Trade Law as Environmental Weapon Stirs Controversy' (1992) 3 *Environmental Policy and Law* 20; E Patterson, 'International Trade and the Environment: Institutional Solutions' (1991) 21 *Environmental Law Reporter* 10599; E-U Petersmann, 'Trade Policy, Environmental Policy and GATT: Why Trade Rules and Environmental Rules Should Be Mutually Consistent' (1991) 46 *Aussenwirtschaft* 197; C F Runge, 'Trade Protectionism and Environmental Regulations: the New Nontariff Barriers' (1990) 11 *Northwestern Journal of International Law and Business* 47; J O Saunders, 'Legal Aspects of Trade and Sustainable Development' in J O Saunders (ed), *The Legal Challenge of Sustainable Development* (1990) 370; S Shrybman, 'International Trade and the Environment: An Environmental Assessment of the General Agreement on Tarriffs and Trade' (1990) 20 *The Ecologist* 30; S Shrybman, *Paying the Price: How Free Trade is Hurting the Environment, Regional Development, Canadian and Mexican Workers* (1991); J Tobey, 'The Effects of Domestic Environmental Policies on the Patterns of World Trade: An Empirical Test' (1990) 43 *Kyklos* 191; D Wirth, 'A Matchmaker's Challenge: Marrying International Law and American Environmental Law' (1992) 32 *Virginia Journal of International Law* 377; and P Low (ed), *International Trade and the Environment*, World Bank Discussion Papers No. 159 (1992).

[7] In the 1980s, relatively little was published on the topic of trade and environment. See Canadian Environmental Advisory Committee, *Freer Trade and the Environment* (1986); D Hunter, 'The Comparative Effects of Environmental Legislation in a North American Free Trade Agreement' (1986-87) 11-12 *Canada-United States Law Journal* 271; W Lang, 'Environmental Protection: The Challenge for International Law' (1986) 20 *Journal of World Trade Law* 489; O Lomas, 'Environmental Protection, Economic Conflict and the European Community' (1988) 33 *McGill Law Journal* 506; L Lones, 'The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation' (1989) 22 *Vanderbilt Journal of Transnational Law* 997; M Prieur, 'Environmental Regulations and Foreign Trade Aspects' (1987) 3 *Florida International Law Journal* 85; and S Rubin and T Graham (eds) *Environment and Trade: The Relation of International Trade and Environmental Policy* (1984).

[8] *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, UKTS 19 (1990) (entered into force 1 January 1989).

[9] For a complete summary of MEAs that contain trade measures, see, *Matrix on Trade Measures Pursuant to Selected MEAs*, WTO Doc WT/CTE/W/160 (2000). See below n 42 for a summary of these MEAs.

change its domestic environmental law, the matter becomes much more complicated, both in terms of international politics and international law.

Two rulings of the WTO Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*Shrimp I*' and '*Shrimp II*')[10] have tackled this issue by interpreting Article XX(g) so as to allow the United States to unilaterally impose trade barriers to pressure Malaysia to change its domestic environmental regime for the protection of sea turtles. These rulings have been described as a 'revolution in WTO jurisprudence'.[11] Given previous interpretations of Article XX(g) in the Mexican tuna cases[12] (which occurred under the old GATT dispute resolution system[13]), the conventional view held by many trade experts before the *Shrimp* rulings,[14] and the lack of consensus on this issue among the WTO membership,[15] a revolution has indeed occurred. The *Shrimp* rulings raise important questions regarding the proper interpretation of Article XX, the relationship between trade law, environmental law and the general

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[10] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[11] Louise de La Fayette, 'Case Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products' (2002) 96 *American Journal of International Law* 685, 685.

[12] *United States – Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not adopted), 30 ILM 1594 (1991) and *United States – Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not adopted), 33 ILM 839 (1994).

[13] Under the GATT system, consensus was required to adopt the recommendations of dispute panels, effectively giving each member a veto. Under the WTO system, consensus is required to reject the recommendations of panels or the Appellate Body, making it difficult to prevent adoption. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 16(4) and 17(14).

[14] See Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491.

[15] See Hakan Nordstrom and Scott Vaughan, WTO Special Studies, *Trade and Environment* (1999).

principles of public international law, and the role of the WTO judiciary in the development of international law. As such, these rulings have important implications not only in the field of trade and environment, but more generally in the realm of public international law and global governance.

The *Shrimp* 'revolution' suggests that the interplay between trade law and public international law will have significant consequences for the future evolution of both.[16] In recent years WTO jurisprudence[17] has increasingly turned to non-WTO sources of international law to interpret the provisions of the WTO Agreements.[18] The rulings in *Shrimp I* and *Shrimp II*, which examined several MEAs in the course of interpreting Article XX(g), are perhaps the most dramatic example of this trend. The ruling in favour of the use of trade measures to induce changes in the internal laws of a sovereign country challenged widely held views regarding principles of public international law such as the sovereign equality of states and the principle of non-intervention. At the same time, the WTO Appellate Body has taken the view that principles of public international law must

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16 Recognizing this reality, Sands made the following comment: 'It is astonishing…how many international lawyers have not heard of the Appellate Body of the WTO, never mind read any of its judgments. And how many of the traditional treatises on public international law simply exclude trade law altogether?' Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (Inaugural Public Lecture as Professor of Public Intemational Law, University of London, 6 June 2000) <http://www.nyu.edu/pubs/jilp/main/issues/33/pdf/33p.pdf> pp 527-559, 558, at 19 February 2003. With respect to the latter, he cites Jean Comacau and Serge Sur, *Droit International Public* (2d ed 1995); Mario Giuliano et al, *Diritto Internazionale* (3d ed 1991); David Ruzie, *Droit International Public* (14th ed 1999); and Malcolm N. Shaw, *International Law* (4th ed 1997).

17 See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body); *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9 (1996) (Report of the Panel) and WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

influence the interpretation of the WTO agreements. However, the relationship between international trade law and other branches of international law remains anything but clear.[19]

The potential impact of decisions rendered by the WTO judiciary on the evolution of different branches of international law raises the important issue of how best to allocate decision making authority between the legislative and judicial branches of the WTO and well as the limits of the WTO's authority vis-à-vis other international institutions. While many mechanisms are available to WTO members to clarify the relationship between WTO law and other sources of international law, the size and diversity of the WTO membership makes it increasingly difficult to achieve the necessary degree of consensus to make this happen through the legislative process.[20] Indeed, lack of progress in the WTO Committee on Trade and Environment on its mandate to clarify the relationship between international trade law and international environmental law was one of the elements that set the stage for the rulings in *Shrimp I* and *Shrimp II*.[21] In the absence of clear guidance from the legislature, the judiciary was left to fill in the gaps.

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[18] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1125 (1994).

[19] One author that has made an outstanding effort to put a dent in the monumental task of clarifying this relationship is Joost Pauwelyn. See Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535. Also see Donald McCrae, 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) 3 *Journal of International Economic Law* 27 and Donald McCrae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 *Recueil des Cours* 111.

[20] For a discussion of the international legislative process in the realm of public international law, see Paul C Szasz, *Selected Essays on Understanding International Institutions and the Legislative Process* (2001) (Edith Brown Weiss, ed), especially chapters 1 and 2.

[21] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 155. The WTO Committee on Trade and Environment (CTE) was established by the *Decision on Trade and Environment*,

In recent years, the difficulty of achieving consensus among the WTO membership has become increasingly evident. At the Third Ministerial Conference in Seattle in 1999, the members could not even agree on a negotiating agenda for what was to be the Millenium Round negotiations. At the Fourth Ministerial Conference in Doha in 2001, they barely managed to agree on the negotiating agenda. Among the more controversial items were agricultural subsidies and affordable access to patented medicines in the developing countries.[22] With respect to the latter issue, the severity of the AIDS crisis in many developing countries prompted a coalition of developing countries to insist on the resolution of this issue before they would agree to launch a new negotiating round.[23] Even so, one item—how to ensure countries that lack pharmaceutical manufacturing capacity have the same access to generic drugs as other WTO members—was left to be resolved by the end of 2002.[24] All but one WTO member (the United States) managed to agree on a solution by the due date, leaving unresolved an issue that had the potential to derail negotiation on the rest of the agenda at the Fifth Ministerial Conference in Cancun

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adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marakesh on 14 April 1994, in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994), 469. Working papers, reports and summaries of deliberations of the CTE are available at <www.wto.org>. Another multilateral forum for the analysis of trade and environment issues is the Joint Session of Trade and Environment Experts at the Organization for Economic Co-operation and Development. See <www.oecd.org>.

[22] *Ministerial Declaration, Fourth Ministerial Conference*, Doha, Qatar, adopted November 14, 2001, WT/MIN(01)/DEC/1, 20 November 2001, available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> at 30 June 2002.

[23] Steven Chase, 'Drug patent skirmish threatens WTO talks', *Globe and Mail* (Toronto), 9 November 2001, B6.

[24] World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, Adopted on 14 November 2001, WT/MIN(01)/DEC/2, 20 November 2001, paragraph 6, <http://www.wto.org> at 28 November 2001.

in 2003.[25] Fortunately, the matter was resolved shortly before the Cancun Ministerial.[26] However, the Cancun meeting met the same fate as the Seattle meeting, with WTO members failing to reach the consensus needed to move forward.

Another item placed on the negotiating agenda at the Doha Ministerial Conference is the issue of the relationship between the WTO and MEAs.[27] The controversy that erupted among the WTO membership over this issue in the wake of the *Shrimp II* ruling[28] apparently made the clarification of the relationship between the WTO Agreements and international environmental law a higher priority item for the members. It is an issue that tends to divide the membership along North-South lines, like the issues of access to medicine and agricultural subsidies. Combined with the complexity of the issues at stake,

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[25] Jeffrey Sparshot, 'United States' Refusal Thwarts WTO Drug-Patent Talks', *Washington Times*, 25 December 2002.

[26] *Decision of 30 August 2003, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc IP/C/W/405, <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003.

[27] See *Ministerial Declaration*, Fourth Ministerial Conference, Doha, Qatar, Adopted 14 November 2001, WTO Doc WT/MIN(01)/DEC/1, 20 November 2001, paragraph 31, <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> at 30 June 2002. The WTO website states:

> *Multilateral environmental agreements.* Ministers agreed to launch negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements. The negotiations will address how WTO rules are to apply to WTO members that are parties to environmental agreements.
> There are approximately 200 multilateral environmental agreements in place today. Only 20 of these contain trade provisions. They are discussed in the WTO's Committee on Trade and Environment (CTE).
> For example, the Montreal Protocol for the protection of the ozone layer applies restrictions on the production, consumption and export of aerosols containing chlorofluorocarbons (CFCs). The Basel Convention which controls trade or transportation of hazardous waste across international borders and the Convention on International Trade in Endangered Species are other multilateral environmental agreements containing trade provisions.
> The objective of the new negotiations will be to clarify the relationship between trade measures taken under the environmental agreements and WTO rules.
> So far no measure affecting trade taken under an environmental agreement has been challenged in the GATT-WTO system.
> *Information exchange.* Ministers agreed to negotiate procedures for regular information exchange between secretariats of multilateral environmental agreements and the WTO. Currently, the Trade and Environment Committee holds an information session with different secretariats of the multilateral environmental agreements once or twice a year to discuss the trade-related provisions in these environmental agreements and also their dispute settlement mechanisms. The new information exchange procedures may expand the scope of existing cooperation.
> *Observer status.* Overall, the situation concerning the granting of observer status in the WTO to other international governmental organizations is currently blocked for political reasons. In the Trade and Environment Committee itself, seven requests are pending, including one by a multilateral environmental agreement. The negotiations will aim at developing criteria for observership in WTO.

<http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#environment> at 30 June 2002.

this political reality raises doubts about the prospects of making any significant progress in this area during the Doha negotiating round.

Moreover, the boundaries of the negotiations in this area are narrowly restricted. The Doha Ministerial Declaration provides:

> 31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:
>
> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;[29]

The narrow scope of the WTO negotiations on this issue reflects a lack of consensus regarding the proper interpretation to give to WTO obligations with respect to global environmental issues and what actions may be required, if any.

This thesis will analyse the relationship between GATT, international environmental law, and public international law.[30] The central issue is whether the WTO needs to legislate clarifications in the wake of the *Shrimp* rulings, what changes are necessary, if any, and how to implement any decisions that might be taken. Unlike the Doha agenda, this thesis is not limited to examining the effect of WTO obligations among parties to MEAs. I also will examine the consistency of MEA measures applied to non-parties and unilateral measures taken in the absence of international agreement. While trade and environment is

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[28] See de La Fayette, above n 10.

[29] *Ministerial Declaration*, Fourth Ministerial Conference, Doha, Qatar, Adopted 14 November 2001, WTO Doc WT/MIN(01)/DEC/1, 20 November 2001, para 31, <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> at 30 June 2002.

the subject of this thesis, the aim is to make a contribution to developing further coherence between WTO law and the wider body of general international law.[31] The trade and environment debate serves as a vehicle for this analysis.

WTO agreements focus overwhelmingly on non-environmental issues among an economically diverse and geographically dispersed membership.[32] A relatively small number of disputes have arisen over the years regarding the application of GATT Article XX exceptions to trade measures to achieve health or environmental goals.[33] Some of

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[30] I will refer to public international law and general international law interchangeably, to denote the general body of international law that consists of treaty law and customary international law.

[31] None of the WTO agreements refer to the task of developing greater coherence between WTO law and the general body of international law. Art III(5) of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1125 (1994) directs the WTO to cooperate with the International Monetary Fund ('IMF') and the International Bank for Reconstruction and Development ('World Bank') 'with a view to achieving greater coherence in global policy-making'. At their first Conference in Singapore in December 1996, WTO Ministers adopted the *Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries*, WTO Doc WT/MIN(96)/14, which 'envisaged a closer cooperation between the WTO and other multilateral agencies assisting least-developed countries' in the area of trade. The organizations involved are the IMF, ITC, UNCTAD, UNDP, the World Bank and the WTO. In *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 17, the Appellate Body stated: '[The] general rule of interpretation [of Vienna Convention art 31] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.' Also see *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS50/AB/R (1997) (Report of the Appellate Body), para 46; *Japan—Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body), 10-12; and *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WTO Doc WT/DS99/R (1999) (Report of the Panel), para 6.13.

[32] See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1125 (1994). While the Preamble recognizes sustainable development and environmental protection as concerns that should be taken into account in the pursuit of trade liberalization, these references apply to the interpretation of the WTO Agreements, rather than impose obligations to protect the environment.

[33] Under GATT (1948–94), there were six disputes involving environmental measures or human health-related measures under GATT Article XX. Of the six panel reports that resulted, three were not adopted.

these involved measures ostensibly aimed at protecting the environment inside the enacting country.[34] Others involved measures aimed at changing the environmental policies of other WTO members.[35] Significantly, the Appellate Body has now interpreted the GATT to permit WTO members to use trade restrictions to influence environmental policy *outside* the importing nation's territory.[36]

See *United States — Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc 29S/91 (Report of the Panel Adopted 22 February 1982); *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988); *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report of the Panel Adopted 7 November 1990), 30 ILM 1122 (1991); *United States – Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report of the Panel not Adopted), 30 ILM 1594 (1991); *United States – Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report of the Panel not Adopted), 33 ILM 839 (1994); *United States — Taxes on Automobiles* (1994), (Report of the Panel not Adopted), 33 ILM 1399 (1994). Under the WTO (since 1995), there have been three such disputes. In all three, the panel reports were appealed to the Appellate Body, whose rulings were adopted. See *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9 (1996) (Report of the Panel), WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body); and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (2000) (Report of the Panel); WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body).

[34] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988); *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9 (1996) (Report of the Panel), WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body); and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (2000) (Report of the Panel); WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body).

[35] *United States – Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report of the Panel not Adopted), 30 ILM 1594 (1991); *United States – Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report of the Panel not Adopted), 33 ILM 839 (1994); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[36] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

The central objective of the WTO—trade liberalization—restricts the use of trade barriers, primarily through obligations regarding non-discrimination (national treatment[37] and most-favoured-nation treatment[38]) and the prohibition of import and export restrictions.[39] However, the GATT (and other WTO agreements) creates no general right of market access, but rather prohibits specific types of trade barriers.[40] Sustainable development is another objective of the WTO,[41] but it is not clear what that means nor how this objective fits in relation to trade liberalization. Key WTO provisions affecting the use of trade barriers to address environmental issues are found in GATT Article XX, the WTO Preamble, and the *Decision on Trade and Environment*. However, the limits these provisions place on the use of trade measures to achieve international environmental goals remain ambiguous.

[37] *General Agreement on Tariffs and Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), art III.
[38] Ibid, art I.
[39] Ibid, art XI.
[40] This is a key point, since it means that WTO members may deny market access as long as they do so in a way that does not violate their obligations or that fit exceptions to those obligations. On this point, see Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249, 257, Sanford E Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27 *Columbia Journal of Environmental Law* 383, 412, and Steve Charnovitz, 'Solving the Production and Processing Methods Puzzle' (2001) Graduate Institute of International Studies 51, 29-31.
[41] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), Preamble.

II. Issues Addressed in Thesis

The central issue in this thesis is to define the legal relationship between international institutions and agreements in the context of the international legal system to *avoid* conflicts between trade liberalization and global environmental protection. Once the legal relationship is defined, the need for law reform can be assessed. These topics in turn raise more general issues regarding the procedures and forums that should be used to achieve legal reforms in this field. The division of responsibility between the WTO judiciary and the 'legislative branch' is influenced by the (in)ability of the members to reach agreement and the legal effect of decisions taken by each. The link between WTO law, international environmental law and general international law raises issues regarding the appropriate international institution in which to resolve issues that involve all three fields of international law.

GATT limits the use of trade restrictions. Several MEAs require trade restrictions.[42] This raises the possibility that a trade restriction imposed under a MEA might be challenged

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[42] See *Matrix on Trade Measures Pursuant to Selected MEAs*, WTO Doc WT/CTE/W/160 (2000). This document lists the following MEAs that contain trade-related measures: (1) *International Convention for the Conservation of Atlantic Tunas*, opened for signature 14 May 1966, TIAS 6767 (entered into force 21 March 1969) (The Resolution by ICCAT Concerning an Action plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, 1994, Article f, recommends non-discriminatory trade restrictive measures; other recommendations relate to the import ban of specific products or products from specific countries.); *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (Washington), opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975) (CITES regulates trade in endangered species by defining the conditions under which import and export permits may be issued for three categories of protected species that are affected by trade: Appendix I (species threatened with extinction); Appendix II (species that may become threatened with extinction if trade is not controlled); and Appendix III (species subject to regulation in the jurisdiction of an individual party that requests co-operation in the control of its trade); (3) *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 19 ILM 837 (1980) (tracking trade flows of certain species); (4) *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, UKTS 19 (1990) (entered into force 1 January 1989) (Requires parties to ban trade in certain substances with non-parties that do not comply with the Protocol.); (5) *Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* (Basel), opened for signature 22 March

under the WTO. What if a party to the MEA challenges the trade restriction of another party to the MEA, at the WTO? What if a non-party challenges the trade restriction of a party to the MEA, at the WTO? Under what circumstances should a WTO member be allowed to unilaterally impose trade restrictions to persuade another WTO member to adopt a particular environmental policy? Who has jurisdiction to resolve such disputes and what should the outcomes be?

This thesis will assess the need for WTO reform as follows:

1. Are the current rules adequate to resolve conflicts between the GATT and MEA provisions, given interpretations by dispute panels and state practice?
2. Do the current rules support interpretations that obviate the need for reform?
3. If the current rules are inadequate, what changes are necessary?

1989, UN Doc EP/IG.80/3, 28 ILM 649 (1989) (Entered into force 24 May 1992) (*Inter alia*, requires export bans to countries that have import bans on specific types of hazardous waste and prohibits trade in certain waste with non-parties.); (6) *Convention on Biological Diversity*, opened for signature 5 June 1992, UNEP/bio.Div./CONF/L.2, 31 ILM 818 (1992) (entered into force 29 December 1993) (Article 10(b) requires parties to adopt 'measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity', but parties are free to choose the specific measures they will use and they are not required to use trade measures. Article 22 provides that the CBD shall not affect the rights and obligations of any party under existing international agreements, except when those rights and obligations would cause serious damage or threaten biological diversity. This provision could be interpreted as permitting trade measures.) (7) *Cartagena Protocol on Biosafety*, 29 January 2000, UNEP/CBD/ExCop/1/3, <http://www.biodiv.org/biosafe> at 23 October 2003 (Regulates procedures for the transboundary movement of Living Modified Organisms, without changing the rights and obligations of parties under other international agreements, including the WTO.); (8) *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, (1992) 31 ILM 849 (entered into force 21 March 1994) (Does not require trade measures, but they might be used to implement the agreement. Article 3.5 provides that 'measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade', which mirrors the language in the preamble (chapeau) of GATT Article XX.); (9) *Kyoto Protocol*, opened for signature 16 March 1998, <http://unfccc.int/resource/convkp.html>, at 4 November 2003 (Does not require trade restrictions, but provides for emissions trading and requires parties to implement policies and measures to minimize adverse effects on trade.); (10) *International Tropical Timber Agreement*, opened for signature 26 January 1994, 33 ILM 1014 (1994). (While the agreement does not authorize trade restrictions, it has trade-related objectives.); (11) *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 1998. (Permits non-

4. How should those changes be implemented?

5. Where should those changes be implemented?

III. The Scope of the Thesis

While there are several WTO agreements that may affect MEAs, this thesis will focus primarily on the WTO Agreement, the GATT, and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.[43] While many of the arguments developed in this thesis may be applicable to the interpretation and application of the *Agreement on Technical Barrier to Trade*[44] and the *Agreement on the Application of Sanitary and Phytosanitary Measures*,[45] those agreements affect primarily domestic, rather than international, environmental protection.[46] Thus, they will be discussed only insofar as they inform the analysis of the GATT provisions that are relevant to international environmental issues.

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discriminatory import and export restrictions.); (12) *Draft Persistent Organic Pollutants Convention*, reproduced in 37 ILM 505 (1998). (Requires trade bans on prohibited substances).

[43] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994).

[44] *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[45] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[46] For a useful discussion of the differences in the kinds of measures addressed in these agreements, see Gaines, above n 40, 390-397.

It is beyond the scope of this thesis to consider the relationship between MEAs such as the *Convention on Biological Diversity*[47] and *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS'),[48] as important as that issue may be. The obligations contained in TRIPS are different in nature from those regarding trade in goods. Thus, TRIPS will be considered only in so far as it serves as a precedent for agreeing to minimum standards of global environmental protection in a possible WTO agreement on 'Trade-Related Aspects of Environmental Protection' or 'TREPS'.

It is also beyond the scope of this thesis to consider the relationship between MEAs and the *General Agreement on Trade in Services* (GATS).[49] While trade in environmental services and the movement of natural persons have relevance to global environmental cooperation, the structure of GATS and its progress on these issues make GATS a poor fit, given the focus of this thesis on the use of trade measures to enforce MEA obligations and to provide incentives to participate in MEAs.

Another field that lies beyond the scope of this thesis is the relationship between MEAs and foreign investment. The threat of claims for compensation for expropriation under foreign investment protection agreements may affect the cost of implementing MEA

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[47] *Convention on Biological Diversity*, opened for signature 5 June 1992, UNEP/bio.Div./CONF/L.2, 31 ILM 818 (1992) (entered into force 29 December 1993).
[48] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994).
[49] *General Agreement on Trade in Services*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1B, 33 ILM 1197 (1994).

obligations. Moreover, the WTO does not have an agreement on foreign investment protection.

This thesis will not consider the relationship between safeguard measures, trade remedy laws and MEAs.[50] Instead, this thesis focuses on the trade measures that are more likely to be used in enforcing international environmental obligations, rather than measures designed to protect domestic industry from 'unfair' foreign competition.

With respect to international environmental law, this thesis will focus on general principles, rather than provide a detailed discussion of the provisions of MEAs. Specific provisions of MEAs will only be discussed insofar as they inform the analysis of the compatibility of WTO law with international environmental law. Similarly, with respect to general international law, this thesis will not enter into theoretical debates such as the appropriateness of the principle of sovereign equality as an organizing principle of global governance. Rather, I will focus on the state of the law as it stands currently and the relationship between the fundamental principles of international law, international environmental law and WTO law.

[50] Anti-dumping and countervailing duties could potentially be used to enforce MEAs.

IV. The Relationship between the WTO and Other Rules of International Law

WTO panels are directed to interpret the WTO agreements 'in accordance with customary rules of interpretation of public international law'[51] and, except as otherwise provided, 'the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.'[52]

The *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')[53] codifies the customary rules of treaty interpretation[54] and applies to the interpretation of WTO agreements. Customary international law is developed by the common practices of countries and is to be distinguished from conventional international law, which is

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[51] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2) states: 'The dispute settlement system of the WTO…serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

[52] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, vol. I, 33 ILM 1125 (1994), art XVI(1).

[53] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[54] The key rules of treaty interpretation in the *Vienna Convention*, ibid, are:

> Article 31: General Rule of Interpretation
>
> 1. A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes…
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> Article 32: Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

constituted by treaties.[55] The Appellate Body has consistently taken the view that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* have 'attained the status of a rule of customary or general international law' and form 'part of the "customary rules of interpretation of public international law"'.[56]

The first rule of treaty interpretation requires that the *ordinary meaning* to be given to the terms of the treaty *in their context* and in the light of its *object and purpose*. The key point is that the ordinary meaning of the words cannot be divorced from the context in which they are used nor the purpose they aim to serve. 'Ordinary meaning' does *not* require a superficial or literal reading of the treaty terms.

(emphasis added)

55 This distinction is important because it can influence the interpretation of treaty obligations. For example, in *The United Mexican States v Metalclad Corporation* (2001) BCSC 664, the requirement to treat foreign investors in accordance with international law was interpreted to exclude the concept of transparency, an obligation contained in many treaties, on the grounds that no evidence had been introduced to show that the concept of transparency formed part of customary international law. The NAFTA Commission subsequently adopted a formal interpretation confirming the court's interpretation to ensure that future arbitration panels would not read a transparency obligation into the minimum standard of treatment for foreign investors under NAFTA Chapter 11. NAFTA Free Trade Commission adopted the following interpretation of Article 1105(1):

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
> 3. A determination that there has been a breach of another provision of NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

See *NAFTA – Chapter 11 – Investment, Notes of Interpretation of Certain Chapter 11 Provisions* (NAFTA Free Trade Commission, 31 July 2001), <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp> at 15 October 2001.

56 *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 16. See also *Japan—Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body), 104; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (1997) (Report of the Appellate Body), para 46; *European Communities—Customs Classification of Certain Computer Equipment*, WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998) (Report of the Appellate Body), para 84; and *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 114; and *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), para 7.12. Also see John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000), 162, 181: 'The Appellate Body…has made reference to general international

Lord McNair sums up the task of interpretation as, 'the duty of giving effect to the expressed intention of the parties…as expressed in the words used by them in light of the surrounding circumstances.'[57]

The approach taken by the Appellate Body has been to first examine the context of the provision in which the language is expressed, then proceed to examine the context of the particular agreement in which the provision is found, and lastly to examine the context of the *Uruguay Round Agreements* as a whole.[58] However, the Appellate body has also gone beyond the immediate context of the *Uruguay Round Agreements* to consider the provisions of MEAs and principles expressed in documents such as the *Rio Declaration*.[59]

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law principles, particularly as embodied in the Vienna Convention on the Law of Treaties, which the Appellate Body calls upon for principles of treaty interpretation.'

[57] Lord McNair, *The Law of Treaties* (1961), 365. He provides a vivid example (taken from another area of legal interpretation) of how the context can significantly alter the 'ordinary meaning' of a word, at 367:

> A man, having a wife and children, made a will of conspicuous brevity consisting merely of the words 'all for mother'. No term could be 'plainer' than 'mother', for a man can have one mother. His widow claimed the estate. The court, having admitted oral evidence which proved that in the family circle the deceased's wife was always referred to as 'mother', as is common in England, held that she was entitled to…the whole estate. 'Mother' is, speaking abstractly, a 'plain term', but, taken in relation to the circumstances surrounding the testator at the time when the will was made, it was anything but a 'plain term'….while a term may be 'plain' *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used….If the words used are not clear in the light of the circumstances in which they were used, it is permissible for a tribunal to examine the question whether the intention of the parties is different from that which the words in their natural and ordinary sense express.

[58] In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), the Appellate Body examined the meaning of 'like products' in the context of all the paragraphs of Article III in order to determine how to interpret the same provision as it was used specifically in Article III:4. In *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 114, in its interpretation of the chapeau of Article XX, the Appellate Body stated, 'It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought', citing in support, Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, 1984), 130-131.

[59] *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4

Vienna Convention Articles 31 and 32 set out a hierarchy of methods and sources of interpretation. Article 32 provides a secondary means of interpretation that, in theory, only comes into play in situations where Article 31 proves inadequate.[60] In contrast to the historical context laid out in Article 32, Article 31(3) emphasizes the importance of the subsequent evolution of the law. Thus, the contemporary legal context may have greater influence than the historical context surrounding the creation of treaty obligations. Indeed, the Appellate Body has taken this approach with respect to the interpretation of GATT Article XX(g), a provision drafted over fifty years ago. In *Shrimp I*, the Appellate Body stated:

> The words of Article XX(g), 'exhaustible natural resources',…must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment….From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.[61]

UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874. See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), paras 129-134.

60 See Jackson, *Jurisprudence*, above n 56, 426: 'Under typical international law, elaborated by the Vienna Convention…, preparatory work history is an ancillary means of interpreting treaties. In the context of interpreting the GATT, we have more than forty years of practice since the origin of GATT…Thus,…it is this author's view that one cannot rely too heavily on the original drafting history.' See Jackson, at 145, note 37: '…the Vienna Convention…is generally considered to relegate preparatory history (Article 32) to a subsidiary role in interpretation, to be used only when the means specified in Article 31 do not resolve an interpretive problem.' In support, Jackson cites *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted) and Ian Brownlie, *Principles of International Law* (4th ed, 1990), 630. Jackson notes the case of former negotiators who have received fees from an interested party to testify as to the negotiating history based on their own experience, noting that such testimony cannot always be given full credibility. However, Schwebel argues that Article 32 must be interpreted to give preparatory work a greater role in the interpretation of treaties than the words (particularly 'confirm') would suggest. The practice of using preparatory work to either confirm or to contest the 'ordinary meaning' of the treaty terms favours an interpretation that allows this practice to continue. If Article 32 may only be used to confirm, but not to contest, the interpretation that results under Article 31, then Article 32 would be redundant. See Stephen M. Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st* Century (1996), 541.

61 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 129-130. The Appellate Body cited *Namibia (Legal Consequences) Advisory Opinion* [1971] ICJ Rep 31, in which the ICJ stated that where concepts

However, there is some debate regarding the 'evolutionary' or 'evolutive' interpretation of treaties.[62]

A. The 'Evolutionary' Interpretation of Treaties

The rule of inter-temporal law sprang from the dictum of Judge Huber in the *Island of Palmas* case.[63] The draft *Articles for the International Law Commission on the Law of Treaties* extended this ambiguous doctrine to the applicability of subsequent legal evolution to interpretation of treaties—a treaty would be interpreted in the light of the law in force at the time the treaty was drawn up, but its application would be governed by the rules of international law in force at the time the treaty was applied.[64] The proposed article was not included in the *Vienna Convention*, which contains no such general rule. However, Higgins notes that Article 31(3) contains a 'hint' in providing that 'any relevant rules of international law' may be applicable, while Article 64 allows a later emergent rule of *jus cogens* to void a treaty.[65] Higgins concludes that it is preferable to focus on the intention of the parties, reflected by reference to the objects and purpose,

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embodied in a treaty are 'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law….'

[62] See Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st* Century (1996), 173.

[63] *Island of Palmas* II UNRIAA 845: 'A judicial fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time such a dispute in regard to it arises or falls to be settled….the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of the law.'

[64] See Higgins, above n 62,178.

[65] The only peremptory norms that are clearly accepted and recognized in general international law are the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. See International Law Commission, *Annual Report 2001*, Chapter IV, State Responsibility, <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>, at 21 October 2003, 208.

notwithstanding judicial indications that the Huber rule is applicable to the law of treaties.

GATT 1994, which consists of GATT 1947 (as amended), 'is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947'.[66] Thanks to this legal fiction, even if the GATT must be interpreted in the light of the law in force at the time the treaty was drawn up, the relevant time frame is now arguably 1994, not 1947. This view is buttressed by the *Vienna Convention* interpretation rule that the object and purpose of the treaty may be gleaned, in part, from its preamble, which was drawn up during the Uruguay Round, not 1947. However, in the context of Article XX, there are many arguments that favour an 'evolutionary' approach that permits a more flexible interpretation that can take into account both existing non-WTO rules of international law and future developments.

Nothing in the *Vienna Convention* prevents the 'evolutionary' approach to interpretation. Indeed, Article 31(3) clearly allows subsequent agreements and practice to inform treaty interpretation and, as Judge Higgins points out, 'any' relevant rules of international law. Frowein notes that Article 3(2) might be read as an 'attempt to prevent the development of treaty rights through later evolutions', but rejects that view.[67] Pauwelyn also rejects the

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[66] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, vol. I, 33 ILM 1125 (1994), Article II(4). Jackson notes that the Uruguay Round, by establishing an entirely new treaty, avoided the need to use the amendment requirements of the GATT. See Jackson, *Jurisprudence*, above n 56, 375.

[67] Jochen Abr. Frowein, 'Reservations and the International Ordre Public' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st* Century (1996), 403, 404-5. Frowein suggests that DSU

view that Article 3(2), in explicitly confirming certain existing rules, demonstrates an intention to contract out of all other rules of international law.[68]

Article XX recognizes that GATT obligations might have to give way in order to achieve other policy goals. Articles XX(b) and (g) use broad language that does not restrict the choice of policy instruments available to achieve environmental goals, but rather allows this determination to evolve over time as knowledge and conditions change. Both international law and scientific knowledge evolve over time. Both affect the interpretation and application of Articles XX(b) and (g). Thus, the interpretation of Article XX involves both questions of law and questions of fact whose conclusions cannot be predetermined.

Because Articles XX(b) and (g) take aim at moving targets, they need to be interpreted flexibly. Environmental conditions, prevailing rules of international law and state practice need to be taken into account at the time of interpretation. Since the Article XX chapeau

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Article 3(2) represents a misplaced attempt to prevent the development of treaty rights through later evolutions:

> We have recently witnessed a strange phenomenon where States tried to protect themselves against the development of treaty rights through later evolutions. Under Article 3 para. 2…the dispute settlement system is described as a central element in providing security and predictability to the multilateral trading system. The provision then adds:
> 'The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rules of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'
> It would seem that particularly powerful States…have insisted on this clause limiting what is sometimes considered to be the rather broad discretion of courts or other dispute settlement organs when they make use of rules of dynamic or evolutive interpretation. However, even with the rule indicated it is certainly beyond human possibilities to avoid evolutive interpretation with new facts and social conditions arising.

[68] Pauwelyn, above n 19, 541. He cites, *inter alia*, *Georges Pinson (France) v United Mexican States* (1928) 5 RIAA 327, 422 (Permanent Court of Arbitration): 'Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way' and *Korea—Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (2000) (Report of the Panel), para 7.96, n 753 (rejecting the argument that DSU 3(2) excludes other international law).

fulfils the role of preventing abuse of Articles XX(b) and (g), the latter need not be interpreted in an overly restrictive manner.

One problem with this evolutionary approach to interpretation is that it leads to more ambiguity and less predictability regarding how a provision might be applied in the future. Nevertheless, there are strong arguments in favour of flexibility. Articles XX(b) and (g), like the GATT Article XXI security exception, play a central role in the allocation of responsibility between national governments, the WTO, and other international organizations. The shifting circumstances of both global security and global environmental concerns require a flexible approach to policy making. Moreover, the evolutionary nature of customary international law favours an evolutionary approach to interpreting such key provisions. For example, the practice of States with respect to the general international law principles of sovereign equality and non-intervention continues to evolve. Their evolution will affect the methods employed to manage the global environment and thus the range of environmental measures that can be justified under Articles XX(b) and (g).

The evolution of human knowledge affects the determination of how to address environmental problems. For example, fifty years ago, banning the use of CFCs could not have been justified scientifically, because we had no knowledge of their effect on the ozone layer nor any knowledge of the impact of ozone depletion on human, animal or plant life or health. Today, we know that it is necessary to avoid using these chemical compounds because scientific knowledge has advanced to the point where we can make that determination. Thus, the very subject matter of Articles XX(b) and (g) is not static. It

will vary with the particular circumstances of each case and the state of human knowledge at the time the case is considered. Circumstances change.

Accepted wisdom on which measures work best to achieve a given policy objective changes over time; so do the policy goals. Numerous considerations from a variety of academic disciplines go into the determination of whether to permit the consumption of a particular product and how to prevent its consumption if that is the chosen policy. Is it necessary to restrict trade in cocaine in order to protect human health? What about alcohol? What about CFCs? What about tobacco? For each of these products, the answer to the question posed depends on the era in which it is asked, scientific knowledge regarding the health effects of the product, the social and economic implications of a given policy choice, and information regarding the effectiveness of one policy instrument (taxation, education) versus another (regulation, criminalization).

The evolutionary approach to WTO interpretation is consistent with the rules of treaty interpretation, particularly the rules allowing interpretation in light of the objectives (such as trade liberalization, sustainable development, environmental protection and recognition of the needs of developing countries) and international law (which includes international obligations set out in agreements such as CITES).

B. The Effect of Non-WTO Rules on WTO Law

Pauwelyn defines the relationship between WTO rules and other rules of international law based on five categories:

> (1) WTO rules that add previously nonexistent rights or obligations to the corpus of international law (such as nondiscrimination principles in trade in services);
> (2) WTO rules that contract out of general international law (such as [the DSU with respect to] general international law on countermeasures)…or deviate from, or even replace, other preexisting rules of international law…;
> (3) WTO rules that confirm preexisting rules of international law, be they of general international law (such as DSU 3.2…) or preexisting treaty law (such as GATT 1994 incorporating GATT 1947 and the TRIPS Agreement incorporating parts of certain WIPO conventions);
> (4) non-WTO rules that already existed when the WTO treaty was concluded (on April 15, 1994) and that are (a) relevant to and may have an impact on WTO rules; and (b) have not been contracted out of, deviated from, or replaced by the WTO treaty….general international law…other treaty rules that regulate…the trade relations between states (such as environmental…conventions…); and
> (5) non-WTO rules that are created subsequent to the WTO treaty…and (a) are relevant to and may have an impact on WTO rules; (b) either add to or confirm existing WTO rules or contract out of, deviate from, or replace aspects of existing WTO rules; and (c) if the latter is the case, do so in a manner consistent with the interplay and conflict rules in the WTO treaty and general international law.[69]

Pauwelyn argues that the reference in Article 3(2) to the 'customary rules of interpretation of public international law' favours the view that the interpretation of WTO rules must take into account other rules of international law.[70] He notes that this approach was confirmed by the panel in *Korea—Measures Affecting Government Procurement*:

> Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with the customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it….[T]o the extent that there is not conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties….[71]

Thus, the effect of other rules of international law on WTO law will depend in part on their consistency with WTO law, and vice versa. Achieving greater coherence between WTO law and other branches of international law is facilitated where the two are consistent. In Chapters 3 and 4, I will show that the interpretation of Article XX in the

[69] Pauwelyn, above n 19, 540-541.
[70] Pauwelyn, above n 19, 542-543.

Shrimp cases is indeed consistent with the relevant rules of international environmental law and general international law, even though the latter was not explicitly taken into account in the rulings. I will argue that, in future, these rules should be taken into account explicitly in order to maintain consistency and coherence between WTO law and the other branches of international law. This will prevent deviations that might create divergence, rather than coherence.

C. Context, Object and Purpose: The WTO preamble

Although it provides no binding right or obligation,[72] the WTO preamble sets out the *object and purpose* of the trade agreements and provides an overall *context* in which to interpret trade obligations and exceptions applied in cases involving the environment.[73] It thus directly affects interpretation. The preamble sets out a concise summary of the principal issues and policy objectives that shed light on the context and purpose of the WTO agreements.

The WTO preamble incorporates the objectives of sustainable development and environmental protection on the following terms:

> Recognizing that their relations in the field of trade and economic endeavour *should* be conducted with a view to *raising standards of living*, ensuring full employment and a large and steadily *growing volume of real income and effective demand*, and *expandin*g the *production* of *and trade* in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the*

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[71] *Korea—Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (2000) (Report of the Panel), para 7.96.

[72] Note, *inter alia*, the use of the word 'should' in the first paragraph, as opposed to the mandatory term 'shall'.

[73] This argument was raised with respect to the GATT, in support of amending the GATT preamble to promote such environmental policy goals as conservation of exhaustible resources and sustainable development. See E Patterson, 'International Trade and the Environment: Institutional Solutions' (1991) 21 *Environmental Law Reporter* 10599, 10600.

> *environment and to enhance the means for doing so* in a manner *consistent with their respective needs and concerns at different levels of economic development*,
>
> Recognizing further that there is a need for *positive efforts* designed to ensure that *developing countries*, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development,
>
> Being desirous of *contributing to these objectives by* entering into reciprocal and mutually advantageous arrangements directed to the *substantial reduction of tariffs and other barriers to trade* and to the *elimination of discriminatory treatment in international trade* relations…'
> (emphasis added)

In assessing the appropriate balance to achieve and the mechanisms to employ in the (potentially) conflicting policies of global trade liberalization and global environmental protection, the issues laid out in the preamble inform the interpretation of the WTO.[74]

The fundamental objective of the WTO is to reduce barriers to trade in order to increase global welfare through the efficient allocation of resources based on the concept of comparative advantage. Differences in the level of technological, economic and institutional development affect the ability of developing countries to implement both international trade obligations and international environmental obligations. The preamble recognizes that levels of economic development affect the priority given to environmental protection and that improving environmental protection requires enhancing the means for doing so. This is consistent with Principle 11 of the *Rio Declaration*, which states:

> Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

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[74] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 129.

The *Rio Declaration* represents a statement of principles reflecting the broad consensus achieved among the nations of the world in 1992, as the Uruguay Round was drawing to a close. As such, it provides evidence of the circumstances surrounding the drafting of the WTO preamble.

While the WTO preamble does not spell out methods for enhancing the ability of members to protect the environment, in the context of the WTO mandate this likely means raising incomes through gains from trade, enhancing technological capacity through technology transfer and technical assistance, and institution building through training and studies. All of these methods are features of the WTO system. The fundamental premise of the WTO system is that trade liberalization will raise incomes. Technology transfer is promoted indirectly through TRIPS.[75] The theme of technical assistance from developed countries to developing countries is found elsewhere in the WTO agreements. Institutional capacity building is carried out indirectly through studies and trade policy reviews and directly through the WTO training institute, funded by developed countries.[76] The liberalization of trade in environmental technologies and services provide further means of enhancing the ability of members to improve environmental protection. All of these methods of enhancing environmental protection are in conformity with the fundamental WTO themes of trade liberalization and special

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[75] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994).

[76] The Doha Development Agenda Global Trust Fund was created following the WTO Ministerial Conference in Doha, in November 2001, to fund capacity-building in developing countries, primarily through training programs. See <www.wto.org> at 30 March 2002.

treatment for developing countries. They also are consistent with Principle 9 of the *Rio Declaration*, which states:

> States should cooperate to strengthen endogenous capacity-building for sustainable development…through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

The WTO preamble establishes a hierarchy of objectives that is reflected in both the language used and the order in which objectives are laid out. The preamble uses distinct language for environmental protection and sustainable development. *Seeking* environmental protection only means *making an effort* in this regard.[77] Moreover, the order of appearance of this objective implies that environmental protection is secondary to the objective of raising incomes through trade liberalization, in the context of the WTO mandate. In contrast, sustainable development is more closely integrated into the economic objectives set out in the preamble. The underlying premise is that the fundamental objective of trade liberalization is consistent with the concept of sustainable development.[78] Allowing sustainable development means interpreting trade obligations to permit measures that have this aim, whether through the interpretation given to trade obligations or through the interpretation of exceptions to those obligations. The phrase 'in

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[77] The *Oxford English Dictionary* definition of 'seek' is 'to make it one's aim, to try or attempt to (do something)'. See OED (1978) vol. IX, at 389. To 'try' means 'to make and effort, endeavour, attempt'. See vol. XI, at 438. The Spanish version uses the term '…y procurando…'. The French version uses the term '…en vue a la fois de proteger…'. In *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), the panel examined the Spanish and French versions, using the *Diccionario de la Lengua Espanola* and the *Grand Dictionnaire Encyclopedique Larousse*, respectively. The English, French and Spanish texts are equally authentic. See *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, para 6.

[78] 'In accordance with' means 'the action or state of agreeing; agreement; harmony; conformity.' *Oxford English Dictionary*, Vol I, 62. 'Agreement' means 'mutual conformity of things, whether due to likeness or to mutual adaptation; concord; harmony; affinity.' *Oxford English Dictionary*, Vol I, 191. 'In conformity with' means 'in agreement, accordance or harmony with; in compliance with.' *Oxford English Dictionary*,

accordance with...sustainable development' implies mutual adaptation and harmony of the objectives of trade liberalization and sustainable development. Mutual adaptation means that the concept of sustainable development should accommodate trade liberalization and that trade obligations should accommodate sustainable development. Arguably, this means that the interpretation of trade *obligations*, not only the *exceptions* to those obligations, should accommodate the concept of sustainable development.

In *Shrimp I*, the Appellate Body gave weight to the preamble's reference to environmental protection and sustainable development in applying these references to the interpretation of the *exception* in Article XX(g), but did not apply the preamble to the interpretation of the *obligations* violated by the American measure. The Appellate Body stated, 'While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.'[79] The Appellate Body therefore interpreted Article XX(g) in the context of contemporary concerns about environmental protection, as reflected in modern international conventions and declarations that address environmental issues.

In *Shrimp II*, the panel appeared uncertain as to the meaning of Article 31(3)(b) of the *Vienna Convention*:

> Insofar as [the 1996 Report of the CTE] can be deemed to embody the opinion of the WTO Members, it could be argued that it records evidence of 'subsequent practice in the application of

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Vol II, 813. The Spanish version uses the term 'de conformidad con el objetivo…'. The French version uses the term 'conformement a l'objectif…'.

[79] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 129.

> the treaty which establishes the agreement of the parties regarding its interpretation'…and as such should be taken into account in the interpretation of the provisions concerned. However, even if it is not to be considered as evidence of a subsequent practice, it remains the expression of a common opinion of Members and is therefore relevant in assessing the scope of the chapeau of Article XX.[80]

In *Tuna II*, the panel adopted the view that other international agreements could not be taken into account in interpreting the provisions of GATT, because they were,

> not concluded among the Contracting Parties to the General Agreement, and …did not apply to the interpretation of the General Agreement or the application of its provisions…practice under [the other treaties] could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it.[81]

However, the panel in *Shrimp II* adopted a different view:

> the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to this dispute. Article 31.3(c) of the Vienna Convention provides that…there shall be taken into account, together with the context, 'any relevant rule of international law applicable to the relations between the parties'. We note that, with the exception of the Bonn Convention…Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body in paragraph 168 of its Report.[82]

WTO law forms part of the general body of international law. The opinions of the WTO judiciary influence the development of international law. Thus, other sources of international law need to be taken into account in interpreting WTO provisions. The

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[80] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.56. While perhaps not directly applicable to the views expressed in the Report of the CTE, Howse argues that the 'insider view' (that is, the views of trade experts at the WTO) regarding the permissibility of unilateral measures under Article XX would not qualify as an 'agreement' within the meaning of *Vienna Convention* art 31. However, his argument is based on the consistent view to the contrary taken by the United States in the *Tuna* cases, coupled with the fact that these rulings were never adopted by the GATT parties. See Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491, 518-519. In other words, the consistency of American legal arguments, together with consistent American opposition to the adoption of GATT reports that contradicted them, provides evidence that there was no agreement among GATT parties regarding the interpretation of Article XX on this issue.

[81] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted), para 5.19.

WTO judiciary has accepted this state of affairs. However, the WTO judiciary has been sporadic in its consideration of other sources of international law. In subsequent chapters, I will argue that the WTO judiciary needs to consider the relevant rules of international law on a more systematic basis, in order to promote greater coherence between WTO law and other branches of international law. Promoting coherence now will prevent future conflicts between WTO law and other sources of international law.

D. Conflicts between Treaties

Neither GATT nor the WTO Agreement contain a conflicts clause that expressly determines whether GATT or MEA obligations prevail in the event of a conflict. Indeed, there is no general conflicts clause that determines the relationship between WTO law and the rest of international law. Thus, conflicts must be resolved either through reference to conflicts clauses in MEAs and other treaties or the general rules of international law regarding conflicts between treaties. Customary international law is binding on all WTO parties, but treaties can only bind their parties.[83]

In general international law, where there is no conflicts clause that determines which treaty prevails in case of a conflict, there is a presumption that the later treaty prevails over an earlier treaty on the same subject.[84] The presumption flows from the idea that the

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[82] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.57.

[83] See Pauwelyn, above n 19, 544, citing the maxim *pacta tertiis nec nocent nec prosunt*. Also see discussion in Chapter 3.

[84] See Ian Brownlie, *Principles of Public International Law* (3rd ed, 1979), 603, where the author states, '...it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject matter...'. See McNair, above n 57, 219: 'Where the parties to the two treaties said to be in conflict are the same,...[i]f the provisions of the earlier one are general and those of the later one are special and detailed,

countries would be aware of the earlier treaty when they created the later treaty and that their intention would therefore be to have the later treaty take precedence in the event of any inconsistency. However, another presumption is that the more specific treaty is intended to prevail over the more general one.[85] Both presumptions are simply methods of determining the intention of the parties to a treaty.

The presumption that the later treaty prevails does not work well in the modern multilateral context for two reasons. First, the relevant date for each State is the date it consented to be bound by the treaty.[86] This is problematic where new States accede on an ongoing basis, since the determination of which treaties prevail will vary from one State to the next depending on their date of accession. For example, both the WTO and CITES continue to add new members. Second, the content of the rules of many multilateral treaties continues to evolve over time.[87] For example, the WTO uses waivers, formal decisions and amendments to alter obligations, such as TRIPS obligations on patents.[88]

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that fact is some indication that the parties intended the special one to prevail.' See McNair, ibid 218, note 2, where the author cites Phillimore, vol. ii, xcviii(6): '...if a collision happened between two Treaties concluded between two different contracting parties, the more ancient one must be executed, because it was not within the competence of the party promising, to act in derogation of his antecedent obligations to another.'

[85] See McNair, above n 57, 219: '[where] one treaty contains general provisions and the other special provisions *in pari materia*,...the maxim *generalia specialibus non derogant* comes into play - that is to say, 'the specific prevails over the general'.

[86] See Pauwelyn, above n 19, 546.

[87] Ibid.

[88] For example, least-developed countries agreed to implement patent protection for pharmaceuticals in 2006, but this date was extended to 2016. See *Declaration on the TRIPS Agreement and Public Health*, 14 November 2001, WTO Doc WT/MIN(01)/DEC/2, 20 November 2001, <http://www.wto.org> at 30 November 2001 and *Least-developed country members — obligations under article 70.9 of the trips agreement with respect to pharmaceutical products*, Waiver submitted to the WTO General Council for approval on 8 July 2002, <http://www.wto.org> at 10 September 2003. The WTO members also decided to amend art 31 of the *Agreement on Trade-Related Investment Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), in order to permit compulsory licenses to be issued on pharmaceuticals for export to countries that lack manufacturing capacity. See *Decision of 30*

Pauwelyn uses the term 'continuing treaties' to refer to such treaties where the appropriate date of acceptance of treaty obligations is difficult to determine. He argues persuasively that when continuing treaty norms are involved, applying the later-in-time rule may not make sense and could lead to arbitrary solutions.[89]

Of course, treaties may be interpreted so as to avoid conflicts. For example, the broad language of Article XX provides a way to avoid conflicts between GATT and other branches of international law.[90]

With respect to the relationship between different WTO agreements, the practice of the Appellate Body suggests that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement.[91] However, where there is a conflict between the WTO Agreement and a Multilateral Trade Agreement, the former prevails.[92] The sequence of analysis of provisions within one agreement is also important, since an improper sequence may be considered an error of

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August 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc IP/C/W/405, <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003.

89 See Pauwelyn, above n 19, 546.

90 Pauwelyn also make this point. See ibid, 550.

91 In *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), para 7.15 the panel followed the practice set out by the Appellate Body in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, which stated that the panel 'should' have applied the Licensing Agreement first because this agreement deals 'specifically, and in detail' with the administration of import licensing procedures. The Appellate Body noted that if the panel had examined the measure under the *Licensing Agreement* first, there would have been no need to address the alleged inconsistency with Article X:3 of the GATT 1994. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (1997) (Report of the Appellate Body), para 204.

92 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art XVI:3.

law.[93] However, the sequence need not follow the order of appearance of provisions in a particular agreement. Rather, the correct sequence is based on logic and whether a different sequence would produce a different result.[94]

The content of MEAs and the practice of parties to them should influence the interpretation of both the jurisdiction of the WTO over matters covered in the MEA (a choice of forum issue) and the interpretation of WTO obligations. The practice of signatories to CITES has been to address the issue of trade bans imposed by CITES within the CITES framework, not the WTO. For example, CITES imposes a ban on trade in elephant ivory. Four African nations with healthy elephant populations have sought to have the ban lifted to allow them to sell stockpiles of ivory.[95] Even though these nations are members of the WTO, they have not sought recourse before the WTO where they

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[93] In *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), for example, the Appellate Body considered the sequence of analysis important in examining whether the American measure was justifiable under Article XX of the GATT 1994. It held that the panel erred by looking at the chapeau of Article XX and then subsequently examining whether the American measure was covered by the terms of Article XX(b) or (g) because '[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter … has not first identified and examined the specific exception threatened with abuse'. At para 120. See also *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), para 7.17 and *United States—Tax Treatment for 'Foreign Sales Corporations'*, WTO Doc WT/DS108/AB/R (2000) (Report of the Appellate Body), para 89.

[94] See for example *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), para 7.19, where the panel decided to analyze the *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994) in the following order: art 2.4, 2.2, 2.1 and then art III:4 of the GATT 1994.

[95] Alanna Mitchell, 'Proposed ivory sale may harm elephants', <http://www.globeandmail.com> (Toronto), at 18 June 2002. Botswana, Namibia, South Africa and Zimbabwe applied for a change in the rules at the convention secretariat in Geneva. The request to bring back a limited ivory trade was scheduled for consideration at a two-week conference of CITES in Chile in November 2002.

might challenge the ban as a violation of GATT Article XI. Indeed, in the thirty years since CITES was opened for signature, none of its trade provisions have been challenged as inconsistent with either GATT or WTO obligations. A reasonable interpretation is that the States that are parties to both CITES and GATT intended the more specific trade obligations of CITES to prevail over the more general GATT obligation in Article XI.

Moreover, the practice of resolving differences regarding the application of CITES trade restrictions under CITES, and not seeking such decisions at the WTO or GATT, suggests that a proper interpretation of the decision-making authority granted to the WTO is that it does not include jurisdiction to resolve conflicts between parties to CITES regarding matters addressed in that MEA.

Support for the view that MEA provisions can influence the interpretation of WTO obligations under *Vienna Convention* Article 31(3)(c) can be found in the decision of the Appellate Body in *Shrimp I*. The Appellate Body applied definitions of natural resources found in a variety of MEAs to the interpretation of the term 'exhaustible natural resources' in GATT Article XX(g) to include living resources.[96] Moreover, the finding that the five species of turtle at issue were 'exhaustible' was based on the fact that they had been listed in CITES Appendix I, which includes 'all species threatened with extinction which are or may be affected by trade'.[97]

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[96] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), 46-51.
[97] Ibid, para 130.

Further support for the view that MEA provisions form part of the rules of international law that apply to the interpretation of WTO provisions is found in the statement of the ICJ that, '…an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[98]

However, the effect of other rules of international law on the interpretation of WTO provisions will depend on whether the other rules are binding on all WTO members (for example rules that reflect customary international law) or the parties to the dispute (as in Shrimp II). Thus, it is not possible to say that all non-WTO sources of international law must be taken into account in the interpretation of WTO agreements.[99]

V. Conclusion

The foregoing discussion highlights the need for further analysis to define the relationship between specific WTO rules and other rules of international law. The purpose of this thesis is to conduct this analysis with respect to key GATT obligations and exceptions and the general principles of international environmental law and general international law.

Chapter 2 will review WTO jurisprudence and analyse the scope of the relevant GATT rules: Articles I, III, XI and XX. Chapter 3 will analyse the consistency of MEA and unilateral environmental trade measures with GATT rules, principles of international

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[98] *Namibia (Legal Consequences)* (Advisory Opinion) [1971] ICJ Rep 31.
[99] See generally, Pauwelyn, above n 19.

environmental law and the jurisdictional competence of States. Chapter 4 will analyse the consistency of the *Shrimp* rulings with the international legal principles of sovereign equality, non-intervention, and necessity. Chapter 5 will analyse whether and how the ambiguity in Article XX should be resolved in light of its role with respect to the 'constitutional' division of authority between national governments and the WTO and the ability of Article XX to facilitate evolutionary coherence between different branches of international law.

Chapter 2

The Evolution of GATT Obligations and Exceptions

I. Introduction

This chapter provides an overview of the balance between trade and environment in the *General Agreement on Tariffs and Trade* ('GATT')[1] and the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* ('WTO Agreements').[2] It reviews the relationship between key substantive obligations with respect to trade and key exceptions for environmental measures in GATT and WTO jurisprudence. It traces the evolution of interpretations of the key GATT obligations and exceptions in GATT 1947 and GATT 1994[3] and identifies outstanding interpretative issues that have yet to be resolved.

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[1] *General Agreement on Tariffs and Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). In this chapter, the analysis of the applicability of article XX to the environment at pp 34-36 and the analysis of *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988) and *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989) at pp 61-68 closely follow Bradly J Condon, *Making Environmental Protection Trade Friendly Under the North American Free Trade Agreement* (unpublished LL M thesis, University of Calgary, 1993).

[2] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1125 (1994).

[3] GATT 1994 consists of the provisions of the *General Agreement on Tariffs and Trade* dated 30 October 1947, annexed to the *Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (excluding the Protocol of Provisional Application), as amended by the legal instruments which have entered into force before the date of entry into force of the WTO Agreement. See GATT 1994, art 1. The substantive obligations and exceptions discussed in this chapter are essentially the same in both GATT 1947 and GATT 1994.

Where a panel report is adopted and results in the disputing parties conforming their practice to the conclusions and findings of the report, this provides evidence of practice establishing agreement regarding interpretation under the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*').[4] Where later panels follow prior panel interpretations on the same issue, this provides further evidence of practice. It is difficult to resolve the issue of what constitutes sufficient practice under the *Vienna Convention.*[5] Nevertheless, where a consistent approach to interpretation emerges over several years and several cases, it is likely that future panels and the Appellate Body will continue to apply the same interpretation. For this reason it is important to identify interpretative trends.

The adequacy of the GATT in general regarding environmental protection is a matter of debate, which often depends on one's perspective on the role that trade measures should play in environmental protection. For example, a 1992 GATT study concluded:

> GATT rules do not prevent governments adopting efficient policies to safeguard their own domestic environment, nor are the rules likely to block regional or global policies which command

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[4] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 59.

[5] See John Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000), 129. He also argued that the Council adoption of a panel report could be viewed as the equivalent of a resolution or decision by the Contracting Parties definitively interpreting the GATT, but doubted that this was the intention of adoption. Jackson notes in another article that the practice of GATT parties was to treat adopted panel reports as binding on the parties, but not unadopted reports. The changes to WTO decision-making procedures introduced in the Uruguay Round do not state the legal effect of a panel report as clearly as the *Statute of the International Court of Justice*, art 59, but nevertheless indicates that the panel decisions are binding on the parties. See Jackson, *Jurisprudence*, 165. The introduction of formal mechanisms for interpretation and amendment under WTO, combined with automatic adoption of panel and Appellate Body reports, will likely affect the legal impact of panel interpretations in terms of constituting practice under the *Vienna Convention*. These mechanisms are discussed in Chapter 5 of this thesis and in Jackson, at 168. With respect to unadopted GATT reports, the Appellate Body takes the view that they may offer guidance, but there is no legal requirement to take them into account in WTO cases. See *European Communities – Customs Classification of Certain Computer Equipment*, WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998) (Report of the Appellate Body) and *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body). Also see Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491, 516.

> broad support within the world community. At the same time, trade measures are seldom likely to be the best way to secure environmental objectives and, indeed, could be counter-productive.[6]

In 1999, a WTO study reiterated that trade barriers are a poor policy instrument to use to pursue environmental goals. However, the study notes:

> [G]overnments have found trade measures a useful mechanism for encouraging participation in and enforcement of multilateral environmental agreements in some instances, and for attempting to modify the behaviour of foreign governments in others. The use of trade barriers in this way is fraught with risks for the multilateral trading system, unless trade policy is used in this manner on the basis of prior commitments and agreements among governments as to their obligations in the field of environmental policy.[7]

In *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ('*Shrimp I*'),[8] the United States banned imports of shrimp from several countries on the grounds that they did not provide adequate safeguards to ensure that sea turtles were not killed in the process of catching shrimp. The *Shrimp I* panel developed a new test to apply in the analysis of GATT Article XX exceptions that reflected the policy concerns expressed in the 1999 WTO report, finding that measures which 'undermine the multilateral trading system' cannot be permitted under Article XX.[9] The Appellate Body overturned this attempt to formulate a new doctrine, based on interpretative principles:

> [T]he Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of GATT 1994 and the WTO Agreement*, which…it described in an overly broad manner….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

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[6] GATT Secretariat, 'Expanding trade can help solve environmental problems, says report' Press Release, in GATT, *Trade and the Environment* (1992) [hereinafter GATT Report].
[7] Hakan Nordstrom and Scott Vaughan, WTO Special Studies, *Trade and Environment* (1999), 3. For a review of the report, see Steve Charnovitz, 'World Trade and the Environment: A Review of the New WTO Report' (2000) 12 *Georgetown International Law Review* 523.
[8] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).
[9] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), para 7.44-7.62.

> employed in the appraisal of a given measure under the chapeau of Article XX. (emphasis in original)[10]

Thus, the Appellate Body clearly rejected the philosophical approach to GATT interpretation that had found expression in similar cases under GATT 1947. In *United States – Restrictions on Imports of Tuna*, GATT panels in 1991 ('*Tuna I*') and 1994 ('*Tuna II'*) rejected American import bans on tuna imports where the tuna was caught in a manner harmful to dolphins.[11] In both instances, the panels reasoned that allowing the American measures would undermine the multilateral trading system.[12] While neither panel report was adopted by the GATT, the decisions had a significant impact on the trade and environment debate.[13] The reasoning of the Appellate Body in *Shrimp I* was

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[10] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 116.

[11] See *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted) and *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not Adopted). These rulings were never adopted by the GATT due to the opposition of the United States. Under the dispute settlement system of the GATT, adoption of panel reports required consensus, effectively providing a veto on adoption.

[12] See *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 46 and *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not Adopted), para 5.26. The argument that basing trade restrictions on the importing country's assessment of the exporter's policies would open a Pandora's box of trade barriers has been described as a 'slippery slope' argument by John Jackson. See John Jackson, 'The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights' (2000) 94 *American Society of International Law Proceedings* 222, 224. Howse argues that reading this into the text of art XX in WTO dispute resolution would amount to adding to obligations or diminishing rights of WTO members and thus run counter to DSU art 3.2. See Howse, above n 5, 517-518.

[13] See, for example, Ted McDorman, 'The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles' (1991) 24 *George Washington Journal of International Law and Economics* 477; K Holland, 'Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean' (1991) 17 *Syracuse Journal of International Law and Commerce* 267; E Christensen and S Geffin, 'GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System' (1991) 23 *Inter-American Law Review* 569; Thomas J Schoenbaum, 'Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?' (1992) 86 *American Journal of International Law* 700; Thomas E Skilton, 'GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy' (1993) 26 *Cornell International Law Journal* 455; Daniel C Esty, *Greening the GATT: Trade, Environment, and the Future* (1994); Bradly J Condon, 'NAFTA and the Environment: A Trade-Friendly Approach' (1994) 14 *Northwestern Journal of International Law and Business* 528; Thomas J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *American Journal*

more consistent with new provisions setting the parameters of the WTO dispute settlement system, which make it clear that panels and the Appellate Body are to clarify provisions, using the customary rules of treaty interpretation, rather than create obligations not found in the text of the agreements.[14]

In 2001, Malaysia complained that the United States had failed to comply with the ruling in *Shrimp I*. In *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (*'Shrimp II'*), the Appellate Body pushed the envelope further.[15] In their consideration of whether the United States had complied with the ruling in *Shrimp I*, both the original panel and the Appellate Body found that a unilaterally imposed import ban met the requirements of the Article XX(g) exception. Malaysia chose not to apply for American certification of its sea turtle protection program and not to participate in a regional agreement to protect sea turtles. The United States maintained its import ban on shrimp from Malaysia in order to pressure the Malaysian government into doing both. Chapter 3 will consider the implications of this decision for the permissibility of unilateral and multilateral trade measures to address international environmental problems. This chapter will consider this decision in the context of a series of GATT and WTO decisions in which the more general treatment of trade and environment has evolved.

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of International Law 268; Joseph. J Urgese, 'Dolphin Protection and the Mammal Protection Act have Met Their Match: The General Agreement on Tariffs and Trade' (1998) 31 *Akron Law Review* 457; Richard W Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12 *Georgetown International Law Review* 1.

[14] See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2).

The key GATT obligations that are typically contravened in trade and environment disputes are national treatment (Article III), most-favoured-nation treatment (Article I) and the general prohibition against trade restrictions (Article XI). Non-discrimination is a fundamental principle underlying the GATT, and other WTO agreements. GATT rules are concerned primarily with limiting the extent to which countries may discriminate between domestic products and imports, between imports from different countries, and between goods sold in the domestic market and those exported.[16] Thus, if environmental measures do not discriminate between countries or between domestic and imported goods, they are less likely to violate the GATT.

GATT Articles XX(b) and (g) are the key exceptions that encompass environmental measures. The Article XX preamble (referred to as the 'chapeau') makes these exceptions 'subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination', implying that discrimination may be justified in certain circumstances. An environmental measure that violates GATT obligations may nevertheless be allowed to stand if it meets the conditions set out in these provisions. The WTO *Agreement on Technical Barriers to Trade* uses similar language in its non-discrimination obligations and environmental exceptions.[17] However, it is beyond

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[15] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).
[16] GATT Report, above n 6, 7.
[17] *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). Other than in *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), WTO Doc WT/DS231/AB/R, AB-2002-3 (2002) (Report of the Appellate Body), the substantive provisions of the *Agreement on Technical Barriers to*

the scope of this thesis to analyse these provisions of the *Agreement on Technical Barriers to Trade*, since they require an analysis independent of the GATT analysis.[18]

II. Non-Discrimination

This part considers the application of the principle of non-discrimination to environmental measures in the GATT. I first examine the most-favoured-nation and national treatment rules. I then discusses how the term 'like products' may restrict the range of environmental goals that may be pursued using trade measures.

A. Most-Favoured-Nation and National Treatment

Two key subsidiary principles flow from the principle of non-discrimination. The 'most-favoured-nation' rule prohibits discrimination among nations who are party to the trade

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Trade have not been interpreted by either panels or the Appellate Body. The provisions of the Tokyo Round *Agreement on Technical Barriers to Trade* (the 'Tokyo Round Standards Code') which preceded the *Agreement on Technical Barriers to Trade* have also not been addressed by any panel.

[18] The *Agreement on Technical Barriers to Trade* is an extension of the GATT to a particular type of trade barrier. See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 80. While the *Agreement on Technical Barriers to Trade* uses similar principles and language, treaty terms must be interpreted in the context of the provision and agreement in which they are used, even where the language is identical. See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 88, where the Appellate Body makes this point with respect to the term 'like products'. Moreover, they cannot be given an identical interpretation as the GATT equivalents since that would violate the principle that all treaty terms are to be interpreted so as not to be redundant. This principle has been applied by the Appellate Body. In *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 23 the Appellate Body stated the principle in the following terms: 'One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.' For example, the admonition against 'unnecessary' obstacles to trade in the *Agreement on Technical Barriers to Trade* echoes the use of the term 'necessary' in GATT art XX. Had the drafters intended these terms to have the same effect, they could have incorporated GATT art XX into the *Agreement on Technical Barriers to Trade* by reference. Since they did not do so, and also chose different wording, interpretations of the term 'necessary' will not necessarily apply to the term 'unnecessary'.

agreement.[19] The 'national treatment' rule prohibits discrimination between domestic and imported goods that favours the former to the detriment of the latter.[20]

Because it applies to domestic regulatory measures, the national treatment rule may call into question governmental measures that are not necessarily designed for the purpose of restricting imports.[21] The national treatment rule prohibits both explicit and implicit discrimination. It may thus be used to challenge regulations or taxes that *prima facie* appear to be non-discriminatory, but have the effect of placing imported products at a disadvantage.[22]

B. GATT: 'Like Products' (The Product-versus-Process Debate)

GATT Articles I and III require MFN treatment and national treatment, respectively, for 'like products'. This phrase plays a central role in determining the basis upon which a

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[19] GATT art I:1 states the MFN principle as follows: '...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.' However, there are exceptions to this rule. For example, pursuant to GATT art XXIV, this rule does not prevent the formation of free-trade areas, which by their very nature, grant privileges to their members that are not extended to non-members.

[20] GATT art III:4 states the national treatment principle as follows: '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.' For a general discussion of national treatment in the context of GATT 1947, see John H Jackson, 'National Treatment Obligations and Non-tariff Barriers' (1989) 10 *Michigan Journal of International Law* 207 and, in the context of the *Canada-United States Free Trade Agreement*, see *Lobsters from Canada*, 3 TCT 8182 (Final Report of the FTA Panel 25 May 1990).

[21] Jackson, ibid 209.

[22] Jackson, ibid 212. A good example of such a measure is Ontario's 10-cent tax on aluminum cans. While the tax applied equally to domestic and imported products, it placed American beer at a competitive disadvantage *vis-à-vis* Ontario beer because the former is packaged primarily in cans while the latter is sold mostly in bottles. Because of the tax, a case of 24 bottles sold for $26.40, while a case of 24 cans sold for $31.60. After the tax was introduced, canned beer sales dropped by more than 60%, while bottle sales

country may discriminate against imports. If two products are alike, they must be so treated. If they are not alike, they may then be treated differently. This raises the issue of whether products may be distinguished based solely on the physical characteristics of the product or whether they may also be distinguished based on the manner in which they were produced. That is, may products be treated differently because the production and processing methods (PPMs) used to make them are harmful to the environment?

To what extent does the requirement to accord non-discriminatory treatment to 'like products' prohibit product differentiation based on environmental standards observed in the production or processing of the products? The term 'like products' appears to refer to the nature and properties of two competing although not identical products. But the expression 'like product' may have different meanings according to the context in which the term is used. Hence, product differentiations based on production processes (for example, health standards) may be GATT-inconsistent if they are 'applied to imported or domestic products so as to afford protection to domestic production' (Article III:1,2,5), to discriminate in favour of certain supplier countries (Article I), or to unduly interfere in foreign regulatory systems by making most-favoured-nation treatment subject to conditions (Article I). But they may be consistent with GATT rules (Article III) if they are applied as non-discriminatory production or consumption standards with a view to protecting health and environmental resources in the importing country.[23] In the trade and

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increased marginally over the same period. See S Feschuk, 'Can the tax, Alcan urges', *Globe and Mail* (Toronto), 12 November 1992, B3.

[23] E-U Petersmann, 'Trade Policy, Environmental policy and the GATT: Why Trade Rules and Environmental Rules Should Be Mutually Consistent' (1991) 46 *Aussenwirtschaft* 197, 216. John Jackson has argued that the GATT focuses on the product, not the production process. If a production process in an exporting nation causes cross-border pollution in an importing nation, he suggested the parties may use a

environment debate, the focus has thus been on the correct interpretation of Article III, which will be the focus of this section.

The GATT 1947 term in Article III:4 was interpreted in *United States - Restrictions on Imports of Tuna* to prohibit discrimination based on PPMs and to allow discrimination based only on the characteristics of the products themselves.[24] While this interpretation reflected conventional wisdom, some commentators have argued that adequate environmental protection requires that countries be able to distinguish between products based on the environmental impact of both the product and its production method.[25]

However, GATT Article III requires that like products be granted *unconditional* market access, which may imply that non-discriminatory access to the importing nation's market can not be made conditional upon the exporting country's environmental policies.[26] Environmental policies might take differences in the environmental impact of products and their production processes into account. A key issue is whether the term 'like

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bilateral or multilateral treaty to deal with the problem. See John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), 208-209. However, following the Appellate Body ruling in Shrimp I, Jackson modified his view, stating, 'the product-process distinction will probably not survive and perhaps should not survive'. See John Jackson, 'The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights' above n 12, 224.

[24] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted).

[25] For example, Patterson argued that environmental impact should be a relevant factor in defining 'likeness' so that countries will be able to impose standards on products based on environmentally harmful characteristics of their production process. See E Patterson, 'International trade and the environment: institutional solutions' (1991) 21 *Environmental Law Reporter* 10599, 10600. She cited as an example a 1950s French internal tax that applied only to automobiles of large horsepower, which turned out to be almost exclusively American-made. The subsequent dispute was resolved by negotiation between the United States and France. At n 14.

[26] F Roessler, *The Rules of the GATT and Environmental Policies*, mimeo cited in Petersmann, above n 23, 210, note 1.

products' permits the environmental impact of a product *outside* the importing nation to determine 'likeness'.[27]

In *Tuna I*, the United States banned imports of Mexican tuna products on the grounds that Mexican fishing techniques killed more dolphins than United States fishing techniques. The GATT panel held that the national treatment obligation in Article III:4 requires the importing nation to treat like products the same irrespective of differences in production methods. The term 'like products' did not apply to production processes, but rather to products as such. It therefore did not permit differentiation between products based on production processes that had no effect on the quality of the product. The panel stated in this regard, that:

> Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.[28]

Under the *Tuna I* interpretation, which was never adopted by the GATT parties, production processes could only be taken into account if they alter the environmental impact or safety of the product itself. Following this line of reasoning, the environmental impact of production processes on the environment *outside* the importing nation is irrelevant to the determination of whether products are alike. An importing country may protect its own environment, but has no say in how the exporting country protects its own environment or the global commons. Consequently, domestic regulations could not

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[27] Petersmann, above n 23, 210.

discriminate against imported goods based on processing methods that do not have a domestic environmental impact. However, policies that discriminate between goods on the basis of their environmental impact without regard to the country of origin, and that do not have the effect of placing imports at a competitive disadvantage, would not violate the principle of non-discriminatory treatment.

The argument against trade restrictions based on processing methods is rooted in the principle of non-discrimination. The principle of non-discrimination permits an importing nation to distinguish between similar goods on the basis of their environmental impact in the importing nation's territory. However, because it prohibits discrimination based on the product's country of origin, it may be interpreted to prohibit discrimination based on the environmental impact of production processes in the territory of the exporting nation. On this view, the domestic environmental standards of the exporting nation are irrelevant to the issue of whether two products are alike, and cannot justify discrimination against that country's products. However, this view has now been challenged in WTO jurisprudence[29] and in the academic literature.[30]

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[28] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 41.

[29] See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (2000) (Report of the Panel); WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body). For a complete list of GATT and WTO cases addressing the term 'like products', see *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), footnote 58.

[30] See Howse, above n 5, 514-515; Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 *European Journal of*

1. Recent Jurisprudence

In *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ('*Asbestos*'), Canada challenged a French ban on imports of asbestos products.[31] The Appellate Body held that the interpretation of 'likeness' is different in Articles III:2 and III:4.[32] The general principle in Article III:1, that internal measures 'should not be applied to imported and domestic products so as to afford protection to domestic production', informs the interpretation of both provisions.[33] Thus, in Article III:4, the term applies to products that are in a competitive relationship.[34] The Appellate Body has adopted a framework of four criteria to assess evidence that indicates whether products are in a competitive relationship that would lead to the conclusion that they are like products:

(i) the physical properties, nature and quality of the products;

(ii) the extent to which they may serve the same or similar end-uses ;

(iii) the extent to which consumers perceive and treat the products as alternative means of satisfying a want or demand; and

(iv) the international tariff classification of the products.[35]

International Law 249; Patterson, above n 25; John Jackson, 'The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights', above n 12.

[31] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body).

[32] Ibid paras 94-100.

[33] Ibid paras 97-98.

[34] Ibid para 99.

[35] Ibid para 101.

All four criteria must be examined before reaching a conclusion as to likeness.[36] The source of the first three criteria is the *Working Party Report on Border Tax Adjustments*,[37] while the fourth was added by subsequent panels.[38] Other criteria may be added in the future.[39] The range of evidence that will be considered in determining likeness has thus expanded since the ruling in *Tuna I*. As a result, processing methods such as the impact of fishing methods on dolphin mortality might now be taken into account in determining likeness, under the third criteria, if there is evidence of consumer perception and behaviour to support this.[40] Nevertheless, the conclusion would likely remain the same, since dolphin-friendly and dolphin-unfriendly tuna would likely be found to be like products under the other three criteria. The physical qualities of the product are the same and the end-use is the same regardless of how the tuna is caught. The tariff classification of tuna is based on the type of tuna, not how it is caught.[41]

In *Shrimp I*, the measure at issue was remarkably similar in nature to the measures at issue in the *Tuna* cases. In the *Shrimp* cases, the parties to the dispute did not argue that turtle-friendly and turtle-unfriendly shrimp were not like products under GATT Article

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[36] Ibid para 109.
[37] *Working Party Report on Border Tax Adjustments*, Adopted 2 December 1970, BISD 18S/97.
[38] See, for example, *EEC – Measures on Animal Feed Proteins*, BISD 25S/49, (Report of the Panel adopted 14 March 1978), para 4.2 and *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83 (Report of the Panel adopted 10 November 1987), para 5.6, in addition to *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 101.
[39] In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 102, the Appellate Body noted, 'These criteria are…simply tools to assist in the task of sorting and examining the relevant evidence. They are neither treaty mandated nor a closed list of criteria that will determine the legal characterization of a product.'
[40] Howse also makes this point. See Howse, above n 5.

III. Rather, the United States conceded that the shrimp embargo violated GATT Article XI and focussed its arguments on whether the measure was justifiable under Article XX. On the facts of the case, this was the correct approach to take, since the analysis employed in the *Asbestos* case would result in a ruling that they are like products under the first, second and fourth criteria. Thus, even if they could be proved not to be like products under the third criteria (consumer tastes), the balance of evidence would weigh against such a conclusion. Moreover, it would be difficult to prove that consumer tastes treat the two as unlike products, since many consumers (perhaps a majority) would make their product selection based on price rather than environmental impact. Indeed, were this not the case, a consumer labelling requirement (stating which product was turtle-friendly) would be sufficient and an import ban would be unnecessary.

In the *Asbestos* case, the Appellate Body decided that the health risks associated with asbestos could be evaluated under the first (physical properties) and third (consumers' tastes) criteria. The physical properties of asbestos fibres that made them carcinogenic were likely to influence its competitive relationship with other products in the market place. Moreover, the health risks associated with asbestos fibres would influence consumers' behaviour. The Appellate Body held that Canada had not met the burden of proving that asbestos fibres and the French product (PCG fibres, a non-carcinogenic, artificial substitute for asbestos) were like products, reversing the panel's conclusion on this issue. These facts are very different from the facts in the *Tuna* and *Shrimp* cases. The

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[41] For example, in Canada's implementation of the Harmonized System, yellow fin tunas carry the tariff classification number 0303.42.00. See <http://www.ccra-adrc.gc.ca/customs/general/publications/tariff2003/chap03ne.pdf> at 22 September 2003.

method of processing and producing asbestos was not at issue, but rather the physical properties of the product itself. Moreover, the physical properties of the product would influence consumer behaviour, rather than the consumer's reaction to the method of production.

In a key aspect of the ruling, the Appellate Body overruled the panel's interpretation of the relationship between Article III:4 and Article XX(b):

> We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994….Article III:4 and Article XX(b) are distinct and independent provisions…each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that the interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to 'adopt and enforce' measures 'necessary to protect human…life or health'….[D]ifferent inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risk may be relevant in assessing the *competitive relationship in the marketplace* between allegedly 'like' products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health.[42] (emphasis in original)

This approach to defining the relationship between substantive GATT obligations and exceptions makes sense. The particular facts in any given case can be analysed both to determine whether a substantive obligation has been breached and, if so, whether the breach may be excused under an exception to the obligation. However, two important issues remain. Should PPM-based trade measures pass the test under Article III:4 and is there only one appropriate analytical procedure to follow with respect to the analysis of PPM-based trade measures?

2. The Academic Debate

In the academic literature, there are essentially two opposing views on how to address trade restrictions that are based on PPMs. Howse and Regan argue that the GATT consistency of PPM-based measures should be based on an analysis of discrimination effects under Article III:4, rather than an analysis under GATT Article XI and XX.[43] They argue that PPM-based measures are governed by Article III:4 because they are regulations affecting the internal sale of products, even when they take the form of import prohibitions. Sanford Gaines argues that measures that prevent goods from entering the market are covered by Article XI (which governs measures affecting 'importation'), not

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[42] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 115.

[43] Howse and Regan, above n 30. Howse pursued this argument further a few years later in another article. Howse interprets paragraph 121 of the Appellate Body report in Shrimp I as suggesting that the product versus process distinction is unlikely to hold up in future interpretations of art XX. He argues that the Appellate Body's remarks (that art XX would be largely inutile unless it could be used to justify measures conditioned under other countries' policies) support the view that process-based measures do not violate GATT obligations and that art XX is therefore not necessary to justify them (provided they are non-discriminatory). For example, measures that condition market access on the method of production used, rather than the policies in the exporting country, would not violate non-discrimination obligations. In particular, Howse believes that the Appellate Body ruling in Asbestos supports the view that non-discriminatory process-based measures are consistent with art III:4, based on their consideration of consumer preferences their interpretation of 'like products'. Thus, while he notes that no single factor is dispositive, he finds this particular factor to be significant with respect to the product/process issue. See Howse, above n 5. Howse argues as follows: 'Perhaps of even greater significance in assessing whether the product/process distinction forms any real part of the WTO jurisprudence is the dictum of the AB in Asbestos that, even where two products are deemed to be 'like' for purposes of art III:4, they may still be treated differentially in regulation, provided that the result is treatment 'no less favorable' for the 'group' of imported products compared against the 'group' of like domestic products. Thus, arguendo, if a panel were to hold that turtle-friendly and turtle-unfriendly shrimp were 'like' products, it would still need to consider whether treating turtle-unfriendly shrimp differently would lead to less favorable treatment of imported shrimp as a group than domestic shrimp as a group. This would require a judgment as to whether, in singling out turtle-unfriendly shrimp, the regulatory scheme in its structure, design and operation, is systematically biased against imported shrimp as a group. A scheme that was even-handed between imports and domestic shrimp, and focused appropriately on conservation goals, might well pass this test.' Howse, above n 5, 515.

Article III (which governs measures affecting 'imported' products).[44] Gaines favours an analysis of the trade consistency of PPMs in Article XX, using an OECD analysis of the relationship between trade rules and PPMs that categorizes PPMs based on the proximity of interest of the country taking the trade measure and the environmental resource be protected and the location of the targeted producers of the product.[45]

One purpose of advocating an Article III:4 analysis of the kind of PPM-based trade measures used in the *Tuna* and *Shrimp* cases is to avoid the restrictive interpretation of Article XX that was taken in the *Tuna* cases. However, the interpretation of Article XX in the *Shrimp* cases lessens the need to remove the PPMs analysis from Article XX. Moreover, Article XX is the more appropriate place to decide the complex issues at stake in the trade and environment debate, not only with respect to trade law, but also with respect to public international law.[46] The analysis of the term like products in the *Asbestos* case does not support the view that the products in the *Tuna* and *Shrimp* cases

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[44] Sanford E Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27 *Columbia Journal of Environmental Law* 383. Gaines argues persuasively that, while one might argue 'that keeping a product out of the market is an extreme form of a measure affecting sale. But that would make art XI superfluous.' At 416. Moreover, he takes issue with the Howse and Regan reliance the Automobile Taxes case (interpreting art III:4 to cover measures that apply to manufacturers or importers that might adversely modify the conditions of competition between domestic and imported products on the internal market and not just to the products as such), noting that the foreign automobiles in question were allowed for sale in the United States, whereas most environmental PPM cases involve banning imports altogether. At 415. However, the coup de grace is his argument that the intention of the WTO members to not permit PPM-based trade measures under GATT, except under an art XX exception, is confirmed by the explicit reference in the *Agreement on Technical Barriers to Trade* to 'products and related processes and production methods' and the absence of any corresponding amendment to art III in GATT 1994, given the prevailing view that such measures were not allowed under art III of GATT 1947. At 417-418.

[45] Organization for Economic Co-operation and Development, *Processes and Production Methods(PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures,* OCDE/GD (97) 137 (11 August 1997), <www.oecd.org>at 12 October 2003.

[46] I discuss these issues later in the thesis.

are not like products.[47] At this point, the key question is therefore whether there are other types of PPM-based measures that are amenable to an Article III:4 analysis. In this regard, the OECD-based analysis used by Gaines is most useful.

Gaines classifies environmental regulations into three general categories: product regulations; resource access regulations; and PPM regulations.[48]

Gaines points out that product regulations are generally accepted under GATT (as long as their implementation does not discriminate against foreign producers), whether they set standards for products[49], tax products[50] or prohibit the import of banned products.[51] These regulations are generally acceptable because their focus is on protecting the environment or human health in the importing country and they focus on the product itself. The French ban on asbestos falls into this category. Gaines sees the argument of Howse and Regan as a proposal to treat PPM-based trade measures the same way as product regulations.

In disputes involving resource access regulations, Gaines argues that a 'government's sovereign right to exercise control' over the resource is not at stake. Rather, the issue is whether rules regulating access to publicly-owned or commons resources (such as timber,

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47 For a contrary view, see Howse, above n 5.
48 Gaines, above n 44, 390-395.
49 See *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 14.
50 See *United States—Taxes on Automobiles*, WTO Doc WT/DS31/R (1994) (Report of the Panel not Adopted), paras 5.44-5.55 and *United States—Taxes on Petroleum and Certain Imported Substances*, GATT BISD, 34th Supp (1988) (Report of the Panel adopted 17 June 1987), 34.
51 See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 192.

petroleum and fish) treat foreign nationals unfairly or distort markets.[52] Gaines cites the example of the *Softwood Lumber* dispute between Canada and the United States. This dispute involves countervailing duties (and, more recently, antidumping duties) applied periodically against Canadian lumber imports by the United States.[53] Another example would be Canadian regulations that banned exports of unprocessed herring and salmon.[54]

Gaines' method of distinguishing the resource access category from the category of PPM regulations is not entirely satisfactory. One can argue that the government's control over the resource is at stake in the *Softwood Lumber* dispute, since the American government has pressured Canadian governments to replace their system of setting the fees companies pay to harvest timber with the American system of auctioning timber rights. Thus, in this particular case, a more accurate distinction might be that this case involves GATT rules regulating trade remedy laws, rather than the analysis under Article III that takes place with respect to product regulations or the analysis under Articles XI and XX that takes place in cases involving PPM regulations. However, this distinction is not entirely satisfactory either, since the Canada-United States dispute regarding herring and salmon centred around Articles XI and XX, not trade remedy laws. Moreover, the *Tuna* and

[52] Gaines, above n 44, 393.
[53] For a detailed discussion of this case, see Bradly J Condon, *NAFTA, WTO and Global Business Strategy: How AIDS, Trade and Terrorism Affect Our Economic Future* (2002), 45-49. Since 1993, there have been several panel decisions regarding different aspects of this dispute under the *Canada-United States Free Trade Agreement*, opened for signature 22 December 1987-2 January 1988, 27 ILM 281 (entered into force 1 January 1989), the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994) and the WTO.
[54] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988) and *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the FTA Panel, (16 October 1989).

Shrimp cases, which he classifies as PPM cases, also involve rules regulating access to commons resources. Nevertheless, Gaines distinction between product and PPM regulations provides a useful conceptual framework for determining the appropriate GATT analysis in these two categories.

Gaines describes PPM regulations as laws that 'seek to mitigate the environmental effects of private activities by specifying the conditions under which those activities must be carried out' (that is, the PPMs used to produce the goods).[55] He cites the example of emissions standards to reduce air, water and soil pollution, noting that the majority of regulations in this category do not regulate trade and are primarily aimed at protecting the domestic environment. As a result, the majority of PPM regulations fall outside the realm of trade law.[56] However, a sub-category—PPM-based trade measures—does fall under the jurisdiction of trade law. This category is the focus of the OECD conceptual framework.

The OECD framework classifies PPM-based trade measures as product-related and non-product-related. The product-related category regulates production processes to ensure the safety of food and pharmaceuticals, for example. In the WTO context, this category is governed primarily by the *Agreement on the Application of Sanitary and Phytosanitary*

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[55] Gaines, above n 44, 393.

[56] Gaines argues that 'trade law has no jurisdiction in this realm of environmental policy', despite allegations by business interests that strict environmental regulation impairs international competitiveness, which he categorizes as a 'debatable point at best'. Gaines, ibid 394. It is worth noting, however, that these concerns regarding the effect of this type of environmental law on competitiveness has prompted some commentators to propose the use of countervailing duties to compensate for the allegedly lower production costs enjoyed by firms operating in so-called 'pollution havens' and that it was this type of concern

Measures and the *Agreement on Technical Barriers to Trade*.[57] Non-product-related PPMs influence the technology and raw materials used by the producer, without altering the quality or character of the final product. The American trade embargoes against tuna and shrimp fall into this category. The majority of PPM-based trade measures in this category involve the methods used by primary producers to harvest or cultivate natural goods and are limited in number.[58]

The OECD framework further classifies non-product-related PPM-based trade measures into four categories, based on the nature and location of the environmental problem: transboundary pollution; management of transboundary living resources; global environmental concerns; and local environmental concerns limited to the territory of the country (or territories of the countries) that is/are the target of the trade measure.[59] Neighbouring countries generally resolve cases of transboundary pollution through negotiation, treaties or litigation, rather than through the application of trade sanctions.[60] The remaining three categories are thus the most interesting from a trade policy perspective and are the focus of this thesis.

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regarding competitiveness that prompted the American government to reject the adoption of the *Kyoto Protocol*.

[57] Gaines, ibid 396-397. *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[58] Gaines cites the following examples: fisherman, farmers, loggers, miners and hunters. Gaines, ibid 399.

[59] Gaines, ibid 399-400.

[60] Perhaps the best example is the *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905, discussed in Chapter 4. A mining company in the Canadian province of British Columbia polluted a river

(a) Transboundary Living Resources

PPM-based trade measures have been used to protect transboundary living resources in two situations: 1) multilaterally, to enforce international resource conservation agreements among the interested states[61] and 2) unilaterally, by one of the countries with an interest in the resource, to enforce its own conservation regime in the absence of an international conservation regime.[62] Gaines states the issue in this context as 'whether the rules of international trade will or should deny a single interested state the use of unilateral PPM-based trade measures to achieve its environmental protection objectives even though it is widely agreed that the same measures would be permissible if taken in conjunction with a multilateral arrangement'.[63] The WTO Appellate Body has provided one answer to this question in the *Shrimp* cases.[64]

(b) Global Environmental Concerns

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valley in the American state of Washington. The United States successfully sued Canada for the damage that the pollution caused in American territory.

[61] For example, the *Convention on International Trade in Endangered Species* (CITES) requires signatories to ban, control or monitor trade in products derived from endangered species. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975). For a concise description of CITES, its operation and its decision making procedures, see 'The CITES Fort Lauderdale Criteria: The Use and Limits of Science in International Decisionmaking' (2001) 114 *Harvard Law Review* 1769 (arguing that politics and economics play as great a role in CITES decision making as science).

[62] For example, the shrimp embargoes of the United States in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) (with respect to Asian countries with which it had not negotiated a multilateral agreement) and in *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body) (with respect to Malaysia, which refused to participate in a multilateral agreement).

[63] Gaines, above n 44, 400-401.

Gaines describes this category as a mirror image of the case of transboundary resources. The unilateral actor may be the target, rather than the initiator, of a trade measure taken under a multilateral agreement to regulate internationally traded goods. He cites the example of the ban on trade in CFCs with non-cooperating countries under the *Montreal Protocol*.[65] These trade restrictions are product-related. The authority to impose non-product-related PPM-based measures on goods made using ozone depleting substances has not been implemented in the *Montreal Protocol.*[66]

(c) Local Environmental Concerns

The OECD study defines this category as a situation where the 'environmental and other effects [are] limited to the territory of the country using the PPM'.[67] A country is free to address its own environmental problems through a PPM regulation as long as it does not distort trade or otherwise externalise the costs of its own policies. The OECD study does not discuss the situation where a country uses a PPM-based trade measure to pressure a foreign government (or business) to adopt the desired PPM in its own territory.[68] With respect to the latter situation, Gaines cites Austria's unsuccessful effort to impose PPM-based import restrictions on tropical timber.[69]

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[64] This point is discussed in detail in Chapter 3.
[65] *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, UKTS 19 (1990) (entered into force 1 January 1989), art 4(1) and art (2).
[66] Ibid, art 4(4).
[67] Gaines, above n 44, 401. Organization for Economic Co-operation and Development, above n 45, 15.
[68] Gaines, ibid 401.

While the foregoing categorization is useful, all three of the above categories raise the issue of whether trade measures should be allowed to provide economic incentives to countries to participate in multilateral environmental agreements ('MEAs') and, if so, how to square such a policy with not only WTO law, but public international law as well. Thus, these three situations could also be categorized as follows: 1) unilateral measures to conserve transboundary living resources in the absence of a MEA; 2) multilateral measures to induce acceptance or implementation of a MEA; and 3) unilateral measures to address non-transboundary concerns in the absence of a MEA. The Appellate Body rulings in *Shrimp I* and *Shrimp II* have established a basis for justifying the first two categories under Article XX, although the limits of that approach have yet to be clearly defined.[70] Measures under the third category are less tenable, however, due to the lack of 'jurisdictional nexus'[71] between the importing country and the environment of the exporting country.

If the environmental or health interests of the importing country are not at stake in the third category, it is difficult to see how such a trade measure could be justified solely on the basis of a discrimination analysis under Article III. All three categories refer to PPMs that do not affect the characteristics of the product itself, so the *Asbestos* analysis of whether they are like products would not save a discriminatory measure. Moreover, all

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[69] Gaines, ibid 402. Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (1994) 188-189.

[70] See discussion in Chapter 3.

[71] In *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), the Appellate Body cited the 'jurisdictional nexus' between the United States and the migratory sea turtles as one reason for holding that the American embargo qualified as a measure relating to the conservation of exhaustible natural resources under GATT art XX(g).

three categories raise issues regarding the limits of WTO jurisdiction. The analysis under Article III assumes that the WTO has jurisdiction over the matter at hand. In contrast, Article XX sets out the fields of regulation that have been reserved to the jurisdiction of WTO members, to be exercised at the national level or in other international agreements if they wish. Therefore, all three types of non-product-related PPM trade measures should be analysed under Articles XI and XX, not Article III (those measures that ban or restrict imports would constitute Article XI violations). Product-related PPM trade measures, like product regulations, if they fall outside the scope of the *Agreement on the Application of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade*,[72] would be susceptible to an Article III analysis because they affect the character of the final product.

C. Outstanding Issues Regarding National Treatment

Whether PPM-based trade measures should be allowed under Article III is an interpretative issue that has yet to be resolved in academic debate. However, despite academic arguments to the contrary,[73] I conclude that non-product-related PPM trade measures are not permitted under Article III and must therefore be justified under Article XX. WTO jurisprudence does not contradict this view and, in my view, does not support the contrary view presented by Howse and Regan.[74] Moreover, for the reasons cited

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[72] Gaines, above n 44, 396-397. *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[73] See Howse and Regan, above n 30.

[74] Ibid.

above, it would be inappropriate for the WTO judiciary to substitute an Article III analysis for the Article XI/XX analysis (or an analysis under the *Agreement on Technical Barriers to Trade*[75] or the *Agreement on the Application of Sanitary and Phytosanitary Measures*[76]) with respect to this category of measures.

III. Article XI: Quantitative Restrictions

Should PPM-based trade measures be allowed under Article XI? GATT Article XI prohibits import and export restrictions[77], subject to narrow exceptions for agricultural trade. 'Environmental' trade embargoes, such as American bans on tuna and shrimp imports and a Canadian ban on herring and salmon exports, have been found to violate this obligation.[78] The main analysis of the measures in these cases has taken place under the Article XX exceptions. For the reasons given in the preceding section, non-product-related PPM trade restrictions or bans are best analysed under Article XX. The appropriate approach under Article XI should therefore be to find that such measures are prohibited by Article XI so that the analysis may then proceed to Article XX. Should a different approach be taken in the case of import or export restrictions imposed under a MEA?

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[75] *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[76] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[77] GATT art XI:1 states: ' No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product 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.'

The relevant part of GATT Article XI:1 states:

> *No* prohibitions or restrictions…*shall* be instituted or maintained…on the importation of *any* product 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.' (emphasis added)

This is pretty unequivocal, mandatory language. *No* import or export restrictions *shall* be used for *any* product from any WTO member. However, even such clear and absolute language must be interpreted in its context, in light of its object and purpose, and taking into account other agreements and rules of international law applicable between the parties.[79] The intention and practice of the parties are also relevant.[80] An argument can be made that it was not the intention of the WTO members to prohibit import or export restrictions imposed under MEAs or other international agreements requiring the use of such measures. This intention is confirmed in practice by the resort of MEA parties to MEA forums to address the issue of import and export restrictions, rather than challenging such measures under Article XI:1. For example, African countries that wish to resume the commercial exploitation of ivory have sought permission to relax trade restrictions under the *Convention on International Trade in Endangered Species* ('CITES'), not the WTO.[81] Thus, one can argue that Article XI:1 should be interpreted as not applying to MEA measures (between parties to the MEA) because they fall outside

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[78] As noted above, this point was conceded in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).
[79] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31.
[80] See Lord McNair, *The Law of Treaties* (1961), 424.
[81] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975). See Alanna Mitchell, 'Proposed ivory sale may harm elephants', <http://www.globeandmail.com> (Toronto), at 18 June 2002. Botswana,

the jurisdiction of the WTO. This approach views MEA trade measures as *lex specialis*—the more specific trade provisions in MEAs prevail over the more general language of Article XI in the event of inconsistency.[82] However, Article XI:1 should be interpreted in a manner that is compatible with other international obligations where possible.[83] Moreover, this approach has been rejected in GATT and WTO jurisprudence.[84]

An alternative approach is to interpret MEA trade restrictions as violations of Article XI:1 and proceed to analyse the measure under Article XX exceptions. In *Shrimp II*, the Appellate Body accepted that the US import ban violated Article XI:1 because that issue was not contested by the parties to the dispute. No case has raised the issue of whether an import or export ban imposed under a MEA violates Article XI:1. However, this analytical approach is the better of the two alternatives.

Namibia, South Africa and Zimbabwe applied for a change in the rules at the convention secretariat in Geneva.

82 See discussion in Chapter 1.

83 In *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc WT/DS54R, WT/DS55R, WT/DS59R, WT/DS64R (1998) (Report of the Panel), para 14.28, in response to Indonesia's argument that the *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994) was *lex specialis* and therefore was the only applicable law (to the exclusion of other WTO provisions), the Panel invoked the presumption against conflict in public international law:

> In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.

See also *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (1999) (Report of the Panel), paras 9.92-9.95.

84 See *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (1999) (Report of the Panel), para 9.64:

> Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement. Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such

Environmental policy choices do not fall under the jurisdiction of the WTO. However, trade measures do. Article XI clearly prohibits trade restrictions as a general rule. Thus, there is a clear conflict between the general rule of Article XI and the obligation to use trade restrictions in certain MEAs.[85] There is no conflicts clause in the WTO that determines which obligation is to prevail. However, Article XX provides exceptions to the Article XI general rule that reserve jurisdiction over environmental policy to national governments, subject to the requirements of the Article XX chapeau. The national governments can exercise their jurisdiction regarding the content of environmental policy alone or in concert with other national governments in MEAs. As long as the policy fits the parameters of Article XX(b) or (g), the trade restrictions in question will qualify for provisional justification under one of these two subheadings. However, the WTO retains jurisdiction over the use of trade restrictions to implement those policies. That supervisory jurisdiction is exercised under the Article XX chapeau, to ensure that MEA obligations are not implemented so as to avoid GATT obligations. It is necessary to retain this jurisdiction of the WTO over the manner of implementation in order to ensure that WTO members do not abuse their jurisdiction under Article XX(b) or (g) to create disguised barriers to trade or to unjustifiably discriminate against other WTO members. Even if the WTO had a conflicts clause that determined that MEA trade obligations prevail over GATT obligations (or if the rules regarding conflicts between treaties led to

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restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report EEC – Imports from Hong Kong.

[85] See Chapter 1, n 42, which summarizes the MEAs that contain trade-related provisions.

the same conclusion), the implementation of the MEA obligations would still need to be subject to the requirements of the chapeau in order to safeguard against abuse.

This analytical procedure accords with the intention of WTO and MEA parties to place trade policy under the jurisdiction of the WTO and environmental policy under the jurisdiction of the MEA. The view that MEA trade restrictions qualify for provisional justification under either Article XX(b) or (g) but nevertheless remain subject to WTO supervision under the chapeau provides a way to reconcile potential conflicts between the two sets of obligations. This approach thus avoids the conflict and is more consistent with the presumption against conflict in public international law.[86]

National treatment and MFN must also apply to MEA measures, in order to prevent abuse in the manner in which they are implemented and applied in domestic law. The obligations set out in the MEA itself are unlikely to discriminate, but could be implemented in domestic legislation so as to violate MFN or national treatment obligations or applied in a manner that constitutes arbitrary or unjustifiable discrimination and thus requires an examination under Article XX. Since the discrimination test under Articles I and III are more strict than the discrimination test in the Article XX chapeau, discriminatory measures that could be justified under Article XX would nevertheless fail to pass muster under Articles I and III. It would be unwise to say that the DSB has no jurisdiction at all over trade measures implemented pursuant to MEAs, because a WTO member could then purport to take a measure under a MEA and

[86] See above n 83.

thereby preclude DSB scrutiny altogether.[87] As long as the MEA requires that trade measures be implemented in conformity with the requirements of the Article XX chapeau, any apparent conflict between the MEA and GATT obligations will be resolved.[88] Even if the MEA contains no explicit requirement in this regard, the MEA should be interpreted in a manner that is consistent with GATT obligations where the MEA parties are GATT members.[89]

If a measure does not discriminate, or violate Article XI, there is no need to determine whether it meets the conditions set out in Articles XX(b) or (g).[90] On the other hand, if

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[87] In addition to non-discrimination, in exceptional circumstances GATT art XXIII:1(b) provides a further cause of action that should not be ruled out in the case of MEA measures, for the same reasons. For a discussion of the scope of art XXIII:1(b) in the context of measures taken to protect human health, see *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), paras 185-191.

[88] Principle 12 of the *Rio Declaration* is consistent with this view. It provides that '[t]rade policy measures should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess, 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874. This language echoes the language of the art XX chapeau. Similarly, *Agenda 21*, para 39.3(d) provides guidelines for the implementation of trade measures that reflect key GATT obligations and exceptions: non-discrimination, least-trade-restrictiveness, transparency and special consideration for developing countries. *Agenda 21*, Report of the United Nations Conference on Environment and Development 9, Rio de Janeiro 3-14 June 1992, UN Doc A/Conf.151/26/Rev.1. Following these guidelines in the implementation of MEA trade measures promotes coherence between international environmental law and international trade law. Also see *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992 (1992) 31 ILM 849 (entered into force 21 March 1994) and *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. For a different view of the purpose of these provisions, see Jan McDonald, 'It's not easy being green: Trade and Environment Linkages Beyond Doha' in Ross Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (2003), 145 (arguing that deference to the imperatives of world trade and economic development in non-trade *fora* show that real progress on promoting mutually supportive trade and environment policies remains elusive).

[89] The GATT would be taken into account under Vienna Convention, art 31(3)(c), which requires that 'any relevant rules of international law applicable in the relations between the parties' be taken into account in the interpretation of treaties.

[90] In the context of the *Canada-United States Free Trade Agreement*, opened for signature 22 December 1987-2 January 1988, 27 ILM 281 (entered into force 1 January 1989), the majority of the FTA panel in the *Lobsters* case ruled that once a measure that deals with both foreign and domestic products is found to be consistent with the national treatment obligation of GATT art III, not only is there no need to consider the

the measure is found to violate an obligation, the issue then becomes whether it is nevertheless permitted under an Article XX exception. This raises the question of the subject matter of Articles XX(b) and (g).

IV. Article XX Exceptions

GATT Article XX contains two paragraphs, drafted in 1947,[91] that seek to balance trade liberalization and environmental protection:

> 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…

While Articles XX(b) and (g) do not explicitly cover environmental measures, their language can be and has been interpreted to include environmental concerns. Nevertheless, before the *WTO Agreement* entered into force,[92] there was some debate over the applicability of these provisions to the environment.

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environmental exceptions, but there is no need to consider any other obligations either, in this case, those prohibiting import and export restrictions under art XI. However, two of the five panel members delivered a strong dissent, arguing persuasively that arts III and XI are not mutually exclusive. *Lobsters from Canada*, 3 TCT 8182 (Final Report of the FTA Panel 25 May 1990). See also T McDorman, 'Dissecting the Free Trade Agreement Lobster Panel Decision' (1991) 18 *Canadian Business Law Journal* 445, 453.

91 *General Agreement on Tariffs and Trade 1947*.

92 The *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, 33 ILM 1197 (1994) entered into force 1 January 1995.

A. The Applicability of Article XX to the Environment

Some GATT critics have argued that environmental issues were mostly overlooked when the GATT was drafted, because environmental protection was not an issue at the time.[93] For example, Shrybman pointed to the fact that the word 'environment' does not appear in the GATT text, but only in a collateral agreement on subsidies.[94] He further argued that paragraph XX(b) was not intended to protect the environment because 'it is a fundamental tenet of legal interpretation that the meaning and application of an agreement be determined at the time that it was concluded or amended'.[95] Shrybman therefore concluded that the drafting history of XX(b) indicated it was intended to protect 'quarantine and other sanitary regulations'.[96] He did not, however, address paragraph XX(g).

Others have taken the opposite view. For example, Charnovitz concluded, after an historical review going back to the 19th century, that the history of Article XX demonstrates that it *was* designed to encompass environmental measures.[97] To conclude that XX(b) was aimed solely at sanitary restrictions would require a narrow look at the

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[93] See, for example, S Shrybman, 'International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade' (1990) 20 *The Ecologist* 30.
[94] Ibid 34, note 22. The *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT*, art 11 recognized the validity of subsidies that may be used to effect the 'redeployment of industry in order to avoid congestion and environmental problems'. The Tokyo Round Standards Code also made reference to the environment.
[95] Shrybman, ibid.
[96] GATT, *Analytical Index, Notes on the drafting, interpretation and application of the Articles of the General Agreement* (3rd ed) 116, cited in ibid 34.
[97] S Charnovitz, 'Exploring the Environmental Exceptions in GATT art XX' (1991) 25 *Journal of World Trade* 37, 55.

drafting process that took place between 1946 and 1948.[98] He cited more than a dozen examples of treaties that used trade measures to pursue environmental objectives between 1890 and 1927.[99]

The prior existence of trade-restrictive environmental provisions does not prove that Article XX was intended to resolve conflicts between the GATT and these other international agreements. However, it does demonstrate that trade-restrictive environmental laws did exist before the GATT was drafted. Whether the drafters of Article XX were aware of the existence of such trade barriers and the need to consider the circumstances under which environmentally motivated trade restrictions would prevail over the general principles of trade law is now a moot point. The Appellate Body has held that term 'natural resources' in Article XX(g) is not static in its content but rather 'by definition evolutionary' and therefore has to be interpreted within the framework of the entire legal system prevailing at the time of interpretation.[100] This temporal issue has thus been resolved, at least with respect to Article XX(g).

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[98] Ibid 44. Charnovitz points out that the reason why there was little debate on the scope of XX(b) at the time was that the point had already been debated twenty years earlier, in the context of the *International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927* and several bilateral treaties. One example of the latter is the Canada-Mexico trade agreement of 1946, which exempted restrictions 'imposed for the protection of plants or animals, including measures for protection against disease, degeneration or extinction...'. At 41-43.

[99] Ibid 39-41.

[100] *United States—Import Prohibition of Certain Shrimp and Shrimp* Products, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 130, citing *Namibia (Legal Consequences) (Advisory Opinion)* [1971] ICJ Rep 31.

Leaving aside the issue of whether or not the interpretation of Article XX should be frozen in time,[101] GATT 1947 has now become GATT 1994. The drafters of the Uruguay Round agreements were certainly aware of the trade and environment debate, as evidenced by the reference to sustainable development and environmental protection in the preamble of the *WTO Agreement* and the *Decision on Trade and Environment*. Thus, if the applicability of Articles XX(b) and (g) to environmental protection measures depends on the negotiating context in the year in which they were drafted (or susceptible to amendment), both the year and the context have now changed.

Charnovitz considers the language of Article XX, properly interpreted, to be adequate to meet the task of balancing free trade and environmental protection:

> There may be a few issues that do not fit the Article XX framework - the preservation of scenic vistas, perhaps. But just about everything else relates squarely either to the life or health of living organisms or to the conservation of truly exhaustible resources like clean air, fossil fuels, and stratospheric ozone.[102]

Experts advising Canada's NAFTA Environmental Review Committee took the view that the combination of GATT Articles XX(b) and XX(g) provide an exception for a broad range of environmental measures.[103] Nevertheless, some environmental organizations recommended that this understanding be clarified in the NAFTA.[104] As a result, NAFTA Article 2101, which incorporates Article XX, states in part:

> The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g)

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[101] This issue was discussed in Chapter 1.
[102] Charnovitz, above n 97, 55.
[103] Canada, *North American Free Trade Agreement: Canadian Environmental Review* (Ottawa: October 1992), 15.
[104] Ibid.

> applies to measures relating to the conservation of living and non-living exhaustible natural resources.[105]

This provision may clarify the application of GATT Article XX to environmental measures, but it does not alter its meaning or scope. Article XX(b) still applies to the protection of 'human, animal or plant life or health' and Article XX(g) still applies to the conservation of 'exhaustible natural resources'. The Uruguay Round negotiations presented an opportunity to provide a comparable clarification. It is reasonable to assume that they found this unnecessary to do so.

B. The Division of Subject Matter Between Articles XX(b) and (g)

One issue that remains unresolved is the division of subject matter between Articles XX(b) and (g). In *United States – Standards for Reformulated and Conventional Gasoline ('Reformulated Gasoline')*, the Appellate Body stated:

> In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:
>
> 'necessary' - in paragraphs (a), (b) and (d);
> 'essential' - in paragraph (j);
> 'relating to' - in paragraphs (c), (e) and (g);
> 'for the protection of' - in paragraph (f);
> 'in pursuance of' - in paragraph (h);
> and 'involving' - in paragraph (i).
>
> It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of *connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.* (emphasis added)[106]

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[105] *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994), art 2101(1).
[106] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

Article XX plays the key role of dividing jurisdiction over different subjects between the WTO 'legislature' and national governments. In this respect, the function of Article XX is similar to the constitutional division of powers in federal systems between federal governments and states or provinces. Indeed, the nature of the analysis can be quite similar in both contexts.[107] However, in the case of Article XX, the jurisdictional line shifts with the nature of the subject matter in question.

A GATT panel interpreted the words 'relating to' in Article XX(g) as exempting a broader range of measures from the strict application of the trade rules than does the word 'necessary' in Article XX(b).[108] In practice, however, both provisions were applied by GATT panels to require that governments use the least trade-restrictive means reasonably available to implement environmental policies. This standard has continued to be applied under the WTO, albeit at different points in the Article XX analysis.

The Appellate Body has adopted an analytical procedure under Article XX that first examines whether a measure can be provisionally justified under Article XX(b) or (g) and then considers whether it satisfies the Article XX introductory proviso, referred to as

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[107] For a comparison of the art XX analysis with the division of powers analysis regarding jurisdiction over environmental laws in the Canadian constitution, see Bradly J Condon, 'Constitutional Law, Trade Policy and Environment: Implications for North American Environmental Policy Implementation in the 1990s' in A R Riggs and T Velk (eds), *Beyond NAFTA: An Economic, Political and Sociological Perspective* (1993), 222. For a comparison of Canadian and Mexican constitutional treatment of environmental law, see Bradly J Condon, 'Federal Environmental Protection in Mexico and Canada' in S Randall and H Konrad (eds), *NAFTA in Transition* (1996) 281. Also see John O McGinnis and Mark L Movsesian, 'The World Trade Constitution' (2000) 114 *Harvard Law Review* 511 and Peter M Gerhart, 'The Two Constitutional Visions of the World Trade Organization' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 1. For a general discussion of trade regulation in federal systems, see Donald H Regan, 'Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo' (2001) 99 *Michigan Law Review* 1853.

the 'chapeau'.[109] While the Appellate Body has stated that the term 'necessary' in Article XX(b) requires a higher level of scrutiny than the term 'relating to' in Article XX(g),[110] the Appellate Body has applied a standard under the chapeau of Article XX that is reminiscent of the least-trade restrictive test applied under Article XX(b).[111]

The threshold for establishing provisional justification for a measure under Article XX(g) (relating to) is lower than under Article XX(b) (necessary). In most cases involving environmental matters, the enacting country argues both. However, the different standards applied suggest that these articles should address different types of policies and measures. In matters addressing protection of human health, XX(b) would seem to apply while XX(g) would not. However, even in this realm, a measure addressing air pollution (to protect human health) was accepted as fitting XX(g) on the grounds that clean air is an exhaustible natural resource.[112] Similarly, Article XX(b) specifically applies to animal life, but measures aimed at saving the life of sea turtles were justified under XX(g).[113] In

[108] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the GATT Panel (22 March 1988) BISD, 35th Supp 98, para 4.6.

[109] See *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 22 and *United States—Import Prohibition of Certain Shrimp and Shrimp* Products, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), paras 118-122.

[110] See *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

[111] With respect to art XX(g), see *United States—Import Prohibition of Certain Shrimp and Shrimp* Products, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 171, '…an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure…'. With respect to the least trade restrictive test in arts XX(b) and (d), see discussion below.

[112] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

[113] *United States—Import Prohibition of Certain Shrimp and Shrimp* Products, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

the case of the French ban on asbestos, the aim is clearly to protect human health, not to conserve natural resources, but most cases are not so clear.

So what, then, is the difference between XX(b) and XX(g)? Should they be interpreted so that a given subject matter can fit either exception? There is nothing in the treaty language to suggest XX(b) is limited to sanitary and phytosanitary measures, though they can be included there.[114] Nor is there any indication that one is intended to apply to internal matters and the other to the global environment. Does this issue matter, since all categories in Article XX are subject to the chapeau test in the end? It should. Otherwise, there would be a redundancy.[115] Moreover, if the threshold is lower for Article XX(g) measures than for Article XX(b) measures, the difference to the two categories needs to be more clearly delineated. While it is not possible to make a definitive list of measures that fit into one category or another, some general guidelines would be useful.

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[114] Sanitary and phytosanitary measures would now be addressed under the *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). See *Australia—Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R, AB-1998-5 (1998) (Report of the Appellate Body).

[115] In *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 23, the Appellate Body stated: 'One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. In support, the Appellate Body cited, *inter alia*, *Corfu Channel (United Kingdom v Albania)*, [1949] ICJ Rep 22 and *Territorial Dispute (Libyan Arab Jamahariya v Chad)* [1994] ICJ Rep 21. Also see *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc WT/DS56/AB/R (1998) (Report of the Appellate Body), para 81, in which the Appellate Body held, 'a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'. Also see *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/AB/R, AB-1999-8 (1999) (Report of the Appellate Body), para 81, affirming this view.

Gaines' categorization of environmental laws (product regulations, resource access regulations, and PPM regulations) and the OECD framework for PPM-based trade measures are useful in this regard. In *Reformulated Gasoline*, the Appellate Body suggested that the 'connection…between the measure…and the state interest' should inform the interpretation of Article XX.[116] The categorization of measures based on the proximity of interest of the enacting country in the subject matter being addressed is thus useful in determining not just whether the measure fits the exception, but also in determining which exception applies.

Categories of measures that have been found to fit into one exception should presumably not fit into the other. For example, since a unilateral measure aimed at protecting transboundary resources (migratory turtles) has been held to fit into Article XX(g), this category of measure should not be covered by Article XX(b). However, since this measure can be classified as one that was necessary to protect animal life—the subject of Article XX(b)—to make the differentiation between XX(b) and XX(g) consistent with the *Shrimp* decisions, one must distinguish this measure on a different basis. The logical choices are the territorial reach of the measure (that is, whether the measure regulates or affects activities inside the territory of the enacting country, outside its territory or both) or the location of the subject matter being protected (that is, whether the interest being protected is in the territorial jurisdiction of the enacting country, outside its territory or transboundary/global).

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[116] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body). While one may argue that this statement was made with

The focus of product regulations is on protecting plants, animals or human health in the importing country and they focus on the product itself. The French ban on asbestos falls into this category. Thus, some measures in this category may not be prohibited by Article III and therefore not require justification under Article XX. Those that are prohibited by Article III should be addressed under Article XX(b), since they focus on the effect the product has in the importing country, rather the effect of the PPMs in the exporting country. While they may affect the activities of foreign producers, that is not their primary aim.

Gaines definition of resource access regulations is more problematic. It requires further definition in order to be useful in the Article XX context. Where the concern is with their effect on market distortions, so that the issue is subsidies rather than trade restrictions, Article XX does not come into play, as in the *Softwood Lumber* case. However, where they involve export restrictions aimed at conserving natural resources, as in the *Herring and Salmon* case,[117] the logical choice is Article XX(g). In this case, control over the resource being protected is in the country enacting the measure, but the location of the resource is transnational (the fish migrate between international, Canadian and American waters) and the measure has effects on transnational access to the resource. Thus, as in the *Shrimp* case, the territorial reach of the measure is extraterritorial and the location of the subject matter being protected is transnational.

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respect to the strictness of the different standards rather than with respect to the division of subject matter, the two are closely related.

PPM regulations include emissions standards to reduce air, water and soil pollution that do not regulate trade and are primarily aimed at protecting the domestic environment. This category of PPM regulations fall outside the realm of trade law and need not be categorized as falling under XX(b) or (g). Thus, only PPM measures that affect trade need to be considered—the focus of the OECD conceptual framework.

PPM-based trade measures in the product-related category focus on the protection of human health in the importing country and are governed primarily by the *Agreement on the Application of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade*.[118] In cases where Article XX comes into play, these measures fit Article XX(b) for the same reason as product regulations do. While they may have extraterritorial reach with respect to the PPMs used in the exporting country, measures affecting human health clearly fall under XX(b) because of the location and nature of the interest being protected.

Non-product-related PPM-based trade measures do not alter the quality or character of the final product. Of the four OECD subcategories, three are relevant here: 1) management of transboundary living resources (where unilateral measures are used to

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[117] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988).
[118] Gaines, above n 44, 396-397. *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994). *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

conserve transboundary living resources in the absence of a MEA); 2) global environmental concerns (where multilateral measures are used to induce acceptance or implementation of a MEA); and 3) local environmental concerns limited to the territory of the country (or territories of the countries) that is/are the target of the trade measure (where unilateral measures are used to address non-transboundary concerns in the absence of a MEA). The American trade embargoes against tuna and shrimp fall into the first subcategory and, pursuant to the *Shrimp* decision, fit Article XX(g) based on both the territorial reach of the measure and the location of the subject matter being protected. The second category fits Article XX(g) for the same reasons. Moreover, MEAs in this category protect global interests in subject matters that may be classified as exhaustible natural resources, such as the ozone layer,[119] global biodiversity,[120] and the global climate.[121]

The third category of measure could fit into either XX(b) or (g) depending on the subject matter. However, if one is to interpret Article XX in accordance with prevailing principles of international law, such measures would not be justifiable under either. There is a lack of 'jurisdictional nexus' between the country enacting the measure and the location of the interest being protected. The proximity of interest is too remote. They do not fit Article XX(b) because they are not aimed at protecting humans, animals or plants

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[119] *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, UKTS 19 (1990) (entered into force 1 January 1989).
[120] *Convention on Biological Diversity*, opened for signature 5 June 1992, UNEP/bio.Div./CONF/L.2, 31 ILM 818 (1992) (entered into force 29 December 1993), *Cartagena Protocol on Biosafety*, 29 January 2000, UNEP/CBD/ExCop/1/3, <http://www.biodiv.org/biosafe> at 4 November 2003.
[121] *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992 (1992) 31 ILM 849 (entered into force 21 March 1994). *Kyoto Protocol*, opened for signature 16 March 1998, available at <http://unfccc.int/resource/convkp.html> at 4 November 2003.

inside the territory of the enacting country. Nor do they fit Article XX(g), since there is no territorial nexus between the enacting country and the subject matter of the measure. Thus, while it may be possible to accompany such trade measures with domestic restrictions (for example, ban the import of tropical timber and ban its sale domestically), the domestic restrictions do not conserve a natural resource that occurs within the territory of the enacting country.

Non-product-related PPM-based trade measures taken pursuant to a MEA would be considered under Article XX(b) or (g) based on the location and nature of the interest being protected. For example, those aimed at the management of transboundary living resources or global environmental concerns would fit into Article XX(g).

One problem with the foregoing proposal is that there is nothing in the wording of Article XX that explicitly assigns subject matter based on geographic proximity of interest. However, there is nothing that excludes this possibility either. Moreover, this approach is consistent with the nature of the subject matter addressed under other Article XX headings that use the term 'necessary'.

In addition to Article XX(b), two other headings employ the term 'necessary'. Article XX(a) permits measures that are 'necessary to protect public morals'. Since public morals are an aspect of cultural differences, the morals being protected would have to be

those of the citizens in the enacting country. [122] Any other interpretation would have to assume the existence of a global moral norm or permit a measure aimed at effecting a policy of cultural imperialism. Article XX(d) permits measures that are 'necessary to secure compliance with laws or regulations'. While Article XX(d) does not specify that the laws in question are those of the enacting country, this is a logical assumption. The illustrative list of laws includes, for example, customs enforcement. Since customs officers are generally not permitted to enforce laws outside their country's territory, this must refer to the enforcement of customs regulations in the enacting country. [123] Thus, the use of the term 'necessary' in Article XX suggests that the location of the state interest is within the territory of the enacting country.

In addition to Article XX(g), two other headings employ the term 'relating to'. Article XX(c) permits measures 'relating to the importations and exportations of gold or silver'. When this article was drafted, the international monetary system was based on the gold standard. It is reasonable to infer that this heading is related to the management of this system. Thus, measures in this category would be primarily aimed at a transnational or global issue, namely the stability of international exchange rates. Article XX(e) permits measures 'relating to the products of prison labour'. These measures would be classified as non-product-related PPM-based trade measures do not alter the quality or character of

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[122] See Bradly J Condon, 'NAFTA at Three-and-One-Half Years: Where Do We Stand and Where Should We Be Headed? A Cross-Cultural Analysis of North American Legal Integration' (1997) 23 *Canada-United States Law Journal* 347, 360-361.

[123] Generally speaking, the jurisdiction of law enforcement officers ends at the border of their country. Thus, it is necessary for countries to enter into international agreements to permit cross-border law enforcement, such as the Schengen Agreement, whose signatories have agreed to allow police from member countries to pursue criminals across jurisdictions. See <http://Europa.Eu.int/en/agenda/schengen.html>at 14 October 2002.

the final product. As noted above, this category of measure falls under Article XX(g) using the proposed conceptual framework. While the activities being regulated occur entirely within the territory of the exporting country, the competitive effect on prices would be international in scope (assuming this is the rationale for this heading). Thus, the use of the term 'relating to' in Article XX suggests that the state interest in question is transnational or global, rather than contained within the territory of the enacting country.

The following sections examine GATT and WTO jurisprudence regarding Articles XX(b) and (g) and the Article XX chapeau. This examination will identify inconsistencies in the jurisprudence with the conceptual framework that I have proposed, if any exist. However, the primary focus of the following sections is on the other tests that measures must pass in order to be justified under Article XX.

C. Article XX(b): Necessary Restrictions on Trade

The party relying on this exception must make a *prima facie* case that the policy goal at issue falls within the range of policies designed to protect human, animal or plant life or health.[124] The analysis then proceeds to whether the measure at issue is 'necessary' to

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[124] For example, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (2000) (Report of the Panel), para 8.194, the panel found that the EC had made a *prima facie* case for the existence of a health risk in connection with the use of asbestos that was confirmed by the opinions of experts and not rebutted by Canada. Thus the policy of prohibiting asbestos fell within the range of policies designed to protect human health. The Appellate Body upheld the Panel's ruling as a finding of fact that did not exceed the Panel's lawful discretion, as the trier of facts, in its appreciation of the evidence. The Appellate Body also made special mention that the Panel had noted that the carcinogenic nature of asbestos fibres had been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization. See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 162.

achieve the policy goal. With respect to human health, the Appellate Body has held that there is no requirement under Article XX(b) to *quantify* the risk a particular product poses to human health. Moreover, WTO Members have an 'undisputed…right to determine the level of protection of health they consider appropriate in a given situation'.[125] Rather, the test of necessity turns upon the issue of whether an alternative measure is reasonably available that is consistent or less inconsistent with WTO obligations.

1. The Availability of Alternative Measures

The central test of necessity is whether there are any alternative, non-trade-restrictive measures reasonably available to achieve the legitimate objective. In the absence of reasonably available non-trade-restrictive measures, the least-trade-restrictive measure that is reasonably available should be chosen. In *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, a GATT panel adopted the following interpretation of the term 'necessary' in Article XX(d) and applied it to Article XX(b):

> ...a contracting party cannot justify a measure inconsistent with other GATT provisions as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[126]

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[125] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), paras 167-168.

[126] *United States - Section 337 of the Tariff Act of 1930*, GATT BISD, 36th Supp 345, 392f (Report by the Panel adopted on 7 November 1989), cited in *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990), (1991) 30 ILM 1122, 1138.

This standard has been followed consistently by both panels and the Appellate Body under the WTO in interpreting the term 'necessary' under both Articles XX(b) and XX(d).[127]

In *Korea—Measures Affecting Import of Fresh, Chilled and Frozen Beef*, the Appellate Body set out the general guidelines, which it reiterated and expanded upon in *Asbestos*:

> We indicated in Korea—Beef that one aspect of the 'weighing and balancing process…comprehended in the determination of whether a WTO-consistent alternative measure' is reasonably available is the extent to which the alternative measure 'contributes to the realization of the end pursued'. In addition, we observed…that '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.[128]

This suggests that the characterization of the objective of a measure by the enacting country is of great importance in determining whether the means chosen to achieve the goal are 'necessary'.

The line of cases under GATT 1947 and GATT 1994 provide a series of examples of the factors that may be considered in determining whether the standard of necessity has been met.

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[127] See *Korea—Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R (2000) (Report of the Appellate Body), para 166 (with respect to XX(d)) and *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), paras 169-175 (with respect to XX(b)). Also see *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9 (1996) (Report of the Panel); WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

2. Efforts to Negotiate International Cooperative Arrangements

In *Tuna I*, the GATT panel ruled that Article XX(b) does not cover measures necessary to protect human, animal or plant life or health outside the jurisdiction of the party taking the measure.[129] This interpretation is consistent with my conceptual framework. However, the panel went on to say that, if Article XX(b) were interpreted to permit extra-jurisdictional protection of life and health, the party invoking the exception would have to demonstrate that it had exhausted all options reasonably available to it to pursue its protection objectives through measures consistent with the GATT, in particular through the negotiation of international cooperative arrangements.[130] This hypothetical *obiter dicta* would be inconsistent with my proposal. The *Tuna I* ruling was never adopted by the GATT parties.[131]

3. Extraterritorial Effect

The *Tuna II* panel, whose ruling was also not adopted by the GATT, employed a different analysis than *Tuna I*, but reached the same result. It applied a three-prong test to both Articles XX(b) and XX(g). The first prong considered whether the American regulations qualified as measures to conserve 'exhaustible natural resources' under Article XX(g) and 'to protect human, animal or plant life or health' under Article XX(b). Despite

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[128] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 169.
[129] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 44-45.
[130] Ibid 46.

arguments from the EEC and the Netherlands that such measures could not be applied extraterritorially, the panel held that neither article specifically limited the location of the resource or animal in question. The panel reasoned that other provisions in Article XX did not exclude measures aimed at actions outside a contracting party's territorial jurisdiction and that international law permitted states to regulate the conduct of their nationals outside their territory.[132] This reasoning is consistent with my framework insofar as its application to Article XX(g), but not with respect to Article XX(b). The *Tuna II* ruling was never adopted by the GATT parties.[133]

4. Market-Based Instruments and Economic Considerations

The *Tuna I* panel indirectly encouraged the use of one other GATT-consistent method of pursuing environmental protection—the use of voluntary, market-based standards to effect changes in production methods, in this case the labelling provisions of the American *Dolphin Protection Consumer Information Act* ('DPCIA'). The panel found the labelling provisions of the DPCIA consistent with the GATT, and in particular, consistent with the most-favoured-nation obligation of GATT Article I:1. The DPCIA did not restrict the sale of tuna products, which could be sold freely with or without the 'Dolphin Safe' label. Nor did its provisions establish requirements that have to be met in

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[131] However, the effort to negotiate was an important element in the Shrimp rulings, albeit in the context of art XX(g), which is discussed below.

[132] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not Adopted), 891-892. The panel gave the example of art XX(e), allowing measures 'relating to the products of prison labour', as one that clearly applied to extraterritorial subject matter. It also noted that a 'state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fisherman on these vessels, with respect to fish located in the high seas.'

[133] There was similar reasoning regarding the territorial reach of measures in the Shrimp rulings, but limited to the context of art XX(g). This is discussed below.

order to obtain an advantage from government. Any advantage resulting from access to the label would depend on the free choice of consumers to prefer tuna carrying the 'Dolphin Safe' label. The labelling provisions did not therefore make the right to sell tuna conditional upon the use of specific fishing methods. Access to the label was likewise consistent with Article I:1, since the regulations applied to all countries whose vessels fished in the Eastern Tropical Pacific and thus did not distinguish between products originating in Mexico and products originating in other countries.

The DPCIA, like other environmental labelling programmes, did not restrict trade by banning or restricting market access. Rather, it relied on access to the market to set the stage for 'green' consumers to influence the choice of production processes used by industry. Since such programmes rely on market demand to achieve their environmental objectives, rather than government intervention, it is not surprising that they be found GATT-consistent, since the GATT is aimed at government regulations and not private transactions.

Petersmann draws the following conclusion from the GATT 1947 cases regarding the necessity of trade-restrictive environmental measures as compared with market-based or other economic instruments:

> Discriminatory import bans, export prohibitions, discriminatory taxes and unilateral discriminatory trade sanctions were found to violate GATT obligations and not to be 'necessary' to achieve the environmental policy objectives of GATT Article XX. Non-discriminatory internal taxes, border tax adjustments, the 'polluter pays principle', product standards, production process requirements, labeling and ingredient disclosure requirements, prohibitions of unhealthy substances, restrictions on cigarette advertising, quantitative internal restrictions and state monopolies were recognized, in

> conformity with the recommendations of economists, as more effective, alternative instruments of environmental policy permitted by GATT law.[134]

The implication of this view is that where other available policy instruments, such as market-based instruments, can be shown to be more cost-effective, less trade-restrictive and equally effective in achieving an environmental goal, only those measures will be considered 'necessary'. Necessity is thus determined by evaluating the effectiveness of the choice of *policy instrument*, not the choice of *policy goal.* Non-economic considerations are allowed to affect *policy* choices, but economic considerations become relevant at the implementation stage, particularly when the instruments chosen to implement those policies interfere with trade.[135]

In *Asbestos*, the Appellate Body diverged on the appropriate weight to give to economic considerations in the context of analysing the 'likeness' of products under Article III:4. In a concurring opinion, one member of the Appellate Body wrote:

> …the other Members of the Division [share a] conception of the 'fundamental', perhaps decisive, role of economic competitive relationships in the determination of the 'likeness' of products under Article III:4….[T]he necessity or appropriateness of adopting a 'fundamentally' economic interpretation of the 'likeness' of products under Article III:4 does not appear to me to be free from substantial doubt. Moreover, in future contexts, the line between a 'fundamentally' and 'exclusively' economic view of the 'like products' under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days.[136]

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[134] Petersmann, above n 23, 215.

[135] The effectiveness of a particular measure depends on several considerations. With respect to PPMs, a uniform measure may prove ineffective in different environmental, economic and political circumstances. The effect on trade may make the measure ineffective if it induces a shift to other markets, rather than compliance with the measure on the part of producers. Similarly, if the measure induces a shift to other environmentally harmful production methods, the measure may lack environmental effectiveness. Finally, where the effectiveness of the measure depends on the market power of the country that restricts imports, its effectiveness will depend on this factor. See Gaines, above n 44, 407-409.

[136] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), paras 153-154.

A GATT-inconsistent measure will not be found necessary under Article XX(b) where alternative, GATT-consistent or less inconsistent measures are reasonably available. However, it is difficult to generalize as to the role that economic considerations may place in any given case in making a determination under this standard. Moreover, given the analytical role of the Article XX chapeau in assessing the manner in which measures are applied (that is, implementation), economic considerations should be reserved for the chapeau analysis. Economic considerations are not the only factor governments take into account in setting environmental policy. The issue in Article XX(b) is whether the policy falls into the range of subject matters governed by the exception. In order to preserve the freedom of WTO members to determine their policy goals independently, the basis for choosing the policy should not be second-guessed by WTO panels. Rather, the panels should focus on whether the implementation of the policy goal meets the tests laid out in the chapeau.

5. The Possibility of Compliance

Another factor that may be considered under the test of the necessity of a given regulation is whether compliance is possible. Even assuming that an import prohibition were the only measure reasonably available to protect dolphins, the *Tuna I* panel found that the particular measure chosen by the United States could not be considered necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United

States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point in time, their policies conformed to the United States dolphin protection standards. The panel considered that a limitation based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.[137]

6. Difficulty of Administrative Implementation

In *Reformulated Gasoline*, the panel held that an alternative measure did not cease to be reasonably available simply because the alternative measure involved administrative difficulties for a member. The panel's findings on that point were not appealed, and thus not address by the Appellate Body. However, in *Asbestos*, the Appellate Body addressed this issue. After noting that a measure which is impossible to implement is not reasonably available, the Appellate Body held that the difficulty of implementation is only one of several factors that must be taken into account.[138]

7. Reference to International Standards

Relying on evidence from the World Health Organization, the Thai Cigarettes panel found that non-discriminatory health protection measures (such as labelling requirements, bans on cigarette advertising, and non-discriminatory taxes) offered effective means to

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[137] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 46.
[138] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), paras 169-170. The Appellate Body did not elaborate on what other specific factors were to be considered.

achieve Thailand's health policy goals regarding cigarettes in a manner consistent with GATT rules.[139] The implication is that what is 'necessary' should be determined in part by reference to international standards, rather than unilaterally.[140]

Canada, in its capacity of *amicus curiae*, used this argument in a challenge to a United States ban on asbestos in *Corrosion Proof Fittings* v. *EPA*[141], arguing that the ban would 'unnecessarily impede international commerce'.[142] Canada argued that since other industrial countries, the World Health Organization, and the International Labour Organization had all rejected a ban on asbestos in favour of a controlled-use policy, the complete ban was inconsistent with the GATT.[143] A ban would not be 'necessary' under the GATT where there is an international consensus that particular asbestos products may be regulated safely.[144]

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[139] See *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990), (1991) 30 ILM 1122, 1138-39. See also Petersmann, above n 23, 214.

[140] The *Agreement on Technical Barriers to Trade* expressly incorporates a general requirement to base standards on international standards and to use the least-trade-restrictive alternative. See *Agreement on Technical Barriers to Trade*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), art 2.

[141] *Corrosion Proof Fittings* v. *EPA*, 947 F. 2d 1201, 1209-1211 (5th Circ. 1991). The Court held that the Canadian petitioners did not have standing to contest the EPA's actions. The GATT did not give Canada standing to protest the EPA's decision in a United States court. The GATT establishes trade dispute procedures of its own. However, the Court vacated the regulation prohibiting the manufacturing and importation of asbestos because (1) the EPA failed to give the required notice to the public regarding the data it intended to use, and (2) the EPA failed to give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately. For a further discussion of the case, see D Wirth, 'A Matchmaker's Challenge: Marrying International Law and American Environmental Law' (1992) 32 *Virginia Journal of International Law* 377, 409-410.

[142] Brief of *Amicus Curiae* Government of Canada, filed May 22, 1990 (No 89-4596), 1, cited in K McSlarrow, 'International trade and the environment: building a framework for conflict resolution' (1991) 21 *Environmental Law Reporter* 1058910592, note 44.

[143] McSlarrow, ibid 10592-93.

In *Asbestos*, Canada adopted a similar view, arguing that controlled use was a less GATT-inconsistent and equally effective means of achieving France's health policy with respect to asbestos. However, the international consensus on the carcinogenic effects of asbestos fibres, reflected in the views of the World Health Organization and other international bodies, influenced the Appellate Body's decision to uphold France's choice of a complete ban as the only means reasonably available to achieve its chosen level of health protection—a halt in the spread of asbestos-related risks.[145] Since the panel found, based on scientific evidence, that the efficacy of 'controlled use' remained to be demonstrated and remained doubtful in the case of the building industry and 'do-it-yourself' enthusiasts, the Appellate Body held that 'controlled use' was not an alternative measure that would achieve the end sought by France.[146]

Thus, on the one hand, where there is international consensus that a given product poses a serious health threat, that will support a finding of fact that the measures taken to regulate the product fall within the range of policies covered in Article XX(b). On the other hand, where there is an international consensus that certain non-trade-restrictive methods of effectively achieving a particular environmental policy goal are reasonably available, trade restrictions will be deemed unnecessary to achieve that goal, and be ruled inconsistent with trade obligations.

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[144] Brief of *Amicus Curiae* Government of Canada, filed May 22, 1990 (No. 89-4596), 17, cited in McSlarrow, ibid 10594, note 76.
[145] See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), para 162.
[146] Ibid para 174.

8. Discrimination

Under GATT 1947, arbitrary discrimination between equally harmful products, premised solely on their country of origin, did not qualify as necessary.[147] In the *Thai Cigarettes* case, Thailand sought to justify a virtual ban on imported cigarettes under Article XX(b). The GATT panel's report accepted that smoking endangers human health and that measures designed to reduce cigarette consumption were therefore permissible under Article XX(b). However, the Thai measure was designed to reduce consumption of imported cigarettes only. Accordingly, the panel found that, because imported cigarettes were banned, while the domestic production and sale of cigarettes remained unrestricted, and since effective alternative means of reducing cigarette consumption were available, the import ban was not necessary.[148]

9. Outstanding Issues Regarding XX(b)

While the meaning of the Article XX term 'necessary' has been analysed in the factual contexts of several GATT and WTO disputes, in none of these cases was there a discussion of the relationship between this term and the general principle of necessity in international law. Indeed, there is little academic discussion of the relationship between these two concepts. Massimiliano Montini has written an interesting article proposing

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[147] As Petersmann observes, it remains to be seen 'to what extent inconsistencies of environmental measures with the basic GATT obligations can be justified as being 'necessary' in terms of art XX. Petersmann, above n 23, 216.

[148] Thailand had alleged that there were differences in the composition of foreign and domestic cigarettes that justified the discriminatory measures, but this argument was not accepted by the GATT panel. See *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990), (1991) 30 ILM 1122, 1127 and 1130-31. Also see GATT Report, above n 6, 13.

that the Article XX(b) necessity test be applied to environmental measures in a manner consistent with the principle of necessity in international law.[149] This is an excellent example of the scholarship that is needed to increase the coherence of WTO law with public international law, not only with respect to trade and environment, but more generally. I will explore this issue more fully in Chapter 4.

Another area of academic discussion concerns the use of the European concept of proportionality in the development of the necessity test in Article XX.[150] I have argued elsewhere that the proportionality test used in the European Court of Justice is less favourable to environmental measures than is the least-trade-restrictive test traditionally used in GATT and WTO jurisprudence.[151] It second guesses decisions of national governments regarding the level of environmental protection they choose and is thus more intrusive on the independence of national governments in the field of environmental policy. Since the purpose of Article XX is to remove certain policy areas from the

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[149] Massimiliano Montini, 'The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001).

[150] See, for example, A Desmedt, 'Proportionality in WTO Law' (2001) 4 *Journal of International Economic Law* 441; M Hilf and S Puth, 'The Principle of Proportionality on its Way into WTO/GATT Law' in A von Bogdandy, P Mavroidis and Y Mény (eds), *European Integration and International Coordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002) 199; and Jan Neumann and Elisabeth Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law After Korea—Beef, EC—Asbestos, and EC—Sardines' (2003) 37 *Journal of World Trade* 199. Montini, ibid 155 proposes that the proportionality test be used to conduct a cost-benefit analysis to determine what is necessary under art XX. I disagree with both the use of the proportionality test and the use of cost-benefit analysis in art XX. See discussion below. Howse interprets aspects of *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) as incorporating a proportionality concept into art XX(g). See Howse, above n 5 and discussion below.

[151] Bradly J Condon, 'Reconciling Trade and Environment: A Legal Analysis of European and North American Approaches' (2000) 8 *Cardozo Journal of International and Comparative Law* 1.

jurisdiction of the WTO, it would be inappropriate to introduce such an intrusive test in WTO jurisprudence.[152]

The only jurisprudence that is inconsistent with my proposal to limit measures under Article XX(b) to those aimed at the protection of interests within the territory of the enacting country consists of *obiter dicta* in *Tuna I* (the actual holding is consistent with my proposal) and the reasoning regarding territorial reach in *Tuna II.* Since neither decision was adopted, nothing in the adopted jurisprudence is inconsistent with my proposal with respect to Article XX(b) (particularly with respect to GATT 1994).

D. Article XX(g): Measures Relating to Conservation

Article XX(g) has played a central role in GATT and WTO cases involving environmental issues. GATT panels tended to interpret XX(g) as restrictively as Article XX(b), applying a least-trade-restrictive test in both instances. While the Appellate Body has rejected this trend in terms of the analysis under each of these headings, making the threshold under Article XX(g) easier to meet than under Article XX(b), the chapeau applies to both at the end of the analysis.

In *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,*[153] a GATT panel examined regulations under the Canadian *Fisheries Act*[154] that prohibited

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[152] Neumann and Türk, above n 150, reach the same conclusion for similar reasons.
[153] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,* GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988).
[154] RSC 1985, c F-14, as am.

the export of unprocessed herring and salmon from Canada. The GATT panel concluded that 'the export prohibitions...were contrary to Article XI:1 and were justified neither by Article XI:2(b) nor by Article XX(g)'.[155] The panel developed a 'primarily aimed at' test in its interpretation of the words 'relating to' under GATT Article XX(g).[156] This test characterized the purpose of a measure by comparing its effect on the environment to its effect on trade. If the measure is not an effective means of environmental protection, but is an effective trade barrier, then the measure does not 'relate to' environmental protection and is treated as a simple trade barrier rather than an environmental measure.

Canada advised the United States that it would accept the GATT decision and remove the export restrictions, but added 'that our conservation and management goals cannot be met unless we continue to have a landing requirement'.[157] The United States considered that such a requirement would seem 'designed to have the same effect as the GATT illegal export restrictions'.[158]

The Canadian government replaced the export prohibitions with new regulations requiring the same fish, plus a few additional species of salmon, to be landed at stations in the west coast province of British Columbia. Once landed, the regulations required the

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[155] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988), para. 5.1. GATT art XI:2(b) provides that art XI:1 does not apply to 'import and export prohibitions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade'.
[156] Ibid.
[157] Letter of Canadian Minister for International Trade, Pat Carney, to United States Trade Representative Clayton Yuetter, March 21, 1988, cited in Herring (FTA) at 4.
[158] Letter of United States Trade Representative Clayton Yuetter to Canadian Minister for International Trade John Crosbie, May 2, 1988, cited *In the Matter of Canada's Landing Requirement for Pacific Coast*

completion of catch reports, reporting of landings, on-site examination, and biological sampling.[159] The United States challenged Canada's landing requirement as an export restriction that was designed to favour Canadian fish-processing plants, this time under the new *Canada-United States Free Trade Agreement* ('FTA').[160] Canada said the measure was necessary to ensure accurate data collection for the purpose of managing the resource. The relevant obligations and exceptions in the FTA mirrored those of GATT 1947. [161]

In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring ('*Herring (FTA)*'),[162] the FTA panel found the landing requirement to be an export restriction in violation of GATT XI:1 and then considered whether the measure could be saved by the GATT XX(g) exception. The FTA panel accepted the interpretation given by the GATT panel regarding the meaning of the words 'relating to':

> ...the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of [exhaustible] natural resources...[W]hile *a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource*, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g)...[S]imilarly...the terms 'in conjunction with' in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore...only be considered

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Salmon and Herring, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 4.

[159] *Pacific Herring Fishery Regulations*, amendment, SOR/89-217, Canada Gazette Part II, Vol. 123, No. 10, pp. 2384-2385; *Pacific Commercial Salmon Fishery Regulations*, amendment, SOR/89-219, Canada Gazette Part II, Vol. 123, No. 10, pp. 2390-2391, cited in Herring (FTA) at 4.

[160] *Canada-United States Free Trade Agreement*, opened for signature 22 December 1987-2 January 1988, 27 ILM 281 (entered into force 1 January 1989).

[161] GATT arts XI:1 and XX(g) are incorporated into the *Canada-United States Free Trade Agreement* in arts 407 and 1201, respectively.

[162] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989).

> to be made effective 'in conjunction with' production restrictions if it was primarily aimed at rendering effective these restrictions. (emphasis added) [163]

The FTA panel acknowledged the need to allow governments appropriate latitude in implementing conservation and environmental policies.[164] However, the panel further developed the 'primarily aimed at' test by interpreting Article XX(g) to permit governments the freedom to employ a given conservation measure only 'if the measure would have been adopted for conservation reasons alone'.[165] The analysis under this test considers such factors as the conservation benefits of the measure and the alternative measures available that might achieve the same objective.

The FTA panel adopted a cost-benefit analysis as the appropriate method to determine whether the stated conservation purpose of a measure is genuine, apparently assuming that such an approach was the only means of making environmental policy decisions:

> ...since governments do not adopt conservation measures unless the benefits to conservation are worth the costs involved, the Panel must examine the costs of the conservation measure—both resource costs and the costs of inconvenience to commercial and other interests affected by the measure -- to determine whether the conservation benefits would in fact have led to the adoption of the

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[163] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988), para. 4.6, cited in *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 28-29.

[164] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 29.

[165] Ibid 30. Two commentators have misquoted this test. Shrybman writes: '...the panel went on to hold that it is also incumbent upon the country seeking to justify a conservation program that may have trade-restricting effects to establish that the program 'was established for conservation reasons alone and that no other means were available to accomplish those objectives.' S Shrybman, *Paying the Price: How Free Trade is Hurting the Environment, Regional Development, Canadian and Mexican Workers* (1991), 6. Similarly, McKeith writes: 'In *dicta*, however, the trade panel stated that any regulation restricting free trade would be upheld only if its sole purpose was conservation and no lesser [sic] restrictive alternative was available.' M McKeith, 'The Environment and Free Trade: Meeting Halfway at the Mexican Border' (1991) 10 *UCLA Pacific Basin Law Journal* 183, 207. While converting 'relating to' into 'primarily aimed at' stretches the meaning of those words, their conversion into 'sole purpose' by these commentators would make the term a narrower one than 'necessary', an interpretation that is supported by neither the GATT provision nor the panel interpretation thereof.

> measure...[and] whether the government would have been prepared to adopt that measure if its own nationals had to bear the actual costs of the measure.[166]

Charnovitz criticized this as an 'idealistic but dubious proposition' upon which to build a definition of 'primarily aimed at', concluding that such an inherently subjective analysis leaves environmental regulations vulnerable to a broad array of challenges.[167] Cost-benefit analysis is no more subjective than other kinds of analysis, such as ethical, philosophical or political analysis. And it may seem consistent with the primary function of trade agreements—to act as instruments of economic policy. However, it does not answer the question of whether a government would have enacted an environmental regulation in the absence of trade effects. In some instances, ethical and political considerations may cause governments to select the less cost-effective of two policy instruments.[168] While cost-benefit analysis may have a role to play in balancing economic and environmental goals, it should not be used to determine whether a given regulation 'relates to' environmental protection, since it is not capable of answering that question.[169]

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[166] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 31. The panel took this economic analysis approach in spite of an earlier recognition that 'the conservation of natural resources encompasses broader environmental concerns reflecting both economic and non-economic interests'. At 29. This test second-guesses what are in essence political policy decisions. However, the panel took the view that the prohibition against 'disguised' trade restrictions in art XX Preamble both required and empowered the panel to look behind a government's representations as to its purpose in enacting a measure to make its own evaluation of the conservation justification in question. At 32-33.

[167] S Charnovitz, 'Exploring the Environmental Exceptions in GATT Article 20' (1991) *Journal of World Trade* 37, 50-51.

[168] See, for example, M Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (1988). Sagoff questions the role economic analysis should play in political decisions regarding the environment. He sees economic analysis as antithetical to democracy because it takes political decisions out of the hands of elected representatives and places them in the care of unelected economists. Sagoff argues that substantive environmental policy should be based on ethical, aesthetic, cultural, and historical considerations and, therefore, should be the subject of political deliberation, not economic analysis. If the latter has a role to play, it is limited to determining the most cost-effective of the procedures that may be used to implement the substantive policy goals that have already been determined by the politicians.

[169] Whether environmental regulation is a proper subject of cost-benefit analysis is a contentious issue. See, for example, Sagoff, ibid; S Rhoads, *The Economist's View of the World: Governments, Markets, and*

The panel was unable to determine with certainty how necessary the landing requirement was for the collection of data, and hence the conservation of the fishery, given the difficulty of measuring the risk that, without such a requirement, there could be substantial volumes of unlanded exports. Given a choice between erring on the side of conservation and removing a barrier to trade, they chose the latter, despite having earlier expressed the view that Article XX(g) was not intended to allow the trade interests of one country to override the 'legitimate' environmental concerns of another.

One could infer from the panel's application of the 'primarily aimed at' test that their interpretation required them to err on the side of trade liberalization when in doubt. The implication is that, where a measure is aimed *equally*[170] at conservation and restricting

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Public Policy (1985); J Knetsch, 'Economics, Losses, Fairness and Resource-use Conflicts' in Ross and Saunders (eds), *Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts* (1991) 20; H Daly and J Cobb, *For the Common Good* (1989); and A Gore, *Earth in the Balance: Ecology and the Human Spirit* (1992), 182-196. In many cases, it is as impossible to accurately measure the monetary value of environmental benefits as it is to place a dollar value on non-pecuniary losses such as the death of a child in a tort action. Sagoff argues that some things should never be assigned a monetary value. He writes, 'The things we cherish, admire, or respect are not always the things we are willing to pay for. Indeed, they may be cheapened by being associated with money. It is fair to say that the worth of things we love is better measured by our unwillingness to pay for them. Consider, for example, love itself.' At 68. In sum, if the non-pecuniary value of an environmental benefit cannot be accurately measured, or should not be measured, then the issue of whether the economic cost of achieving that benefit is disproportionate cannot be satisfactorily resolved using cost-benefit analysis. The Appellate Body has rejected cost-benefit analysis as a requirement for justifying a measure under Article XX(g) in *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 21:

> We do not believe … that the clause 'if made effective in conjunction with restrictions on domestic production or consumption' was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been 'primarily aimed at' conservation of natural resources at all.

[170] Shrybman reads the decision differently, concluding that the case 'illustrates that in a contest between environmental and trade objectives, the former is not likely to come out the winner even when the effects

trade, it will fail the FTA panel's 'primarily aimed at' test and will not be considered a measure 'relating to the conservation of an exhaustible natural resource'.[171]

The 'primarily aimed at' test is meant to determine the *purpose* of the measure in question, rather than its *effect*. The FTA panel implicitly concluded that the primary *purpose* of the landing requirement was to restrict trade. However, the FTA panel also found that its primary *effect* was to facilitate the collection of information[172] and that 'catch information is vital to Canada's management of its salmon and herring fisheries'.[173] Nevertheless, the FTA panel concluded that access to 100 per cent of the catch was not necessary to the validity of the data.[174]

The panel derived the 'primarily aimed at' test from the words 'relating to'.[175] 'Relate to' means to 'have some connection or relation to'.[176] The words 'relating to' cover a wider

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on trade are tangential or secondary'. See Shrybman, above n 165, 6. While this statement may be an accurate reading of the case, it is somewhat misleading, since the holding in the case errs on the side of trade where the *purpose* of the measure is equally divided between trade and environmental objectives, seemingly disregarding the *effect* of the measure.

[171] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 52. One panel member disagreed with this conclusion and considered that the landing requirement did meet the criterion of being 'primarily aimed at' conservation. At 52, note 29.

[172] The panel stated, 'an important reason for the specific rule requiring all salmon and herring to be landed in Canada was to make exports more amenable to data collection and this, in fact, is its principal effect'. Ibid 22.

[173] Ibid 52.

[174] Ibid 41. This was the key rationale for invalidating the regulations. The panel stated (at 54): 'Because it is applicable to 100% of the salmon and herring catch, the present landing requirement cannot be said to be "primarily aimed at" conservation and thus cannot be considered a measure 'relating to the conservation of an exhaustible natural resource' within the meaning of GATT art XX(g) and hence not a measure subject to an exception applicable under art 1201 of the Free Trade Agreement'.

[175] In the panel's view, 'the "primarily aimed at" test is meant to determine whether [the measures are part of a genuine conservation programme]': Ibid 30. The criterion in art XX(g) that the measures be taken 'in conjunction with restrictions on domestic production or consumption' was not at issue in the FTA case. Ibid 27.

range of measures than the words 'necessary' or 'essential'.[177] Even though the FTA panel adopted the GATT panel's distinction between measures 'necessary' to the achievement of a stated policy purpose and measures 'primarily aimed at' conservation, in the end the FTA panel's application of the latter test in the *Herring (FTA)* case transformed the words 'relating to' into a requirement that the measure be necessary. The 'primarily aimed at' test, as set out in *Herring (FTA)*, narrows the scope of the words 'relating to' so that they are read as 'necessary'. In both the GATT and the FTA cases, the elaboration of the 'primarily aimed at' test led to an interpretation that the ordinary meaning of the words 'relating to' does not bear.

In effect, the FTA dispute panel interpreted the words 'relating to' in GATT Article XX(g) to mean that a measure cannot qualify as relating to conservation unless it is the least trade-restrictive means of achieving the conservation goal.[178] The FTA panel ruled that, while it was necessary to land 80 to 90 per cent of the catch in Canada to ensure proper data collection, it was not necessary to land 100 per cent in Canada. This FTA

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[176] *Webster's Dictionary*, (2nd ed, 1959) vol 2, 1525. Similarly, *Black's Law Dictionary*, 1158, defines 'relate' as 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'.

[177] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD, 35th Supp, 98, GATT Doc 35S/98 (1988) (Report of the Panel Adopted 22 March 1988), para 4.6, cited in *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, 2 Canadian Trade and Commodity Tax Cases 7162 (Final Report of the FTA Panel 16 October 1989), 28.

[178] See J Anderson and J Fried, 'The Canada-U.S. Free Trade Agreement in Operation' (1991) 17 *Canada-United States Law Journal* 397, 403, '...the principle promulgated by this panel states that, if one is pursuing environmental regulation, the GATT provides that one do so in the least trade-restrictive way possible without compromising the environmental standard one has set for oneself.' Canada and the United States subsequently agreed to allow 20 to 25% of the catch to be landed outside Canada, subject to a further review regarding the effect on data collection. The implementation of the decision by Canada and the United States provides evidence of their intention that the least-trade-restrictive test form part of the analysis under art XX(g).

panel interpretation of Article XX(g) required the parties to use the least-trade restrictive means of conserving natural resources in order to rely on the exception.

In *Tuna I*, the GATT panel interpreted Article XX(g) as only permitting measures aimed at resource conservation within the jurisdiction of the enacting country. The panel reasoned that a country can effectively control the production or consumption of a resource only to the extent that it falls under its jurisdiction.[179] Moreover, the panel expressed the view that its interpretation restricting environmental measures to internal matters under Article XX 'would affect neither the rights of individual countries to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies'.[180] This interpretation of Article XX(g) is inconsistent with the conceptual framework I proposed above.

The *Tuna II* panel rejected the view that Article XX(g) limited the location of the resource in question. The panel noted that two previous panels had considered Article XX(g) to be applicable to policies relating to migratory species of fish, without distinguishing between fish caught inside or outside the jurisdiction of the country enacting the measure. The panel reasoned that other provisions in Article XX did not exclude measures aimed at actions outside a contracting party's territorial jurisdiction and that international law permitted states to regulate the conduct of their nationals outside

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[179] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 47.
[180] Ibid 51.

their territory.[181] However, the panel found that the American trade measures could only accomplish their objective by forcing other countries to adopt American-style laws and that this disqualified the measures under Article XX(g). This proved fatal:

> …measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed at either the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption…[182]

Unlike the *Herring and Salmon* decision, the *Tuna I* and *Tuna II* rulings were never adopted by the GATT and have not been cited with approval by the Appellate Body. Indeed, recent interpretations and rulings of the Appellate Body have diverged significantly from the course charted by the *Tuna* rulings. Nevertheless, the *Tuna* rulings remain relevant to future interpretations in that they highlight the divergence interpretations that exist under GATT 1947 and GATT 1994. Divergence and convergence of interpretations are relevant in determining the degree to which continuity of practice exists between the GATT 1947 and the GATT 1994, which in turn will inform future interpretations and negotiations in the trade and environment field.[183]

The Appellate Body has examined Article XX(g) on three occasions under GATT 1994. In *Reformulated Gasoline*, at issue were American regulations under the *Clean Air Act*

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[181] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not Adopted), 33 ILM 839, 891-892. The panel gave the example of art XX(e), allowing measures 'relating to the products of prison labour', as one that clearly applied to extraterritorial subject matter. It also noted that a 'state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fisherman on these vessels, with respect to fish located in the high seas.'

[182] Ibid paras 5.26-5.27.

[183] See Lord McNair, *The Law of Treaties* (1961), 424, where the author states:
'...when there is doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty has a high probative value as to the intention of the parties at the time of its conclusion.'

that set different standards for foreign and domestic refiners.[184] The measures were found to violate national treatment under GATT Article III:4. Having found that 'clean air' qualified as an exhaustible natural resource and that clean air standards were imposed upon both foreign and domestic producers, the Appellate Body found that the regulations qualified for provisional justification under Article XX(g). However, they failed to meet the test set out in the chapeau because the discrimination was arbitrary and unjustifiable. The United States had failed to make an effort to cooperate with foreign governments and refineries to facilitate the application of the same standard to foreign producers and the difference in standards imposed higher costs on foreign than on domestic producers.

In *Shrimp I* and *Shrimp II*, at issue were US regulations under the *Endangered Species Act* that imposed an import ban on imports of shrimp from countries that did not meet unilaterally imposed US standards for the protection of migratory sea turtles. In the appeals, the issue of whether the US measures violated Article XI:1 was not contested. In *Shrimp I*, the policy of protecting turtles was found to meet the requirements of Article XX(g), since they were an exhaustible natural resource and the same requirements were imposed on domestic fishermen. The Appellate Body held that there was a sufficient jurisdictional nexus between the turtles and the United States because they spent part of their migratory life cycle in American waters, without ruling on whether there was an implied jurisdictional limit implied in the language of Article XX(g). However, the American regulations failed the chapeau test because the United States treated Latin

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[184] *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9, 35 ILM 274 (1996) (Report by the Panel) and 35 ILM 603 (1996) (Report by the Appellate Body adopted 20 May 1996).

American and Southeast Asian countries differently. In particular, the United States had failed to make the same effort to negotiate an international agreement for turtle protection with Southeast Asian countries as it had for Latin America.

In *Shrimp II*, the issue was whether the American regulations had been amended so as to comply with the ruling in *Shrimp I*. In the interim, the United States had made significant efforts to negotiate an international agreement for turtle protection with Southeast Asian countries and amended the regulations to comply with each of the requirements set out in *Shrimp I*. However, Malaysia did not fully participate in the new international agreement and refused to seek certification for its turtle program under the new American regulations. Malaysia argued that it should not be required to submit to unilaterally designed American requirements because that would violate its sovereignty. Both the panel and the Appellate Body found that the United States had met the requirements of the chapeau. In short, they interpreted Article XX(g) as allowing the United States to use unilateral trade measures to persuade Malaysia to implement internal measures to protect sea turtles.

1. Exhaustible Natural Resources

In *Reformulated Gasoline*, the Appellate Body ruled that clean air was an exhaustible natural resource. This decision is not consistent with my proposal. The environmental aim of the measure was to protect human, animal or plant life or health from the effects of air pollution inside the territory of the United States. As such, the measure should have

been dealt with under Article XX(b), not XX(g). This would have avoided the necessity of interpreting 'exhaustible natural resource' to include clean air.

In *Shrimp I*, the Appellate Body held that sea turtles were an exhaustible natural resource, rejecting arguments that this term refers to non-living natural resources. The complainants argued that the term should be interpreted according to the understanding of this term in 1947, when the original GATT was drafted. However, as one author notes, the Appellate Body was bound to reject this view, due to the creation of a new interpretive context with the incorporation of GATT 1947 into the WTO framework in 1994.[185] The Appellate Body noted that the generic term 'natural resources' was not static in its content but rather 'by definition evolutionary' and therefore had to be interpreted within the framework of the entire legal system prevailing at the time of interpretation.[186] It then cited examples from several multilateral environmental agreements in which the term was used to include living and non-living natural resource. To support its conclusion that the turtles were 'exhaustible', the Appellate Body noted that they were listed under

[185] See Howse, above n 5, 502. Howse supports this evolutionary approach to the interpretation of the term, arguing that the issue is 'whether a Member has a legitimate reason today for taking trade-restricting measures, not whether they would have had a legitimate reason in 1947'. At 503. Moreover, he argues that the Appellate Body's interpretation of exhaustible natural resources is compatible with the original intent of the drafters of this provision, even if they thought living resources were not exhaustible, since they 'might have intended XX(g) to be interpreted in light of the evidence at the time of the dispute concerning whether a given resource was exhaustible'. At 502.

[186] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 130, citing *Namibia (Legal Consequences) Advisory Opinion* [1971] ICJ Rep 31.

CITES as being in danger of extinction.[187] Moreover, GATT 1947 panels had found fish to be included in this term.[188]

2. 'Relating to' Means 'Primarily Aimed at'

In *Reformulated Gasoline*, the Appellate Body adopted the same approach to the term 'relating to' as used in GATT 1947:

> All the participants and the third participants in this appeal accept the propriety and applicability of the view of the Herring and Salmon report and the Panel Report that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).
> …The relationship between the baseline establishment rules and the 'non-degradation' requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that *substantial relationship*, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).[189]

In *Shrimp I*, the Appellate Body applied the same test as in *Reformulated Gasoline*, noting that the term 'relating to' required an examination of 'the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources'.[190] In what appeared to be a reference to the legitimacy of the policy goal at issue, the Appellate Body stated, 'the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal,

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[187] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 132.
[188] Ibid para 131.
[189] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 19.
[190] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 135.

indeed, by the vast majority of nations of the world' [191], noting that at the time 144 States were party to CITES.

In *Shrimp I*, the Appellate Body pursued the concept of substantial relationship further, noting that it required 'a closed and genuine relationship of ends and means'.[192] In the context of the *Shrimp* measure, that required examining 'the relationship between the general structure and design of the measure…and the policy goal it purports to serve'.[193] The import ban was designed to influence countries to require the use of 'turtle exclusion devices ('TEDs') in shrimp fishing to prevent harm to sea turtles and exempted shrimp harvested under conditions that did not adversely affect sea turtles, such as aquaculture. The requirement to use TEDs was directly connected with the policy of conserving sea turtles and was 'not disproportionately wide in scope and reach in relation to the policy objective'.[194] Therefore, the relationship between ends and means was 'a close and real one'.[195]

Howse describes the test applied by the Appellate Body in *Shrimp I* as 'a 'rational connection' or reasonableness standard' that uses an implicit proportionality concept.[196] He interprets the reference to proportionality in scope and reach as a test of whether all of the trade-restrictive aspects of the American measure have some reasonable connection to the conservation programme. However, he argues that this test does not entail a cost-

[191] Ibid para 135.
[192] Ibid para 136.
[193] Ibid para 137.
[194] Ibid para 141.
[195] Ibid para 141.

benefit analysis, but focuses instead on how well the design of the measure fits with its goal. While this is an accurate assessment of the ruling, referring to it as a proportionality test is apt to cause confusion, given the use of a proportionality test in European jurisprudence that involves a comparison of environmental benefits and trade-restrictive effects, an analysis that is absent in the *Shrimp I* decision (as Howse acknowledges).

3. Restrictions on Domestic Production or Consumption

Article XX(g) requires that conservation measures be 'made effective in conjunction with restrictions on domestic production or consumption'. In *Reformulated Gasoline*, the Appellate Body interpreted 'made effective' as referring to a governmental measure being 'operative', as 'in force', or as having 'come into effect'. The phrase 'in conjunction with' meant 'together with' or 'jointly with'. In this regard, the Appellate Body stated:

> The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.
>
> There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place.[197]

In *Shrimp I* the Appellate Body applied the same test as in *Reformulated Gasoline*, finding that the requirement was met because the same standards were imposed on American shrimp fishermen and enforced with civil and criminal sanctions. Later, in determining whether the American measures constituted arbitrary or unjustifiable

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[196] Howse, above n 5, 503.

discrimination under the Article XX chapeau, the Appellate Body found that identical requirements did not pass the test because they failed to take into account differences in conditions in other countries rather than the effectiveness of other countries' programs in conserving sea turtles. This point is discussed below, but it is important to note that equality of treatment imposes different requirements at different points of analysis. (In *Shrimp I*, the measure was found to violate Article XI:I, so the issue of discrimination under Article III did not arise in the report of the Appellate Body).

In *Reformulated Gasoline*, the Appellate Body distinguished between the analysis of discrimination in Article III:4 and the analysis in Article XX(g):

> In the present appeal, …restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded 'less favourable treatment' than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g).
>
> We do not believe, finally, that the clause…was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception. …in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been 'primarily aimed at' conservation of natural resources at all. [198]

Interpretations of Article XX(g) under GATT 1947 and GATT 1994, have been consistent in applying the 'primarily aimed at' test, albeit with some refinement over time. The term exhaustible natural resources has been consistently interpreted as applying to both living and non-living resources. In terms of the jurisdictional question, with the

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[197] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R,

exception of *Tuna I*, interpretations have not limited the scope of Article XX(g) to internal environmental issues. However, while it is now clear that Article XX(g) covers resources that occur outside a nation's territory, the degree of connection that is required between the country enacting the measure and the resource in question remains unclear.

Howse argues that the requirement of restrictions on domestic production or consumption makes the issue of whether there is an implicit territorial or jurisdictional limitation in Article XX(g) a moot point.

> The AB's failure to resolve the question of whether Article XX(g) has jurisdictional or territorial limits must be understood in light of the section's condition that unilateral trade measures be taken in conjunction with restrictions on domestic resource production or consumption. By virtue of this condition, Article XX(g) already requires a link between environmental trade measures and domestic regulation dealing with the same conservation problem. Were a WTO Member to target its conservation concerns solely at the policies of other countries, without putting its own house in order, then it would not be able to meet this condition of XX(g). The question, then, of whether there is an implicit territorial or jurisdictional limitation in XX(g) may therefore be largely moot, since Article XX(g) by its explicit language only applies to environmental trade measures that are coupled with domestic environmental regulation.[199]

On this reading of Article XX(g), measures aimed at the conservation of transnational or global resources would fall into the range of subjects that fit the exception. However, measures aimed at the conservation of resources that only occur outside the territory of the country enacting the measure might also fit, since the importing country could impose restrictions on consumption of a resource that is not produced in its territory.[200]

4. Outstanding Issues Regarding XX(g)

AB-1996-1 (1996) (Report of the Appellate Body), 20-21.

[198] Ibid.

[199] Howse, above n 5, 504.

[200] For example, signatories to CITES effectively impose domestic consumption restrictions with respect to endangered species that do not occur inside their territories.

The issue of the jurisdictional nexus that is required in Article XX(g) was left unresolved by the Appellate Body in the *Shrimp* cases. There are two important aspects to this issue. One aspect is whether the jurisdictional nexus in Article XX(g), in terms of the geographical location of the resource or environmental issue, should be the same as in Article XX(b). I have proposed a conceptual framework to be used to resolve this issue. My proposal is consistent with all of the adopted decisions regarding Article XX(b) and (g) except *Reformulated Gasoline.* The second aspect requires an analysis of jurisdictional nexus in light of the general principles of international law relating to the sovereign equality of States, extraterritoriality, and the doctrine of necessity. These issues will be analysed in Chapter 4.

E. The Chapeau

In the chapeau, the words 'discrimination between countries where the same conditions prevail' and 'disguised restriction[s] on international trade', provide little guidance on what conditions are relevant or what constitutes a disguise. The approach adopted in both *Reformulated Gasoline* and the *Shrimp* cases in the chapeau analysis is to focus on the manner in which a measure is *applied*, rather than its content (which has already been assessed under the specific exception). In *Reformulated Gasoline*, the Appellate Body discussed the purpose of the chapeau as follows:

> The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].' This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be

> applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.
>
> The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.[201]

In *Reformulated Gasoline*, *Shrimp I* and *Shrimp II*, the Appellate Body has fleshed out the analysis required under the chapeau for measures that have passed muster under Article XX(g). However, the same is not true with respect to Article XX(b).[202] As a result, there remains an important analytical hurdle to jump—how the analysis of whether a measure is 'necessary' is different from the chapeau analysis. The analysis that has been set out thus far looks pretty similar, though not identical. For example, in finding that the American measure did not pass the chapeau test in *Reformulated Gasoline*, the Appellate Body stated:

> There was more than one alternative course of action available to the United States in promulgating regulations without differentiation as between domestic and imported gasoline.[203]

This language resembles the requirement under Article XX(b) that WTO members must use the least 'inconsistent' measure reasonably available for it to qualify as necessary.

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[201] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 22.
[202] In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), the Appellate Body ruled that Canada had not met its burden of proof under art III:4 with respect to the issue of like products. While it ruled that the panel was correct in the manner in which it analyzed the measure under art XX(b) in terms of DSU art 11, the Appellate Body did not discuss the chapeau. (It did not have to because it found no violation of substantive obligations and therefore did not need to make a ruling under art XX.)
[203] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

In *Shrimp I*, the Appellate Body focused further on the theme of reasonableness in defining the role of the chapeau:

> The chapeau…is, in fact, but one expression of the principle of good faith….One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges upon the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.[204]

The Appellate Body has broken down the chapeau analysis to first ask whether a measure is applied in a manner that constitutes 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', which in turn contains three elements: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable; and (3) the discrimination occurs between countries where the same conditions prevail (between different exporting countries or between the exporting countries and the importing country).[205] In both *Reformulated Gasoline* and the *Shrimp* cases, the chapeau was read so as to require an effort at international cooperation, an important point that is discussed below.

1. Unjustifiable Discrimination

In *Reformulated Gasoline*, the Appellate Body found two elements of the US measures to constitute unjustifiable discrimination:

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[204] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 158. The characterization of the role of the chapeau as preventing the abuse of the rights listed in the specific exceptions means that the only logical sequence of analysis is to consider the specific right before analyzing in the chapeau whether the right has been abused. As Howse notes, '[i]t is conceptually impossible to know whether a Member is abusing their rights until those rights have been determined'. See Howse, above n 5, 499.

[205] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 150.

> We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade.' We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.[206]

In *Shrimp I*, the Appellate Body found that the American regulations (but not the statute upon which they were based) failed this test for four reasons. First, the regulations required WTO members to adopt '*essentially the same policy*' as that applied in the United States without taking into account other policies and measures a country may have adopted that would have a *comparable* effect on sea turtle conservation.[207] Second, the United States applied the same standard without taking into consideration whether it was appropriate for the conditions prevailing in other countries.[208] Third, the United States failed to engage in 'serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition'.[209] Fourth, the United States pursued negotiations with countries in the Americas but not in South and South-east Asia and gave the former three years to adopt TED requirements while the latter had only four months. Having successfully negotiated the *Inter-American Convention*, the United

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[206] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).
[207] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 163.
[208] Ibid para 165.
[209] Ibid para 166.

States had demonstrated that there was an alternative course of action reasonably available to achieve its goal of turtle conservation.

2. International Cooperation and Justifiable Discrimination

If non-discriminatory administration of a measure requires international cooperation, an effort must be made to secure that cooperation. In *Reformulated Gasoline*, the Appellate Body rejected the argument of the United States that it was justified in applying different standards to domestic and foreign refiners because verification procedures with foreign refiners would require international cooperation whereas verification of domestic refiners would not.

In essence, the American argument that it was easier to discriminate than to cooperate was not accepted, just as the same (implicit) argument was not accepted in *Shrimp I*.

> The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. …[It appeared that] the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.[210]

Thus, while the American measures were provisionally justified under Article XX(g), they failed the test of 'arbitrary or unjustifiable discrimination' of the chapeau.

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[210] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

This view that efforts to secure international cooperation must be made before GATT-inconsistent action can be justified under the chapeau is consistent with the Appellate Body's interpretation of the chapeau in *Shrimp I* and *Shrimp II*, a chapeau analysis that was also made in the context of Article XX(g).[211] In order to make the analysis of Articles XX(b) and (g) coherent, this factor should not be considered in determining what is necessary under Article XX(b) (as in *Tuna I*), but rather reserved to the chapeau analysis. In this regard, the analytical procedure used in *Tuna I* has been implicitly overturned by *Reformulated Gasoline* and the *Shrimp* cases, since the chapeau analysis will have to be consistent regardless of whether the measure fits Article XX(b) or (g).

3. Arbitrary Discrimination

In *Shrimp I*, the Appellate Body found the lack of flexibility embodied in the American requirement to adopt essentially the same policy without consideration for differences in prevailing conditions constituted not only unjustifiable, but also arbitrary, discrimination.[212] In addition, the lack of transparency in the certification process through which US officials determined whether a country could be exempted from the import ban constituted arbitrary discrimination. There was no opportunity for the applicant country to be heard, no opportunity to respond to arguments made against it, no notice given of a negative decision, no reasons provided for the decision, and no procedure for review or

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[211] What remains unclear, however, is whether art XX must be interpreted as containing a general duty to negotiate. This issue is discussed in Chapters 3 and 4.
[212] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 177.

appeal.[213] In other words, the lack of due process in the denial of certification constituted arbitrary discrimination compared to those who were granted certification.[214]

In *Shrimp II*, the panel and Appellate Body both found that the amended US regulations, together with the efforts made to conclude a comparable multilateral agreement for turtle conservation in the Indian Ocean region, had addressed all of the flaws identified in *Shrimp I*. Even though the United States did not *succeed* in concluding an agreement with Malaysia, the United States no longer applied the measures in a manner that constituted arbitrary or unjustifiable discrimination under the chapeau.

4. Countries Where the Same Conditions Prevail

The analysis of conditions in different countries should depend on the location of the environmental concern. Where the issue is the effect of the product itself on the health or environment of the importing countries, there should be no reason to discriminate against products produced in countries that have harmonized product or process standards or that use different standards that achieve the same level of safety (so that mutual recognition is feasible). In this category of measures, different conditions can justify differential treatment. However, the analysis need not take place in Article XX(b), since the effect of the product on human health or the environment would be a distinguishing feature in the analysis of whether they are like goods.

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[213] Ibid para 180.
[214] Ibid para 181.

Where the issue is the effect of PPMs on the transnational or global environment, differences must be taken into account in order to ensure that the measure is effective. This aspect of the chapeau thus recognizes that applying the same requirements without regard for differences between countries may be both ineffective (with respect to achieving the stated goal of the requirements) and inequitable (in that it results in inequality of treatment).

5. Disguised Restriction

In *Shrimp I* and *Shrimp II*, the Appellate Body did not address the issue of 'disguised restriction'.[215] In *Reformulated Gasoline*, the Appellate body stated the following:

> We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[216]

This aspect of the chapeau test thus remains large ly undefined. While the definition of 'disguised restriction' was left floating in the *Shrimp* cases, the Appellate Body appears to have accepted that the American measures truly were motivated by the desire to prevent the extinction of sea turtles, rather than protectionist aims. The facts of the case did not lend themselves to a finding of 'disguised restriction'. It will likely take a case

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[215] In *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 142, the panel found the revised US measures to be consistent with the requirements of the chapeau and the Appellate Body agreed, but without specifically discussing the issue of disguised restriction.

[216] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

that involves a cleverly disguised protectionist measure to flesh out the analysis under this test, such as the landing requirement that Canada used to replace its export restriction in the *Herring and Salmon* case.

V. Conclusion

The use of trade measures to address environmental concerns can be addressed at several different points in GATT. Where such measures do not violate national treatment or MFN obligations, either because they do not discriminate or because they apply different measures to distinguishable products, there may be no need to justify them under Article XX. However, where such measures take the form of import or export restrictions, they will generally fail to meet the obligations set out in Article XI and will have to be justified under Article XX.

While it is clear that Articles XX(b) and (g) cover environmental trade measures, what remains unclear is the division of subject matter between these two headings. I have proposed that, where a measure does not clearly fit into one or the other, then the subject matter should be assigned based on the location of the environmental concern, with domestic concerns dealt with under XX(b) and transnational or global concerns dealt with under XX(g). Using this proximity-of-interest framework, the measures at stake in *Reformulated Gasoline* should have been addressed under Article XX(b). Measures such as those used in the *Shrimp* cases belong in Article XX(g). These subparagraphs leave WTO members free to choose their environmental policies. However, once it is determined that the policy qualifies as one covered by one of these subparagraphs, the

tests of the chapeau will determine whether the implementation of the policy goal is consistent with GATT.

Under the Article XX exceptions, the burden of proving that a measure is necessary is on the country enacting the measure and seeking the exception.[217] As the cases have demonstrated, this can be a difficult burden of proof to meet.[218] To demonstrate that a trade restriction is necessary to achieve its stated environmental goal, an importing nation must prove that it is the least-trade-restrictive measure reasonably available to achieve the policy goal. While this test has not been applied by WTO panels in Article XX(g) to determine whether a measure 'relates to' conservation, in practice it has been applied

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[217] *United States - Section 337 of the Tariff Act of 1930*, GATT BISD, 36th Supp 345 (Report by the Panel adopted on 7 November 1989). See also McDorman, above n 13, 522, note 292. In contrast, under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994), the importing nation must prove the purpose is to achieve a 'legitimate objective': art 904(4)(a); unless the measure 'conforms to an international standard': art 905(2).

[218] The issue of burden of proof has been repeatedly examined in WTO jurisprudence. The Appellate Body stated in *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (1997) (Report of the Appellate Body), 335 that:
'… the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.'
In *European Communities—Trade Description of Sardines*, the panel stated:
'Once the Panel determines that the party asserting the affirmative of a particular claim or defence has succeeded in raising a presumption that its claim is true, it is incumbent upon the Panel to assess the merits of all the arguments advanced by the parties and the admissibility, relevance and weight of all the factual evidence submitted with a view to establishing whether the party contesting a particular claim has successfully refuted the presumption raised. In the event that the arguments and the factual evidence adduced by the parties remain in equipoise, the Panel must, as a matter of law, find against the party who bears the burden of proof.
Under the well-established principle concerning burden of proof, it is for the complaining party to establish the violation it alleges; it is for the party invoking an exception or an affirmative defense to prove that the conditions contained there are met; and it is for the party asserting a fact to prove it.' *European Communities—Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), citing *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (Report of the Panel), as modified by the, WT/DS34/AB/R, adopted 19 November (1999) (Report of the Appellate Body), para 9.57.

under the chapeau. Current jurisprudence suggests that it is easier to get provisional justification under Article XX(g) than under (b), but the analysis of what is necessary under (b) does not look very different than the analysis that has been applied under the chapeau. Indeed, no analysis of XX(b) has ever made it to the chapeau under GATT 1994.[219] Thus far, the Appellate Body has avoided having to explain how this test differs from the chapeau test. Since many aspects of the least-trade-restrictive test ultimately turn on the range of choices available to implement a particular policy goal, considerations related to this test would be more appropriately placed in the chapeau analysis.

While Article XX has to be applied on a case-by-case basis, the body of cases to date provide a basis for summarizing the types of factors that are relevant to the analysis of the manner in which a policy goal is implemented. First, compliance with the measure must be possible.[220] The measure must therefore be clear as to what constitutes compliance. This may be viewed as an aspect of transparency. Second, there should be international consensus that trade restrictions are the most effective means available to achieve the measure's environmental goal.[221] At the very least, there should be no international

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[219] In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), the Appellate Body found the measure to qualify under XX(b), but did not proceed to analyze its application under the chapeau.

[220] See *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), where the United States required foreign fishermen to kill no more than 1.25 times as many dolphins as American fishermen in the course of catching tuna. If they did not meet this condition, their tuna was banned from the American market. However, the foreign fishermen had no way of knowing in advance how many dolphins their American counterparts would kill in each year and thus could not know whether they had complied with the condition until after the fact.

[221] For example, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body), the fact of international consensus on the health risks posed by asbestos was a key factor in finding that it was necessary to protect human health.

consensus[222] that the trade restrictions are unnecessary.[223] Third, where international cooperation is possible, genuine efforts to resolve the problem through international cooperation should have failed.[224] Fourth, one should consider whether market-based incentives, such as environmental labelling and non-discriminatory green taxes, would be as effective as trade restrictions to achieve the environmental goal.[225] Fifth, the measure must address a problem connected with the environment of the territory of the country enacting the measure. A measure is unlikely to qualify as necessary if it addresses a

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[222] There are two approaches to defining when a sufficient degree of international consensus has been reached. It may require agreement among a majority of countries or unanimity. Unanimity is impractical at the global level due to the number of nations involved, but is obviously necessary at the bilateral level, and advisable at the trilateral level. The GATT adopts a majority approach. The GATT Report argues that GATT rules are unlikely to block 'regional or global policies which command broad support within the world community.' GATT Report, above n 6, 1. The Report implies that what is meant by 'broad support' is at least a two-thirds majority of the votes cast, comprising more than half of the contracting parties - the majority required under the waiver provision of art XXV. The Report states, 'If most of GATT's contracting parties agree to participate in a particular multilateral environmental agreement, the consistency of its trade provisions with GATT is not likely to be a problem since there would be enough votes to secure a waiver, if necessary.' At 12.
North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994), art 104, on the other hand, implies that, within North America, 'international consensus' means unanimity. Art 104 expressly sets out which multilateral or bilateral environmental agreements may override NAFTA's trade obligations, and provides for the addition of further environmental agreements to the existing list by supplementary agreements in writing between the parties.

[223] See *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990). Thailand tried to reduce consumption of imported cigarettes with trade barriers and discriminatory taxes, without trying to reduce consumption of domestic cigarettes. The GATT panel accepted evidence from the World Health Organization that non-discriminatory measures, such as labeling, advertising bans, and non-discriminatory taxes, provided effective means with which to achieve Thailand's health goals without restricting trade.

[224] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (Report by the Panel not Adopted), *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[225] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990).

problem that does not affect the importing nation. Nor will it be necessary if it purports to address a domestic problem, but does nothing to restrict domestic activities that are a cause of the problem.[226]

Rather than limit political discretion with respect to the *formulation* of environmental policy, GATT Article XX seeks to limit political discretion regarding its *implementation.* Under Article XX, a nation can only justify trade-restrictive environmental measures if there are no less trade-restrictive and equally effective means available to implement its environmental policies. GATT Articles XX(b) and (g) are not concerned with *what* environmental policies should be, but whether the subject of the measure falls within the range of policies covered by the relevant heading. The chapeau focuses on *how* they are achieved. Trade restrictions used to achieve environmental goals must be implemented so as to be the most effective means of achieving the stated goal.

A primary aim of trade rules concerning environmental laws has traditionally been to prohibit their use as disguised trade barriers.[227] This prohibition assumes that, as other trade barriers are eliminated, protectionists may seek to have environmental policies implemented using the most trade-restrictive means available, effectively replacing tariffs with non-tariff barriers to trade. The prohibition against the use of disguised trade barriers is designed to prevent such circumvention of trade obligations.

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[226] *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD, 37th Supp, 200, GATT Doc DS10/R (1990) (Report by the Panel Adopted 7 November 1990).
[227] See GATT art XX.

Another central purpose of the trade-environment rules is to seek a balance between trade and environmental policy goals, by permitting environmental policy to be implemented in a manner that restricts trade where necessary. In order to achieve that balance, the rules must also restrict the use of trade-restrictive environmental policy instruments. GATT Article XX therefore require policy makers to choose the least trade-restrictive means available to achieve their environmental goals.

These considerations do not require a nation to justify its *substantive* choice of environmental policy, but rather the methods it chooses to *implement* that policy. This distinction is important for two principal reasons. First, it clarifies which aspect of a challenged environmental measure is to be scrutinized by trade panels. Secondly, it determines the kind of analysis that is appropriate to resolve the issue of whether the measure is the most effective means available of achieving the environmental goal, an issue that is crucial to determining whether a party has chosen the least trade-restrictive means of implementing its stated environmental policy goal.

GATT and WTO jurisprudence has clarified the factors that apply to the analysis of implementation. The analytical procedure has evolved to assign different roles to the chapeau and the subparagraphs, although this evolution is not complete with respect to Article XX(b). However, the jurisprudence has failed to clarify the range of policies that are susceptible to provisional justification under Articles XX(b) and (g). This is in part due to the need to assess the parameters of national jurisdiction in the context of public international law in a manner that is consistent with WTO law. For example, the relationship between the term 'necessary' in Article XX(b) and the general principle of

necessity in customary international law could serve to define the parameters of this heading. However, as I will discuss in Chapter 4, it would be preferable to place the analysis of the necessity principle in the chapeau, where it can be applied in a uniform manner to measures under both Articles XX(b) and (g). In the context of Article XX(g), principles of international law regarding the sovereign equality of States and extraterritoriality may place limits on the range of permissible policies. These issues are explored in the next two chapters.

In principle, the analysis under the chapeau should be the same whether the measure has been provisionally justified under Article XX(b) or (g). In practice, however, the facts of each case must dictate the appropriate factors to consider in a given situation. In particular, the factors that come into play when an importing country uses trade sanctions to motivate a change in the laws and policies of another country may have to take into consideration differences between countries that would not come into play where the aim is only to protect the domestic environment of the importer. The factors considered in this context by the Appellate Body in the *Shrimp* decisions represent an initial attempt to flesh out the analysis in this regard and are discussed in the next chapter.

Chapter 3

Crossing the Line: MEAs, Unilateral Measures and Jurisdiction

I. Introduction

This chapter will consider to what extent GATT permits the use of trade measures to address international environmental problems in multilateral environmental agreements ('MEAs') and unilateral measures by nations.[1] This chapter analyses the consistency of unilateral and multilateral trade restrictions with customary international law regarding the jurisdictional competence of States, international environmental law, and WTO law. This chapter then considers whether the least-trade-restrictive rule should apply to MEA trade measures. Finally, I show how the authorization of unilateral trade measures under GATT Article XX creates a problem of unequal access to the rights provided by that provision, raising concerns regarding the consistency of unilateral measures with the sovereign equality of States.

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[1] In sections II, IV, V and VI of this chapter, the discussion of *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 30 ILM 1594 (1991) and *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4, 12 October 1998 (Report of the Appellate Body adopted 6 November 1998) closely follows the discussion of these two cases in Bradly J Condon, 'Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?' (2002) 9 *Tulsa Journal of International and Comparative Law* 533. However, the analysis of these cases has changed significantly in light of *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW, 15 June 2001 (Report of the Panel); WTO Doc WT/DS58/AB/RW, 22 October 2001, (Report of the Appellate Body Adopted 21 November 2001), a case that was not analysed in this article. The summary of the submissions of the parties in *United States—Restrictions on Imports of Tuna*, ibid, closely follows Bradly J Condon, *Making Environmental Protection Trade Friendly Under the North American Free Trade Agreement* (unpublished LL M thesis, University of Calgary, 1993).

II. The Tuna and Shrimp Rulings on Jurisdiction

The issue of whether there is an implied jurisdictional limitation in GATT Article XX was raised in the *Tuna* cases[2] and the *Shrimp* cases.[3] This part reviews the evolution of Article XX interpretations with respect to this issue.

In *United States—Restrictions on Imports of Tuna* (1991) ('*Tuna I*'), the United States had banned tuna imports from several countries, including Mexico, pursuant to its *Marine Mammal Protection Act of 1972* ('MMPA').[4] The stated purpose of the United States

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[2] *United States – Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 30 ILM 1594 (1991) and *United States – Restrictions on Imports of Tuna,* GATT Doc DS29/R (1994) (Report by the Panel not Adopted), 33 ILM 839 (1994).

[3] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58, 15 May 1998 (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4, 12 October 1998 (Report of the Appellate Body adopted 6 November 1998) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia,* WTO Doc WT/DS58/RW, 15 June 2001 (Report of the Panel); WTO Doc WT/DS58/AB/RW, 22 October 2001, (Report of the Appellate Body Adopted 21 November 2001). It is important to note that GATT 1947, under which the *Tuna* cases were decided, is legally distinct from GATT 1994, under which the *Shrimp* cases were decided. See WTO Agreement, Art II(4). However, the wording of GATT 1947, Art XX was not changed in GATT 1994. What did change was the incorporation of environmental concerns in the WTO Agreement Preamble, which affects the interpretation of GATT Art XX. In addition, the DSU expressly incorporates the customary rules of interpretation of public international law, while the GATT 1947 did not. *See Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), Art 3(2). While this should be viewed as a codification rather than a substantive change, it has led to more references to international law in WTO rulings. The Uruguay Round integrated GATT 1994 into a new framework of several agreements under the administration of the World Trade Organization. While the relevant exceptions in Art XX of GATT 1947 and GATT 1994 are the same, the interpretation of the has changed due to the introduction of new references to environmental protection and sustainable development in the WTO Agreement Preamble, and the explicit reference to the customary rules of interpretation of customary international law in art 3(2) of the DSU. It was more difficult to have panel decisions adopted under the old GATT because the requirement for unanimous agreement essentially gave each contracting party a veto. The DSU created an Appellate Body to hear appeals of panel decisions on issues of law and legal interpretations. See DSU, art 17(1) and (7). The DSU eliminated the veto by requiring the adoption of the AB decision unless there is unanimous agreement against adoption. See DSU, art 17(14).

[4] The *Marine Mammal Protection Act of 1972* (MMPA) (P.L. 92-522, 86 Stat. 1027 (1972), as amended, notably by P.L. 100-711, 102 Stat. 4755 (1988), and P.L. 101-627, 104 Stat. 4467 (1990); codified in part at 16 U.S.C. 1361ff, cited in *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 3, generally prohibits hunting, capturing, killing or importing marine mammals into the United States without authorization. Section

tuna embargo was to discourage fishing methods that kill dolphins in international waters.[5] However, the MMPA provisions gave no regard to whether the foreign fishing activity that resulted in the incidental taking of marine mammals was conducted wholly within the waters of another state and was consistent with that State's domestic and international law obligations.[6] In all of the cases in which import bans were imposed, the fishing activity of the foreign fishermen was consistent with that State's international legal rights pursuant to international treaty and customary international law.[7] While the

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101(a)(2) authorizes limited incidental taking of marine mammals by American commercial fishermen under permits issued by the National Marine Fisheries Service (NMFS). Under section 101(a)(2)(B) of the MMPA, the importation of yellow-fin tuna harvested with purse-seine nets in the ETP is prohibited unless the country in question proves through documentary evidence that its regulatory regime is comparable to that of the United States and its dolphin-kill rates are comparable. The regulatory regime must include the same prohibitions the United States applies to its own vessels and the average incidental dolphin kill must not exceed 1.25 times the average kill of United States vessels in the same period. Section 101(a)(2)(C) of the MMPA requires intermediary nations exporting yellow-fin tuna products to the United States to certify and prove that it prohibits imports of tuna from any nations directly embargoed by the United States. If they do not, they, too, are subject to the embargo. On October 10, 1990, the United States, pursuant to court order, imposed an embargo on imports of tuna from Mexico. The embargo went into effect on February 22, 1991. *See United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 3-5. *See also Earth Island Institute* v. *Mosbacher*, 746 F. Supp. 964, 976 (N.D. Cal. 1990), aff'd 929 F. 2d 1449 (9th Cir. 1991) holding that the Secretaries of Commerce and the Treasury may not allow imports of yellow-fin tuna into the United States from any nation that does not conform with the 1988 MMPA amendments. See also T McDorman, 'The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles' (1991) 24 *George Washington Journal of International Law and Economics* 477, 495, note 130.

[5] For the historical background of international conflicts over tuna fishing and the relationship between dolphins and tuna in the Eastern Tropical Pacific Ocean, *see* R Rosendahl, 'The Development of Mexican fisheries and its effect on United States-Mexican relations' (1984) 3 *UCLA Pacific Basin Law Journal* 1; K Holland, 'Exploitation on porpoise: the use of purse seine nets be commercial tuna fishermen in the Eastern Tropical Pacific Ocean' (1991) 17 *Syracuse Journal of International Law and Commerce* 267; T Steiner, 'The Senseless Slaughter of Marine Mammals' (1987) 61 *Business and Society Review* 18; E Christensen and S Geffin, 'GATT sets its net on environmental regulation: the GATT panel ruling on Mexican yellowfin tuna imports and the need for reform of the international trading system' (1991) 23 *Inter-American Law Review* 569, 572, note 9. Intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the Eastern Tropical Pacific Ocean (ETP). See *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 2. The MMPA prevents American fleets from using this method of tuna fishing. See 'Divine Porpoise', *The Economist*, 5 October 1991, 31; McDorman, ibid; and *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted).

[6] McDorman, above n 4, 492.

[7] Ibid 495.

dolphins being protected were listed as at risk of becoming endangered under the *Convention on International Trade in Endangered Species* ('CITES'),[8] CITES neither required nor authorised the ban on trade in tuna. Mexico challenged the embargo as a disguised trade barrier that was inconsistent with the United States' obligations under the GATT. In *United States—Restrictions on Imports of Tuna* (1994) ('*Tuna II*'),[9] the European Economic Community ('EEC') and the Netherlands challenged provisions of the MMPA, since amended by the *International Dolphin Conservation Act* of 1992,[10] that imposed trade restrictions on imports of tuna from 'intermediary' nations.

In *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ('*Shrimp I*'), the United States banned shrimp imports from WTO members that did not comply with American legal requirements regarding the protection of sea turtles from incidental death in the shrimp harvesting process.[11] The United States negotiated and concluded a regional international agreement on sea turtle protection and conservation with some countries in the Americas, but not other countries that were affected by the trade ban. Article XV of the *Inter-American Convention* included a conflicts clause that stated:

> 1. In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organisation (WTO), as adopted at Marrakesh in 1994, including its annexes.

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[8] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

[9] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted). For a more detailed discussion of this ruling see, *inter alia*, Joseph J Urgese, 'Dolphin Protection and the Mammal Protection Act have Met Their Match: The General Agreement on Tariffs and Trade' (1998) 31 *Akron Law Review* 457.

[10] See 138 Cong Rec H9064-02 (1992) and Subchapter IV of the MMPA, 16 USC s 1411-1418 (1992). For a detailed discussion of the Tuna cases from a political economy perspective, see Richard W Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12 *Georgetown International Law Review* 1.

[11] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

> 2. In particular, and with respect to the subject matter of this Convention, the Parties shall act in accordance with the provisions of the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as Article XI of the General Agreement on Tariffs and Trade of 1994.[12]

The United States gave countries that were parties to the *Inter-American Convention* three years to introduce 'turtle exclusion devices' ('TEDs'), while others were given only four months.[13]

All species of turtles involved were listed as being under threat of extinction under CITES Appendix I, and occurred in American territorial waters as part of their migratory route.[14] However, the American measures were not taken under CITES or any other

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[12] *Inter-American Convention for the Protection and Conservation of Sea Turtles*, opened for signature 1 December 1996, 37 ILM 1246, Art XV.

[13] This was not part of the original design of the measures, but resulted from a United States court order requiring the United States administration to apply the import ban to the entire world when it was only being applied in the Americas. See *Earth Island Institute v. Christopher*, 20 CIT 1389, 948 F Supp 1062 (Court of International Trade 1996). However, the Appellate Body held that the United States government was responsible for meeting its WTO obligations and it was no excuse under international law that the action was required by the courts.

[14] For a detailed review of the American legislation, litigation to enforce the legislation, and the amendments and negotiations that occurred after the WTO case, see Eric L Richards and Martin A McCrory, 'The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law' (2000) 71 *University of Colorado Law Review* 295. For a variety of interpretations of the Shrimp decision, see: Joseph R Berger, 'Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case' (1999) 24 *Columbia Journal of Environmental Law* 355 (taking the view that the Shrimp case represents a positive evolution in the treatment of conservation measures); Benjamin Simmons, 'In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report' (1999) 24 *Columbia Journal of Environmental Law* 413 (arguing in favour of unilateral measures); Shannon Hudnall, 'Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization' (1996) 29 *Columbia Journal of Law and Social Problems* 175 (arguing that the GATT needs to be changed to respond to environmental concerns); Jennifer A Bernazani, 'The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures' (2000) 15 *Connecticut Journal of International Law* 207 (proposing the addition of an exception to Art XX specifically for MEAs); Axel Bree, 'Art XX GATT – Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report' (1998) 17 *Dick. Journal of International Law* 99 (interpreting the decision of the Appellate Body as finding that the American measure did not have extrajurisdictional effect); Terence P Stewart and Mara M Burr, 'Trade and Domestic Protection of Endangered Species: Peaceful Co-existence or Continued Conflict? The Shrimp - Turtle Dispute and the World Trade Organization' (1998) 23 *William and Mary Environmental Law and Policy Review* 109; Matthew Brotmann, 'The Clash between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp' 16 *Pace Environmental Law Review* 321 (1999); Ryan L Winter, 'Reconciling the GATT

MEA but rather under American regulations unilaterally designed to comply with the court order regarding implementation of a section of the American *Endangered Species Act*. The Appellate Body rejected arguments that unilateral measures could not be included under Article XX(g), stating:

> It appears to us…that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, so some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.[15]

The Appellate Body held that the measure met the requirements of Article XX(g), but not the chapeau.

In *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (*'Shrimp II'*), the Appellate Body repeated this statement regarding unilateral measures (twice in two successive paragraphs), referring to it as 'a principle that was central to our ruling' in *Shrimp I*.[16] In *Shrimp I*, the Appellate Body had emphasized a preference for multilateral solutions to international environmental problems, citing both WTO and other international instruments to that effect. It noted that the protection and conservation of migratory species demands concerted and co-operative efforts on the part of many countries. It cited the references in the *Decision on Trade and Environment* to Principle 12 of the *Rio Declaration on Environment and Development* and *Agenda 21* as proof that the WTO has recognized both the need for such co-operative

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and WTO with Multilateral Environmental Agreements: Can we have our cake and eat it too?' (2000) 11 *Colorado Journal of International Environmental Law* 223 (arguing that a conflict between the WTO and MEAs is inevitable).

15 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 121.

efforts and the inappropriateness of unilateral action in dealing with extraterritorial aspects of international environmental problems.[17]

However, in *Shrimp II*, the Appellate Body said:

> Requiring that a multilateral agreement be *concluded* by the United States in order to avoid 'arbitrary and unjustifiable discrimination' in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfil its WTO obligations. Such a requirement would not be reasonable.
> …
> Principle 12 of the Rio Declaration…states, in part, that '[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus'. Clearly, and 'as far as possible', a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX…; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding 'arbitrary and unjustifiable discrimination' under the chapeau….We see, in this case, no such requirement.[18]
> (emphasis in original)

Thus, while the chapeau required the United States to make good faith efforts to reach international agreements before imposing a unilateral import ban to further international environmental objectives, it could not be required to succeed. Certainly, if trade

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[16] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 138.

[17] Principle 12 of the *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874 states: 'Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.'
Agenda 21, Report of the United Nations Conference on Environment and Development 9, Rio de Janeiro 3-14 June 1992, UN Doc A/Conf.151/26/Rev.1, para 2.22(i) reads: 'Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus.'
The Appellate Body also cited Art 5 of the *Convention on Biological Diversity*, opened for signature 5 June 1992, UNEP/bio.Div./CONF/L.2, 31 ILM 818 (1992) (entered into force 29 December 1993) (requiring parties to co-operate in respect of areas beyond national jurisdiction for the conservation and sustainable use of biological diversity) and the Convention on the Conservation of Migratory Species of Wild Animals, which reads: 'The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle.'

restrictions are to be permitted for the purpose of persuading other countries to participate in multilateral environmental protection efforts, this is a logical result. Moreover, the wording of the *Rio Declaration* ('as far as possible') clearly leaves open the possibility that unilateral measures may be needed in some circumstances.[19] However, the issue of whether there is an implied jurisdictional limit in Article XX was left unresolved, despite the numerous arguments made with respect to this issue in both the *Tuna* and *Shrimp* hearings.

In *Tuna I*, the United States took the position that a government could *unilaterally* decide to prohibit imports of a product in order to protect the life of humans, plants or animals outside its jurisdiction.[20] The United States argued that the MMPA did not subordinate the legislation of other parties to its own, but simply specified the requirements for tuna imported into the United States. Moreover, nothing in Article XX supported the assertion that the United States legislation could not be justified because it was applied extraterritorially, since trade measures by nature had effects outside a contracting party's territory.[21] It argued further that the GATT should not be interpreted to require a country to allow access to its market that served as an incentive to deplete the populations of species that are vital components of the ecosystem. Finally, the United States implied that, because CITES obliged parties to prohibit imports in order to protect endangered

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[18] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), paras 123-124.
[19] This point has also been made by Robert Howse. See Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491, 510.
[20] Submissions of the United States, *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-22.

species found only outside its own jurisdiction, international law permitted a state to use trade restrictions to pursue extraterritorial environmental policy objectives.[22]

Mexico argued that Article XX was confined to measures a party could adopt or apply within its own territory.[23] Nothing in Article XX entitled any contracting party to impose measures whose implementation would subordinate the legislation of one party to the legislation of another. To accept that one party could impose trade restrictions to conserve resources in international areas or within the territories of other parties would introduce the concept of extraterritoriality into the GATT and be contrary to international law.[24]

In the *Tuna I* case, Canada stated the issue as being when and to what extent measures taken relating to unilaterally-set conservation objectives can be extended to areas outside national jurisdictions. The United States would have to demonstrate that Mexico's incidental dolphin mortality in waters outside United States jurisdiction impinged on its conservation program to an extent that would allow justification of the embargo under

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[21] Ibid 16-22.

[22] Ibid. In this case, CITES did not include in its Appendix I list of species in danger of extinction any of the species of dolphins which the United States was claiming to protect. The dolphins actually threatened with extinction were found only outside the ETP and were not protected by the United States legislation. United States and international data indicated that no dolphin populations in the ETP were threatened with extinction. Submissions of Mexico, ibid, 20. However, the three ETP species are listed in Appendix II of CITES, which includes species that may be threatened if trade is not restricted. See Christensen and Geffin, above n 4, 595, note 118.

[23] Submissions of Mexico, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-17.

[24] Ibid.

Article XX(g).[25] Canada thus implied that a state should be permitted to exercise jurisdiction over extraterritorial environmental matters in so far as it was necessaryto effectively manage a related internal environmental matter, even if it involved taking measures in the absence of any international agreement on the issue. However, the Canadian submission did not clarify the set of circumstances that might justify such actions in the context of Article XX(g).

The *Tuna I* panel noted that the GATT text in Article XX(b) did not clearly say whether it covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure.[26] However, the drafting history of Article XX(b) indicated it did not.[27] The panel reasoned that:

> ...this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable...[I]f the broad interpretation suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[28]

For the same reason, Article XX(g) only permitted measures aimed at resource conservation within the jurisdiction of the enacting country. Moreover, those measures had to be taken 'in conjunction with restrictions on domestic production or consumption'. The panel reasoned that a country can effectively control the production or consumption

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[25] Submissions of Canada, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 29.
[26] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 45.
[27] Ibid.
[28] Ibid 46.

of a resource only to the extent that it falls under its jurisdiction.[29] Finally, the panel expressed the view that its interpretation restricting environmental measures to internal matters under Article XX 'would affect neither the rights of individual countries to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies'.[30]

While not mentioned by the *Tuna I* panel in its decision, academics had argued that the Article XX exceptions are designed to allow a state to protect vital *internal* resources and to pursue vital *internal* policies, not to project its internal policies and goals onto other states.[31] The *Tuna I* interpretation of the GATT did not permit a state to use trade restrictions to unilaterally assert jurisdiction over environmental matters outside its national territory. The *Tuna I* panel's ruling on this issue was thus consistent with prevailing opinion regarding the scope of the Article XX exceptions in GATT 1947 and the applicable principles of international law.

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[29] Ibid 47. One author takes the opposite view of the effect of this phrase on the issue of whether jurisdictional limitations are implied in Art XX. See Howse, above n 19, 504.

[30] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 51.

[31] See, for example, McDorman, above n 4, 520. He cites in support Jackson's comments regarding art XX(b), '[a]lthough the language is not explicitly restricted to health and safety of the *importing* country, it can be argued that that is what Art XX means'. See John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), 209. Jackson characterizes this as an issue of equalizing competition where foreign manufacturers are subject to less stringent environmental process standards. His opinion on this issue appears to have been accepted by the panel in this case. He states (209): 'Whether an importing nation could use border restrictions or taxes to equalize the price of imported goods with domestic costs of health and safety regulation is as yet an unresolved issue for the world trading system. It is an issue fraught with dangerous potential. If this principle were extended to many types of government regulation - for example minimum wage or other labor regulations - it could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage.' Also see Owen Saunders, who argues: 'While it is true that Art XX does not refer specifically to the health of citizens of the acting state, this is certainly what must be inferred; otherwise the GATT could be read as implicitly justifying far-reaching intrusions on the territorial sovereignty of other states, an interpretation that is unsupported on a reading of the Agreement and on the basis of state practice.' See J Owen Saunders, 'Legal Aspects of Trade

The reasoning of the *Tuna I* panel regarding the jurisdictional scope of Article XX was rejected in *Tuna II*. The *Tuna II* panel applied a three-prong test to both Articles XX(b) and XX(g). The first prong considered whether the MMPA regulations qualified as measures to conserve 'exhaustible natural resources' under Article XX(g) and 'to protect human, animal or plant life or health' under Article XX(b). Despite arguments from the EEC and the Netherlands that such measures could not be applied extraterritorially, the panel held that neither article specifically limited the location of the resource or animal in question.[32] The panel noted that two previous panels had considered Article XX(g) to be applicable to policies relating to migratory species of fish, without distinguishing between fish caught inside or outside the jurisdiction of the country enacting the measure. The panel reasoned that other provisions in Article XX did not exclude measures aimed at actions outside a contracting party's territorial jurisdiction and that international law permitted states to regulate the conduct of their nationals outside their territory.[33]

However, the American measures failed to pass the second prong of the test under either Article XX(b) or XX(g). The intermediary embargo covered tuna imports from third countries whether or not the tuna was harvested in a manner that was harmful to dolphins. The primary embargo permitted the applicable countries to harvest tuna in a manner that

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and Sustainable Development' in J Owen Saunders (ed), *The Legal Challenges of Sustainable Development* (1990) 370, 375. For a contrary view, see Christensen and Geffin, above n 5, 582 and 590.

[32] See discussion in Chapter 2 regarding the scope of Arts XX(b) and (g).

[33] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted), 891-892. The panel gave the example of Art XX(e), which allows measures 'relating to the products of prison labour', as one that clearly applied to extraterritorial subject matter. It also noted that a 'state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fisherman on these vessels, with respect to fish located on the high seas'.

was harmful to dolphins as long as their practices and policies were comparable to American standards. Thus, the American trade measures could only accomplish their objective by forcing other countries to adopt American-style laws. As a result, they could not be considered 'necessary' under Article XX(b), nor related to conservation (that is, 'primarily aimed at' conservation) under XX(g), nor be considered to have been made effective in conjunction with domestic measures under XX(g). Nor could the measures be saved under the Preamble to Article XX, the third prong of the test. The reasoning of the panel echoed the reasoning in *Tuna I*:

> If…Article XX were interpreted to permit Contracting Parties to take trade measures so as to force other Contracting Parties to change their policies within their jurisdiction, including their conservation policies…the General Agreement could no longer serve as a multilateral framework for trade among Contracting Parties.
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> …measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed at either the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption…[34]

In *Shrimp I* the Appellate Body held that there was a sufficient jurisdictional nexus between the United States and the turtles for the purposes of Article XX(g). All of the species occur in waters over which the United States has jurisdiction, even though they migrate across national borders and international waters. In this regard, the Appellate Body's reasoning resembles that of Canada's submission in the *Tuna I* case. At the same time, however, the Appellate Body expressly declined to decide whether there is an implied jurisdictional limitation in Article XX(g) and, if so, the nature or extent of that limitation. The Appellate Body recognized that a State has a legitimate interest in the protection of migratory species that occur within its territory. However, the more difficult

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[34] Ibid paras 3.26-3.27.

issue of what limitations to impose on a State's trade measures in these circumstances remained unresolved.

In *Shrimp I*, the Appellate Body ruled:

> The parties to the Inter-American Convention together marked out the equilibrium line…and provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition.[35]

The Appellate Body thus implied that the lack of consent on the part of the exporting countries was a relevant factor in its decision. International rules in treaties and customary international law derive from State consent.[36]

In *Shrimp II* the Appellate Body assessed whether the negotiation effort subsequently made by the United States in Asia was comparable to that made in the Americas. While the Appellate Body emphasized that the *Inter-American Convention* was the relevant 'example' to use in this case, it rejected the notion that it could serve as a legal standard against which to measure the adequacy of negotiation efforts.[37] Nevertheless, the ruling with respect to the kind of efforts that are required to fulfill the duty to negotiate[38] will undoubtedly be seen by many as an important precedent to follow in this field. In this particular case, the American efforts were assessed as follows:

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[35] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), paras 170-171.
[36] 'The lack of consent by a given state generally means that it cannot be held to the rule in question (*pacta tertiis nec nocent nec prosunt*).' Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535, 536.
[37] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 130.
[38] Howse argues that the AB did not establish a duty to negotiate. See Howse, above n 19.

> The negotiations need not be identical. Indeed, no two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be comparable in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that 'arbitrary or unjustifiable discrimination' will be avoided between countries where an importing member concludes an agreement with one group of countries, but fails to do so with another group of countries.[39]

With the exception of *Tuna I*, both GATT 1947 panels and the Appellate Body rulings on GATT 1994 have consistently adopted the view that Article XX(g) applies to measures involving migratory species – tuna, salmon, herring, dolphins, and turtles. However, none of these decisions have answered this question: what jurisdictional nexus is required under Article XX(g)?[40]

Howse argues that the issue of whether there is an implicit territorial or jurisdictional limitation in Article XX(g) a moot point:

> Once it has been established that the state taking the environmental trade measures is equivalent to restrictions on its own producers and/or consumers, why should it be necessary to identify whether the species being protected is itself sometimes to be found within the state's territory? The purpose of a territorial nexus is to prevent a state that lacks legitimate concern from using a global environmental problem as a pretext for protectionist interventionism. Therefore, it should be sufficient, as required by the text of Article XX(g), that the U.S. measure was even-handed, imposing a conservation burden on its own producers and consumers, and not merely attempting to externalize the costs of environmental protection to the producers of other countries. (sic) [41]

This argument sounds reasonable, at first glance. However, it misses the point. The reason why the issue of territorial nexus is important is not simply due to concerns over protectionism disguised as environmental measures.[42] Jurisdiction is an important issue

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[39] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 122.
[40] Having argued in Chapter 2 that Art XX(b) should be limited to measures aimed at the protection of purely domestic environmental interests, I will limit my discussion of jurisdictional nexus to Art XX(g).
[41] Howse, above n 19, 504.
[42] Indeed, the issue of whether a measure constitutes a disguised protectionist measure is addressed in the Art XX chapeau, not Art XX(g).

because the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'), Article 3(2) requires that WTO rules be interpreted in accordance with public international law.[43] At a broader level, the concern is over how to avoid conflicts between WTO law and public international law and to ensure the integrity of international law. It is generally accepted that WTO rules are part of the wider body of public international law.[44] Even if one sets aside the issue of consistency between WTO law and public international law, the wording of Article XX(g) regarding domestic restrictions does not appear in Article XX(b), where the jurisdictional issue could also arise.[45] Moreover, an importing nation could comply with the Article XX(g) requirement by restricting consumption of a natural resource that does not occur in its own territory, without having any jurisdictional nexus at all.[46] For example, what if the United States imposed similar restrictions to address the conservation of elephants in Africa, a species that does not occur in American territory?

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[43] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994).

[44] See Pauwelyn, above n 36; John Jackson, *The World Trading System* (1997) 25; Donald McCrae, 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) 3 *Journal of International Economic Law* 27; Donald McCrae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 *Recueil des Cours* 111; Ernst-Ulrich Petersmann, 'Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas' (1999) 2 *Journal of International Economic Law* 189.

[45] I have argued in the previous chapter that Art XX(b) should only cover measures that are aimed at the protection of the environment within the enacting country's territory. Indeed, the absence of a domestic restrictions requirement in Art XX(b) provides further support to my argument. (Since the measures that fall under XX(b) are aimed at purely domestic concerns, there is no need to insert this requirement). However, for the sake of argument, I recognize here that the jurisdictional issue might arise under Art XX(b), as it did in *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted).

[46] Since elephants do not occur naturally in American territory, the United States would not have the jurisdictional nexus that it does with respect to sea turtles.

There is an important distinction to be made between environmental concerns based on their geographic connection with the importing country. In international environmental law, both *Agenda 21* and the *Rio Declaration* call upon countries to avoid 'unilateral action to deal with environmental challenges *outside* the jurisdiction of the importing country' (emphasis added).[47] It is only with respect to 'environmental measures addressing transboundary or global environmental problems' that countries are urged, 'as far as possible', to base their actions on international consensus.[48] The phrase, 'as far as possible', leaves an opening for a country to take unilateral action where efforts at international negotiation fail, but only with respect to transboundary or global environmental problems.[49]

Under customary international law, a State acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction.[50] In *Shrimp I*, the holding that the United States had a sufficient 'jurisdictional nexus' for its measure to qualify for provisional justification under GATT

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[47] *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874. *Agenda 21*, Report of the United Nations Conference on Environment and Development 9, Rio de Janeiro 3-14 June 1992, UN Doc A/Conf.151/26/Rev.1.

[48] *Rio Declaration on Environment and Development*, ibid. *Agenda 21*, ibid.

[49] *Rio Declaration on Environment and Development*, ibid refers to transboundary and global environmental problems. However, *Agenda 21*, ibid only refers to 'transborder problems'. See note 17, above.

[50] See Ian Brownlie, *Principles of Public International Law* (2nd ed,1973), 299-301. Jurisdiction flows from the general legal competence of states, often referred to as 'sovereignty'. See ibid, 291. This prohibition of extraterritoriality, which may also be described as an aspect of the principle of non-intervention, would qualify as a 'customary rule of international law', within the meaning of art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See also Brownlie, ibid 302.

Article XX(g) is consistent with customary international law insofar as harm to the turtles would have an effect within its territorial jurisdiction. This holding is also consistent with international environmental law in that the conservation of sea turtles is a transboundary environmental problem. However, the ruling is inconsistent with public international law to the extent that the American measure purports to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals. The following section analyses the factors that are relevant to determining whether a unilateral measure meets the requirements of Article XX in the context of general international law and international environmental law.

III. Article XX and Unilateral Environmental Trade Restrictions

It is now clear that some unilateral measures will survive scrutiny under Article XX(g), where they address transboundary or global concerns that affect the environment of the importing country. Given that international environmental law is implicitly open to the use of unilateral measures in such circumstances, this does not by itself create a rift between international trade law and international environmental law. Indeed, the ruling in the *Shrimp* cases helps to define the duty to negotiate that is expressed in international environmental instruments.

The facts in *Shrimp I* and *Shrimp II* provide guidance regarding the factors that may be considered in determining whether a unilateral trade measure meets the requirements of Article XX. Here, it is important to distinguish between factors that merely tip the balance in favour of the unilateral measure in question and factors that may be interpreted as decisive.

A. Transboundary or Global Environmental Policy

In the *Shrimp* case, the environmental policy goal was to save a migratory species threatened with extinction.[51] The geographic location of the environmental interest was transboundary and included a connection with importing country, since all species of turtle involved occurred in American waters. The legitimacy of the policy goal was accepted by the parties to CITES and by all parties to WTO dispute and third-party participants. The measures required to achieve the goal (that is, the regulation of shrimp fishing, among others) were accepted regionally (as indicated by regional agreements among the affected countries in the Americas and around the Indian Ocean), with the exception of one country (Malaysia). Thus, the effectiveness of the measures was implicitly accepted. Finally, there was an urgent need to resolve the environmental issue. In essence, saving the turtles constituted an 'emergency' because they were threatened with extinction.

The geographic location of the resource and the legitimacy of the policy goal (which, in the *Shrimp* case, is reflected in the consensus that it is necessary to prevent the extinction of species) are factors that must be taken into account in determining whether the subject

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[51] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.76: '[I]in the present case, a number of guideposts are available…that sea turtles are migratory species and that they are on the verge of extinction is unanimously acknowledged. Objectives in terms of protection and conservation of sea turtles are quite clear and largely uncontested. The means of reaching them have been identified by scientists, discussed in seminars and included in negotiation documents. The nature of sea turtles as a migratory species is also important, in light of the preference expressed in a number of international conventions for a multilateral approach to the conservation of migratory species.'

matter qualifies for provisional justification under Article XX(g).[52] The question is whether a geographic connection between the resource and the enacting country is necessary or whether a less proximate connection should suffice. The governing principle of customary international law is that a State acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction.[53] GATT must be interpreted in a manner that is consistent with this principle, which means that some degree of territorial connection to the resource is necessary for a State to unilaterally regulate activities concerning that resource.

The American measures in the *Shrimp* cases were aimed at a transboundary environmental issue in which the United States had a territorial connection. Such cases should be relatively easy to identify. However, distinguishing between 'global' and 'extraterritorial' environmental problems is more difficult. Where the problem occurs entirely outside the territory of the importing country, it would appear to be extraterritorial. However, if one views the global ecosystem as interconnected, then problems that appear to be extraterritorial at first glance could be characterized as global.

[52] The geographic location of the environmental interest is also relevant to determining whether the subject matter belongs in XX(b) or (g). See Chapter 2.

[53] See Brownlie, above n 50, 299-301. This rule, regarding extraterritorial enforcement of measures, is an aspect of jurisdictional competence. Jurisdiction flows from the general legal competence of states, often referred to as 'sovereignty'. See ibid, 291. This prohibition of extraterritoriality, which may also be described as an aspect of the principle of non-intervention, would qualify as a 'customary rule of international law', within the meaning of art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See also Brownlie, ibid, 302. GATT would therefore have to be interpreted in a manner consistent with the prohibition of extraterritoriality. A contrary interpretation would render either treaty void under the *jus cogens* rule. See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 53.

For example, does the United States or Europe have a jurisdictional nexus with respect to the Amazon because it contains a large percentage of global biodiversity and absorbs a significant percentage of global carbon dioxide emissions? Thus, this is not simply a legal question, but also a question of fact that requires scientific analysis. Where there exists a MEA that indicates wide-spread international consensus regarding the global importance of a particular environmental problem, that may provide evidence that the issue is global rather than local and thus raise a rebuttable presumption regarding the categorization of the issue.

The existence of widespread consensus regarding the measures that are required to achieve the policy goal (as opposed to consensus regarding the legitimacy of the goal itself) is a factor to be considered in the chapeau analysis, since this is an implementation issue. The question is how effective must the chosen measures be in order to pass the test? Where there is consensus, the measures are, in essence, deemed to be effective. However, the issue of the effectiveness of measures in achieving the stated policy goal would have to be considered independently where such consensus is absent.[54]

The urgency factor suggests that unilateral measures should only be used as a last resort. It is thus relevant to determining whether efforts to reach a negotiated resolution have

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[54] For example, in *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), the design of the American measure made it impossible for foreign tuna fishermen to comply with the requirement, making it ineffective as a conservation measure. See Chapter 2. For a discussion of the types of concerns that are relevant to the analysis of effectiveness, see Sanford E Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27 *Columbia Journal of Environmental Law* 383 and Organization for Economic Co-operation and Development, *Processes and*

been adequate. For example, where a resource is plentiful, it may not be possible to justify unilateral actions without devoting several years to negotiations, if ever. The role that urgency plays is thus central. Urgency is also a factor that determines whether the defence of necessity may be invoked in customary international law.[55]

B. Ongoing, Serious, Good Faith Efforts to Negotiate

There is some debate as to whether the effort to negotiate cooperative solutions is an essential requirement that must be met before a unilateral measure can be justified under Article XX(g). Moreover, it is not clear how extensive the efforts must be nor what kinds of efforts are required.[56]

Howse argues that negotiation efforts in the Shrimp case were only relevant to determining under the chapeau whether the United States had discriminated between the countries around the Indian Ocean and the countries in the Americas and that negotiation efforts were only one of several factors that determined the outcome of this analysis,

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Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures, OCDE/GD (97) 137 (11 August 1997), <www.oecd.org>.

[55] See discussion in Chapter 4.

[56] In this particular case, the efforts of the United States were as follows:
October 1998: United States initiated the negotiations with a proposal containing possible elements of a regional convention.
July 1999: United States helps to organize and finance an international symposium in Sabah, where participants adopt a Declaration calling for a regional agreement.
October 1999: United States participates in Perth Conference, where governments commit to developing an international agreement.
July 2000: United States helps to organize and finance Kuantan round of negotiations, which produces MOU for South-east Asia/Indian Ocean and plan to draft Conservation and Management Plan (CMP).
September 2001: MOU comes into affect following adoption of CMP at multilateral conference in Manila.
See *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), paras 131-134.

rather than a decisive factor.[57] While I agree with his assessment of this factor's place in the Appellate Body's analysis, his arguments do not persuade me that efforts to negotiate are not essential to justify a unilateral measure under Article XX(g).

Howse argues that 'there is nothing in the wording of the chapeau (or any other part of Article XX) to suggest that a nation must first secure agreement by WTO Members or any other nation before exercising its rights under Article XX(g)'.[58] While this is true, the other headings of XX, unlike XX(g), do not raise the issue of whether unilateral measures can be used to protect transnational or global resources.[59] Whether there is a duty to negotiate prior to imposing unilateral measures under the other headings is a red herring.[60] Moreover, there is nothing explicit regarding the geographic location of the

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[57] See Howse, above n 19, 507: 'Perhaps the most pervasive interpretation of the AB decision in Shrimp/Turtle is that the AB, under the chapeau, imposed a duty to negotiate seriously as a pre-condition to the application of unilateral trade measures to protect the global environment. Clearly, the failure of the U.S. to negotiate seriously with the complainants figures prominently in the AB's finding that, cumulatively, a number of features of the application of the American scheme amounted to 'unjustified discrimination.' However, the AB never held that the requirements of the chapeau, in and of themselves, impose a sui generis duty to negotiate. Rather, the AB's Shrimp/Turtle ruling stands for the more limited propositions that (1) undertaking serious negotiations with some countries and not with others is, in circumstances such as these, 'unjustifiable discrimination,' and (2) that a failure to undertake serious negotiations may be closely connected with, and indeed part and parcel of, various discriminatory effects of a scheme, and may reinforce or perhaps even tip the balance towards a finding that those discriminatory effects amount to 'unjustifiable discrimination' within the meaning of the chapeau.…by offering negotiated market access to some Members and not others, the U.S. was engaging in 'discrimination.' One does not need to infer any self-standing duty to negotiate in order to arrive at this conclusion….'

[58] Howse, above n 19, 510.

[59] See my argument in Chapter 2 regarding the subject matter of Art XX(g).

[60] Some kinds of unilateralism appear to be permitted by Art XX. For example, Art XX(e) permits trade restrictions relating to the products of prison labour and Art XX(f) permits trade restrictions imposed for the protection of national treasures of artistic, historic or archeological value. The former is likely to take the form of import restrictions while the latter is likely to take the form of export restrictions. Neither category appears to require the prior negotiation of a multilateral agreement. However, the Art XX preamble would prohibit the use of these exceptions to justify arbitrary discrimination or disguised restrictions on trade. Thus, the United States could not ban the import of any product on the grounds that the exporting country employed prison labour. Only the actual production of prison labourers could be banned. Similarly, Mexico could not ban imports from the United States on the grounds that the United States failed to ban the import of Mexican archeological artifacts. Mexico, however, would be free to ban the export of such items, as indeed it has. However, measures taken under Arts XX(e) and (f) are specific

resources being protected in Article XX(g), but that does not mean there is no geographic connection requirement. Interpreting Article XX(g) to require negotiations does not require an explicit reference in the text of the article because GATT must be interpreted in a manner that is consistent with general international law. Howse recognizes the existence of that duty and makes a good argument that the duty cuts both ways.[61] However, his arguments do not support the absence of such a duty in the context of Article XX. A widely acknowledged general principle of international environmental law is that States are required to co-operate with each other in mitigating transboundary environmental risks.[62] If such a duty exists in the context of internationalenvironmental law, it should also exist at the interstices of international environmental law and international trade law.

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and narrowly bounded, compared the more general (and ambiguous) language contained in Arts XX(b) and (g). Thus, Arts XX(e) and (f) themselves may be considered an agreement to permit such restrictions. As such, measures taken pursuant to these exceptions would not be unilateral at all.

[61] See Howse, above n 19, 508: 'Had the AB intended to read into the chapeau a self-standing duty to negotiate seriously, it would have given some guidance as to the extent of the duty and its relationship to a corresponding duty of good faith on those countries who are invited into negotiation. After all, the duty of cooperation to solve international environmental problems that is found in the international environmental instruments that the AB cited is a duty on the part of all states who are affecting the commons problem at issue. Thus, the duty to cooperate to solve international environmental problems can be understood not only as a discipline on the country contemplating unilateralism; it also can be regarded as a possible justification for unilateral measures. That is, unilateral measures can be imposed if a country refuses to negotiate in good faith towards a cooperative solution to a commons problem.'

[62] In the *Lac Lanoux* arbitration, the tribunal held that France had complied with its treaty and customary international law obligations to consult and negotiate in good faith before diverting a watercourse shared with Spain. However, the duty to negotiate did not require France to obtain Spain's consent. See *Lac Lanoux (Spain v France)* 24 ILR (1957), 101. Also see *Nuclear Tests Cases (New Zealand v. France)*, 1974 ICJ 457. Similarly, the *Stockholm Declaration*, Principle 24 provides that 'co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty ad interests of all states'. *Declaration of the United Nations Conference on the Human Environment* 5-16 June 1972, UN Doc A/Conf/48/14/Rev.1 and Corr.1 (1973), (1972) 11 ILM 1416 (Stockholm Declaration). The United Nations General Assembly endorsed this principle but noted that it should not be construed to enable other States to delay or impede the exploitation and development of natural resources within the territory of States. See UNGA Res 2995 XXVII (1972).

Moreover, the American effort to apply national laws unilaterally in the international arena ignored the fundamental difference between the nature of national law and the nature of international law. Authority to take actions in the international arena under international law is based on coordination,[63] whereas national law is based on subordination—the actions of a government agency are authorized by legislation, which in turn is authorized by a constitution.[64] While the existence of a positive duty to cooperate in general international law may remain open to question,[65] unilateral trade measures in the GATT context must be preceded by negotiation efforts in order to be justifiable under the necessity doctrine of customary international law.[66]

Howse further supports his argument that there is no duty to negotiate in Article XX by comparing GATT Articles XX and XXI:

> By contrast, where the drafters wanted to make the exercise of some kind of exception to GATT disciplines contingent on agreement or collective action among Members or states generally, they did so explicitly. For example, Article XXI(c) provides an exception where Members are taking action 'in pursuance of ...obligations under the United Nations Charter for the maintenance of international peace and security.'[67]

See generally, Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (1992), 102-109.

63 The *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965), for example, imposes on States 'the duty to co-operate with one another.'

64 See Jerzy Kranz, 'Réflexions sur la souveraineté' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996), 189.

65 See International Law Commission, *Annual Report 2001*, Chapter IV, State Responsibility, <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>, 21 October 2003, 287. Art 41 of the draft arts on Responsibility of States for Internationally Wrongful Acts imposes a positive duty to cooperate to bring an end to any serious breach by a State of a peremptory norm of general international law. See ibid, 286. The draft articles are discussed in Chapter 4.

66 See Chapter 4 regarding the relevance of the necessity doctrine to the interpretation of GATT Art XX with respect to unilateral measures.

67 Howse, above n 19, 510.

This argument is not convincing. The purpose of Article XXI is to set out a division of jurisdiction between the United Nations and the WTO, two international organizations.[68] In contrast, Article XX divides jurisdiction over specific subjects between national governments (whether acting unilaterally or in cooperation with others) and the WTO. Since Article XX sets out the areas where national governments have reserved their right to legislate without being subject to their GATT obligations, there is no need to identify any other international body, as is done in Article XXI.

One further aspect of the Shrimp decision suggests that efforts to negotiate are essential. The panel in *Shrimp II* noted that the good faith negotiations had to be ongoing. They would be ready to revisit the case if these efforts ceased, which suggests that the decision might go the other way were this factor no longer present. The panel emphasized that the right to take unilateral measures was provisional, not permanent, and subject to ongoing WTO supervision:

> [I]n a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, or if they were taken further to the completion of serious good faith efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a *provisional* measures allowed for emergency reasons than as a definitive 'right' to take a permanent measure. The extent to which serious good faith efforts continue to be made may be reassessed at any time. For instance, steps which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage.[69] (emphasis in original)

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[68] The preparatory work relating to the GATT Art XXI security exception is the only source of guidance in this regard because the provision has not been interpreted by any panels. One of the drafters of the original Draft Charter describes the security exception as designed to ensure the proper allocation of responsibility between the United Nations and the WTO, to ensure the WTO does not attempt to take action which would involve passing judgment in any way on essentially political matters. Any measure taken by a member in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter should be deemed to fall within the scope of the United Nations, not the WTO. WTO, *Guide to GATT Law and Practice*, 6th ed, vol I (1995), 600.

[69] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.88.

The factual context[70] and legal framework[71] provided the basis for finding an implicit duty to negotiate in Article XX chapeau.[72] This duty imposed the following obligations:[73]

1. the United States had to take the initiative of negotiations;
2. the negotiations had to be with all interested parties and aimed at establishing consensual means of sea turtle conservation;
3. the United States had to make serious efforts in good faith to negotiate, taking into account conditions in different countries;[74]
4. serious efforts in good faith had to take place before the enforcement of a unilaterally designed import prohibition;
5. there must be a continuous process, including once a unilateral measure has been adopted and pending the conclusion of an agreement; and

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[70] In this case, the factual context was characterized as one in which the survival of highly migratory species depends on concerted and cooperative efforts on part of many countries whose waters are traversed in the course of migration. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965). Ibid paras 5.51-5.52.

[71] The panel characterized the legal framework as follows: (1) the need to protect migratory species has been recognized by the WTO and numerous international instruments; (2) sustainable development is a WTO objective; (3) there was the common opinion of WTO membership expressed in the 1996 Report of the CTE endorsing 'multilateral solutions based on international cooperation and consensus as the best and most effective way…to tackle environmental problems of a transboundary or global nature'; and (4) the parties to the dispute have accepted almost all of the relevant MEAs. Ibid paras 5.53-5.57

[72] Ibid paras 5.59-5.60.

[73] Ibid paras 5.66-5.67, 5.73.

[74] The panel determined that this was the 'standard of review' that should be applied in assessing the effort to negotiate. See ibid para 5.73. However, the panel also recognized that 'no single standard may be appropriate'. Ibid para 5.77. The Appellate Body rejected the view expressed by the panel that the United States should be held to a higher standard given its scientific, diplomatic and financial means, noting that the principle of good faith applies to all WTO members equally. See Ibid para 5.76 and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 134, footnote 97.

6. a multilateral, ideally non-trade restrictive, solution is generally to be preferred, in particular if it is established that it constitutes an 'alternative course of action reasonably open'.[75]

The *Shrimp* rulings flesh out the application of the duty to negotiate in the context of this particular case. This view of the duty to negotiate is not inconsistent with international environmental law or general international law.

C. Flexible Application of Measures

One aspect of the American measures that changed between *Shrimp I* and *Shrimp II* was the flexibility of its application in practice. The implementing measure provided for 'comparable effectiveness' of foreign programs, taking into account the specific conditions prevailing in the exporting country, rather than require 'essentially the same' program as the importing country.[76] The regulations do not need to address the conditions in each specific country, as long as, in practice, they are taken into account.[77] In this regard, the Appellate Body stated:

> Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory.[78]

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[75] Regarding this expression of the least-trade-restrictive test, also see *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.51, where the panel states: [I]it seems that the Appellate Body meant to imply that other, less trade restrictive measures existed and also that import prohibitions, because of their impact, had to be subject to stricter disciplines'.

[76] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), paras 141-144.

[77] Ibid para 149.

[78] Ibid para 144.

This may thus be viewed as a factor that assesses the effectiveness of the measure in achieving the policy goal. Assessing the conditions prevailing in a given country is necessary to determine what methods of environmental protection will be effective in different contexts. The enforcement of environmental laws requires the dedication of human and financial resources that some countries may not have, or that a country may prefer to dedicate to other matters that it deems more important to the welfare of its people. Differences in environmental conditions, technological capacity, financial means, economic priorities, and legal systems among the nations of the world make a one-size-fits-all approach inappropriate.[79]

D. Transparency and Due Process

The revised American law permitted the American authorities to take into account the specific conditions of Malaysia's shrimp production and turtle conservation program, were Malaysia to decide to apply for certification.[80] A country that did not appear to qualify for certification would receive notification explaining reasons for the preliminary assessment, suggesting steps that the government could take to get certification, and inviting the government to provide further information.[81] Transparency and procedural fairness could be considered general requirements under the chapeau because they

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[79] Some of these factors are recognized explicitly in other WTO Agreements as justifying variations in the implementation of WTO obligations (for example, TRIPS Art 41 with respect to variations in legal systems and distribution of law enforcement resources) or with respect to divergence with international standards (for example, TBT Art 2.4 with respect to differences in climate, geography and technology).

[80] Ibid para 146.

[81] Ibid para 147. For additional procedures the United States adopted to comply with the Appellate Body ruling, see *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), paras 3.127-3.136. They include visits by American officials to foreign countries, face-to-face meetings on site, and access to judicial review in the American courts.

facilitate compliance and thus affect the ultimate effectiveness of a measure in achieving its stated policy goal.

While there is no consensus that transparency constitutes a customary rule of international law,[82] requiring transparency in the Article XX chapeau is not inconsistent with general international law.

E. Technology Transfer

The panel in *Shrimp II* interpreted the Appellate Body's comments in *Shrimp I* as requiring a technology transfer program that would enable the exporting countries to comply with the requirements for certification.[83] The panel held that the United States had complied with this requirement through a standing offer to provide technical assistance and training to any government that makes a formal request, proved by actions with respect to several countries.[84] It is difficult to see how this could be a general requirement under Article XX(g), since its implementation depends on the economic and technological circumstances of the countries involved in a given dispute. While technical assistance for developing and least-developed countries generally is encouraged at the WTO, it is not an obligation that must be fulfilled in order to avail oneself of WTO rights.[85] Principle 20 of the *Stockholm Declaration* also encourages the transfer of

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[82] See *The United Mexican States v Metalclad Corporation* (2001) BCSC 664.
[83] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), paras 3.117-3.120.
[84] Ibid paras 3.158-3.160, 3.117-3.120.
[85] See, for example, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994), Art 67 and *Decision of 30*

environmental technologies to developing countries.[86] Taking this factor into account is not inconsistent with this international environmental principle.

The key factors that need to be taken into account in assessing whether to permit unilateral trade measures to conserve transboundary or global resources can be summarized as follows. They must be preceded by good faith efforts to reach a negotiated solution, be applied flexibly to take into account different conditions among countries, and comply with transparency and procedural fairness. In some circumstances, they may require technical assistance. However, the degree of urgency may be a factor that requires much greater effort to reach a negotiated solution, particularly with respect to the time frame involved.

The Appellate Body in *Shrimp I* made it clear that when a WTO member chooses to protect migratory species by way of unilateral trade action rather than multilateral co-operation, it will accept jurisdiction and scrutinize such trade measures under Article XX(g). This approach is consistent with the views I have expressed in Chapter 2 regarding the subject matter covered by Article XX(g). The factors in the Shrimp case that justified the American measure under Article XX(g) are not inconsistent with general principles of international environmental law and general international law regarding the

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August 2003, Implementation of para 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc IP/C/W/405, available at <www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003, para 6.

86 See *Declaration of the United Nations Conference on the Human Environment* 5-16 June 1972, UN Doc A/Conf/48/14/Rev.1 and Corr.1 (1973), (1972) 11 ILM 1416 (Stockholm Declaration). Also see See Francesco Munari, 'Technology Transfer and the Protection of the Environment' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001), 157.

circumstances in which a State may exceed its jurisdiction to address an urgent transboundary environmental problem.

IV. Conflicts between GATT and MEAs

An important issue is whether any distinction should be made between trade measures taken pursuant to multilateral environmental and conservation agreements and those that are not. There is nothing in Article XX(g) that explicitly distinguishes between measures applied as part of an international agreement and other measures.[87]

In *Tuna I*, Australia argued that where a contracting party takes a measure with extraterritorial application outside of any international framework of co-operation, it is appropriate for the GATT to scrutinise the measure against the party's obligations under the GATT. In particular, any measure involving conditional most-favoured-nation treatment by way of country-specific import prohibitions should be examined strictly, especially in view of the history of disputes over tuna.[88] Australia thus implied that the existence of an international agreement dealing with the extraterritorial application of such measures would be relevant to the jurisdiction of a GATT panel to consider their validity under international law and relevant to their consistency with the GATT.[89]

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[87] Submissions of the United States, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-22.
[88] Submissions of Australia, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 26.
[89] This issue never arose in the Shrimp case, which only dealt with the American measures as it was applied unilaterally outside the context of any international agreement with the affected countries.

The *Tuna I* panel ruled that the MMPA prohibition of imports of tuna from Mexico was contrary to GATT Article XI:1 and not justified by Articles XX(b) or XX(g). It concluded that:

> a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own...if the Contracting Parties were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse.[90]

The *Tuna I* panel's ruling was criticized for requiring nations to negotiate international agreements and GATT waivers or amendments if they want to use trade restrictions to implement international environmental policies. But this was a reasonable position to take given the controversy surrounding the proper interpretation of Article XX.[91] The ruling indicated that, if the rights and obligations of the GATT contracting parties were to be modified, they should be modified by the contracting parties themselves, not dispute panels.[92] The panel in *Tuna II* adopted the same view.

The relevance of the distinction between measures taken under MEAs versus measures taken unilaterally was also raised in the Shrimp case. The Appellate Body stated a clear preference for measures taken under international agreements over measures taken

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[90] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 50-51.

[91] The controversy over the proper scope of Art XX remained evident in the CTE Report to the Singapore Ministerial Conference. See Trade and Environment in the GATT/WTO, Background Note by the Secretariat, Annex I, Hakan Nordstrom and Scott Vaughan, *Trade and Environment*, WTO Special Studies, (1999), 74-75.

[92] The 1982 *Ministerial Declaration on Dispute Settlement*, BISD 29S/13, provided that panel decisions 'cannot add to or diminish the rights and obligations provided for under the General Agreement'. This was adopted by the WTO in *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2), which states:

unilaterally, but upheld a unilateral measure because serious efforts to conclude an international agreement had failed.

With respect to their parties, MEAs fulfil the key requirements that were imposed on the United States with respect to its unilateral measure in the *Shrimp* case. Most MEA trade measures can be characterized as addressing the protection of transboundary or global resources.[93] Where a country does not have a territorial nexus with the environmental problem, the MEA provides a legal nexus and may provide evidence that the subject matter is global, if not transnational. MEAs thus provide the jurisdictional nexus and cover subject matter that qualifies MEA trade measures for provisional justification under Article XX(g). The conclusion of the MEA fulfils the duty to negotiate. However, the fulfilment of the requirement for flexible and transparent application of the measure can not be assumed with respect to the implementation of MEA obligations in national law. MEA trade measures must therefore remain subject to WTO scrutiny under the chapeau analysis.

'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

[93] Most MEAs can be categorized as relating to environmental problems that affect two categories of natural resources: (1) non-living resources: clean air, water and soil or climate; and (2) living resources: plants and animals. The characterization of clean air as an exhaustible natural resource in *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body) supports the first category and the same characterization of turtles in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) supports the second category. All of the MEAs listed in the *Matrix on trade measures pursuant to selected MEAs*, WTO Doc WT/CTE/W/160 (2000) can be placed in one of these categories. See Chapter 1, n 42. Those measures that are strictly limited to protecting humans should generally be aimed at protecting the citizens of the enacting countries and people inside their territories and thus would fall within their jurisdictional competence.

The general conclusion that can be drawn from WTO jurisprudence is that trade measures taken pursuant to MEAs would be consistent with GATT if implemented in a non-discriminatory and transparent manner between parties to the MEA. However, WTO jurisprudence regarding unilateral measures does not apply to resources that are located entirely outside the jurisdiction of the importing country and some MEAs, notably CITES, require such 'extraterritorial' measures. However, the existence of a MEA that has been accepted by at least all of the WTO members that are parties to a dispute may be sufficient to categorize an environmental issue as global, rather than extraterritorial, thus providing a sufficient jurisdictional nexus in customary international law. With respect to international environmental law, both the *Rio Declaration* and *Agenda 21* indicate that multilateral agreement can justify the use of trade measures with respect to otherwise extraterritorial environmental problems. Thus, the MEA categorizes a problem as global and provides the necessary jurisdictional nexus. On this view, the jurisdictional nexus would be legal rather than territorial.

The *Tuna I* panel failed to directly address the issue of what would happen should there arise a conflict between the GATT trade obligations and inconsistent trade obligations imposed under multilateral environmental agreements such as CITES.[94]

[94] Such a case has not arisen to date, and is unlikely to be brought be a signatory to a MEA. If such an issue does come before a WTO panel, it would likely be in relation to non-parties to an MEA. See Richard G Tarasofsky, 'International Biodiversity Law and the International Trade Regime', presented at *Panel Session on Multilateral Environmental Agreements and Trade*, IUCN/GETS Meeting, Geneva, 26 April 1995 (on file with author).

The United States indirectly raised this issue in support of its argument that it should be permitted to use trade restrictions to conserve resources that occur outside its territory, noting that a CITES party was obliged to prohibit imports in order to protect endangered species found outside its own jurisdiction.[95] Australia also raised this issue by taking the position that a GATT panel could not resolve conflicts between a contracting party's international trade obligations under the GATT and its obligations under other multilateral agreements, although it acknowledged that no such conflict had arisen in the *Tuna I* case.[96]

The *Tuna I* panel suggested that the incidence of conflicting international trade obligations could be prevented. However, the *Tuna I* panel implied that, in the absence of a GATT amendment or waiver, such conflicts might be resolved against such competing obligations in the absence of any clear intention on the part of the parties to the environmental agreement to have the latter prevail in the event of any inconsistency with their GATT obligations.[97]

However, in this conflict between trade and environment, there existed international trade obligations, but no competing international environmental or conservation obligations.[98]

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[95] Submissions of the United States, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-22.
[96] Submissions of Australia, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 26.
[97] *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 50-51.
[98] See Ted McDorman, 'The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts' (1992) 17 *North Carolina Journal of International Law and Commercial Regulation* 461, 478.

The issue regarding the relationship between GATT Articles XX(b) and (g) and MEAs remained an open question after *Tuna I*.

Where WTO parties agree in a MEA that trade restrictions may be employed to pursue specific environmental objectives, it is reasonable to assume that they intend the MEA obligations to prevail over the general prohibition of GATT Article XI. With respect to the implementation of MEA obligations, it is reasonable to assume that WTO parties intend MEA trade measures to remain subject to the Article XX chapeau requirements in order to prevent abuse.[99] A conflict between MEA trade restrictions and Article XI can be avoided by interpreting Article XX to permit such measures as an exception to Article XI.[100]

The *North American Free Trade Agreement* ('NAFTA') uses a conflicts clause to resolve the issue more clearly than the GATT.[101] While a conflicts clause may be appropriate for

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[99] Regarding the role of the chapeau in preventing abuse, the Appellate Body stated in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 158:

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'

The Appellate Body cited in support B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), 125; *Border and Transborder Armed Actions* [1988] ICJ Rep 105; *Rights of Nationals of the United States in Morocco* [1952] ICJ Rep 176; *Anglo-Norwegian Fisheries* [1951] ICJ Rep 142.

[100] See discussion of Article XI in Chapter 2. Support for the view that the MEA could be taken into account in interpreting Article XX is found in *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTO Doc WT/DS69/AB/R, AB-1998-3 (1998) (Report of the Appellate Body), para 83, in which the Appellate Body found that a bilateral agreement between two WTO Members could serve as 'supplementary means' of interpretation for a provision of a covered agreement.

[101] *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994), Art 104. For comparison of approaches to trade and environment in the WTO, NAFTA and the European Union, see Richard H

a regional trade agreement among countries that share a regional environment and have environmental co-operation systems in place,[102] such a clause may be impractical in a global trade agreement that contains far greater diversity of members with respect to environmental conditions, technological capacity, financial means, economic priorities, and legal systems. The use of a NAFTA-style conflicts clause in the WTO is not as simple a solution as it appears to be, since it involves amending the agreement and choosing which MEAs to list now and which to add in the future. Moreover, such a proposal has already been rejected by both developed and developing country members of the WTO.[103] Resolving ambiguities regarding the relationship between trade and

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Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development' (1997) 91 *American Journal of International Law* 231. Also see Bradly J Condon, 'Reconciling Trade and Environment: A Legal Analysis of European and North American Approaches' (2000) 8 *Cardozo Journal of International and Comparative Law* 1.

[102] See *North American Agreement on Environmental Co-operation between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 13 September 1993, 32 ILM 1480 (entered into force 1 January 1994). See also, Sarah Richardson, 'Sovereignty Revisited: Sovereignty, Trade and the Environment - The North American Agreement on Environmental Co-operation' (1998) 24 *Canada-United States Law Journal* 183 and Bradly J Condon, 'NAFTA and the Environment: A Trade-Friendly Approach' (1994) 14 *Northwestern Journal of International Law and Business* 528.

[103] Several alternatives have been discussed in the WTO Committee on Trade and Environment, but no agreement has been reached on how to address WTO-MEA conflicts. These alternatives include:
(1) retention of the status quo (that is, an interpretive linkage approach);
(2) granting MEA-specific waivers;
(3) various models for amendment of Art XX;
(4) introduction of a "Coherence Clause" providing that in WTO disputes involving an MEA-mandated trade measure, only the application of the measure will be assessed, it being presumed to be provisionally justified under Art XX(b) or (g);
(5) developing principles and criteria by which to assess the validity of trade measures taken pursuant to MEAs;
(6) reversing the burden of proof under GATT Art XX in cases involving specifically mandated trade measures;
(7) developing non-binding intepretive guidelines to be used as a reference in the negotiation of future MEAs, and to assess the WTO-compatability of MEA trade measures;
(8) developing an Understanding to apply across the entire WTO Agreement, regarding differentiated treatment for trade measures applied pursuant to MEAs; and
(9) developing and implementing a voluntary consultative mechanism.
See Committee on Trade and Environment Special Session, Note by the Secretariat , 'Multilateral Environmental Agreements (MEAs) and WTO rules: Proposals made in the Committee on Trade and Environment (CTE) from 1995-2002', WTO Doc TN/TE/S/1, 23 May 2002, 2. Also see Jan McDonald,

environmental agreements is a complex task that is likely to require a more complex solution than that found in NAFTA Article 104. It seems neither necessary nor feasible to introduce a MEA conflicts clause in the WTO at the moment.

An alternative to using this type of conflicts clause in GATT, which avoids the need to change existing WTO provisions, is to use conflicts clauses in MEAs that contain specific obligations to use trade restrictions or give their signatories discretion to employ trade measures. Most signatories to MEAs are likely to be members of the WTO, and it is not unreasonable to ask them to turn their minds to the issue of a conflicts clause for trade measures when negotiating MEAs. However, incorporating a conflicts clause in future MEAs fails to resolve the question of conflicts with existing MEAs.

The application of MEA trade measures between parties is not controversial. Indeed, there have been no disputes in this area. Both GATT and WTO jurisprudence make favourable statements regarding such measures. They are consistent with general principles of international law and international environmental law. The only real issues involve questions of jurisdiction and analytical procedure. These issues are likely to be addressed in the current set of negotiations that were placed on the WTO negotiating agenda for the Doha Round.[104] The application of MEA trade measures to third parties and the use of unilateral trade measures in the international environmental context are more controversial and are not currently on the negotiating agenda.

'It's Not Easy Being Green: Trade and Environment Linkages beyond Doha' in Ross P Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (2003), 145.

[104] See Chapter 1.

V. Measures Applied to Third Parties

Two issues arise with respect to third parties: the application of trade sanctions to intermediary nations that act as trans-shipment points and the application of MEA trade provisions to nations that are not parties to the MEA in question.[105] The former issue was addressed in *Tuna I.* The latter issue, while not directly addressed in Shrimp, is analogous to the situation in *Shrimp II.*

In *Tuna I*, the American law provided for an embargo against 'intermediary nations' that continued to buy products which the United States had unilaterally decided should not be imported by itself or by any other country. Mexico argued that such interference in trade between other parties was not permitted by GATT and was contrary to international law.[106] The EEC argued that the very concept of 'intermediary nation' needed to be rejected because it would affect the right of each contracting party to determine autonomously its own trade policy. The EEC refused to introduce trade measures against a State because of a third country's requirements or on the basis of that country's unilaterally defined standards.[107] Similarly, Japan argued that its trade relations with Mexico should not be subject to American domestic law. The American embargo was not 'primarily aimed at the conservation of' dolphins within the meaning of Article XX(g)

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[105] The *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, UKTS 19 (1990) (entered into force 1 January 1989) reprinted in 26 ILM 1550 (1987), for example, requires parties to ban trade in certain substances with non-parties that do not comply with the Protocol.

[106] Submissions of Mexico, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-17.

[107] Submissions of the EC, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 31.

because an embargo on all yellowfin tuna and tuna products was not a dolphin conservation measure but a sanctions mechanism to force other countries to adopt policies established unilaterally by the United States.[108]

If one views the function of Article XX as preserving the rights of WTO members to legislate domestically in the listed subjects, it follows that they retain their autonomy to legislate domestically or multilaterally in those areas. An international treaty which modifies GATT obligations would do so for those countries party to the newer treaty.[109] An intermediary embargo that is used to support a direct embargo based on the national origin of a product might be justifiable on the same basis as the direct embargo. However, no single State has the authority to dictate the terms of trade between other nations under international law or WTO law.

How do the subject matter and degree of global acceptance of the MEA at issue affect the permissibility of trade sanctions against non-parties?[110] It has been argued that in some

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[108] Submissions of Japan, *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 33.

[109] See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 41(1) and Pauwelyn's analysis of *inter se* agreements, Pauwelyn, above n 36, 547-550. Also see McDorman, above n 98, 483.

[110] See art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980): 'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.' For a description of the process by which a rule becomes a customary rule of international law, see Virginia Dailey, 'Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO' (2000) 9 *Transnational Law and Policy* 331. Commentators have suggested several criteria to determine whether MEAs should be exempted from GATT scrutiny under a GATT waiver or binding interpretation, including the number of parties to the agreement, the range of parties and interests represented (such as developed, developing, importing and exporting), the number of nations affected by the agreement who are parties, the distribution of benefits and harms, and the provision of technical, financial or other assistance. See Chris Wold, 'Multilateral Environmental Agreements and the GATT: Conflict and Resolution?' (1996) 26 *Environmental Law* 841.

situations conservation and environmental agreements can modify the GATT without an explicit modification statement, even with respect to non-parties to such agreements.[111] Thus, an expression of broad international support for the modification of the GATT by environmental or conservation considerations could suffice to suspend the operation of the GATT rules.[112] However, it is difficult to accept that such fundamental principles as privity of contract and State sovereignty could be so easily overturned.[113] Moreover, the

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[111] McDorman, above n 98, 484-5. McDorman argues that, with respect to CITES, GATT obligations must be modified even for countries not a party to CITES, given the completeness of the CITES regime, its obvious inconsistency with GATT, the narrowness of the exceptions to GATT thereby created, and the overwhelming international support for CITES, which then had more signatories than GATT.

[112] McDorman, ibid 486. *See also Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 30, 34, 38, 59, and 64. Art 64 provides that 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'
art 53 (*jus cogens*) provides:
'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' If the relevant CITES provisions regarding trade in endangered species were accorded the special status of *jus cogens*, like the prohibition of trade in slaves enjoys, those CITES provisions would undoubtedly prevail over the GATT in the event of an inconsistency. See Brownlie, above n 50, note 48, 499-500. However, the proponent of a rule of *jus cogens* in relation to *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 53 will have a considerable burden of proof to meet. See Brownlie, ibid, 501. Also see T O Elias, *The Modern Law of Treaties* (1974), 179-184.

[113] 'The lack of consent by a given state generally means that it cannot be held to the rule in question (*pacta tertiis nec nocent nec prosunt*).' See Pauwelyn, above n 36, 536. This principle is the international law counterpart to the Latin maxim, *privatis pactionibus non dubium est non laedi jus caeterorum* (there is no doubt that the rights of others [third parties] cannot be prejudiced by private agreements), (see H Black, *Black's Law Dictionary, 5th ed* (1979), 1076) This principle is reflected in the GATT amending formula. Art XXX:1 provides:
'Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this agreement or to the provisions of Art XXIX or of this Art shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.' The applicable rule of international law, which flows from the principle of state sovereignty, has been clearly and authoritatively stated as follows: 'The rule that a treaty cannot impose obligations upon a 'third State' is well established.' Lord McNair, *The Law of Treaties* (1961), 310; 'A treaty may not impose obligations upon a State which is not a party thereto.' Art 18 of the *Harvard Research Draft Convention on Treaties*, cited in McNair, ibid, 310; 'A treaty does not create either obligations or rights for a third State without its consent.' *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 48. There are few exceptions to this rule. The major exception is set out in art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155

rights of the contracting parties can only be modified by agreement among the contracting parties themselves.[114] However, MEA trade measures applied against non-parties are analogous to the type of unilateral measure the United States applied against Malaysia in *Shrimp II*. Thus, they could be justified under Article XX(g) in the same fashion where they address transboundary or global environmental concerns. However, if they are aimed at extraterritorial environmental concerns, it is difficult to see how they would comply with customary international law or international environmental law. As a result, they would not be justifiable under any GATT interpretation that is consistent with these other branches of international law. However, if the subject matter and degree of global acceptance of the MEA permits the problem to be characterized as global, rather than extraterritorial, the measure could be justified under Article XX(g) as addressing a global issue.

VI. The Least-Trade-Restrictive Principle and MEAs

GATT and WTO jurisprudence have generally indicated that the preferred, less-trade-restrictive alternative to unilateral measures is to negotiate MEAs. MEA trade measures are consistent with GATT if implemented in a non-discriminatory and transparent manner between parties the MEA. However, where the MEA is implemented so as to avoid WTO obligations, the implementing measures must be subject to WTO scrutiny.

UNTS 331 (entered into force 27 January 1980): 'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.'

[114] Pauwelyn, ibid. McNair, ibid.

The least-trade-restrictive test also can be employed as a general conceptual approach to addressing such implementation cases.

Anderson and Fried state the least-trade-restrictive principle as follows:

> ...if one is pursuing environmental regulation, ... one [must] do so in the least trade-restrictive way possible without compromising the environmental standard one has set for oneself.[115]

In *Tuna I*, Australia argued that, under Article XX(b), as previously interpreted,[116] the United States was required to demonstrate that country-specific import prohibitions on tuna were the only means reasonably available to it to ensure the protection of dolphins, and that such measures were the least GATT-inconsistent measures available.[117] Mexico argued that the best way to protect dolphins was by international co-operation among all concerned, not by way of unilateral trade measures.[118]

It was not necessary for the panel to decide whether the trade embargo was the least trade-restrictive means available to conserve dolphins. However, it implied that there were less trade-restrictive methods available to achieve that goal.[119] Moreover, it implicitly accepted Mexico's argument that multilateral negotiation would be the

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[115] Jean Anderson and Jonathan Fried, 'The Canada-U.S. Free Trade Agreement at in Operation' (1991) 17 *Canada-United States Law Journal* 397, 403.
[116] See *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the GATT Panel (7 November 1990) BISD, 37th Supp. 200, DS10/R, 30 I.L.M. 1122 (1991), interpreting the meaning of the word 'necessary' in the context of Art XX(b).
[117] Submissions of Australia, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 26.
[118] Submissions of Mexico, *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 16-17.
[119] *United States—Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594 (Report by the Panel not Adopted), 50.

preferable and less trade-restrictive means of accomplishing international environmental goals.

The *Tuna II* panel also found that a measure cannot qualify as necessary under Article XX(b) where there are other GATT-consistent alternatives available, which includes the negotiation of multilateral agreements. Moreover, measures designed to force other nations to change their environmental policies could neither be considered necessary under Article XX(b) nor primarily aimed at the conservation of natural resources under Article XX(g). The decision thus appeared to require the negotiation of multilateral agreements before a measure could be considered to be the least-trade-restrictive alternative available.[120]

The *Shrimp I* decision concluded that where an alternative course of action is reasonably available, in this case making an effort at multilateral negotiations, a measure cannot qualify under the Article XX chapeau. In *Shrimp II*, the panel indicated that one of the factors to consider in determining whether to permit a unilateral measure is whether a multilateral solution constitutes an 'alternative course of action reasonably open'.[121] This appears to incorporate the less trade-restrictive test into the chapeau and apply the test to

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[120] See *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted). Also see Wold, above n 109. For another environmentally related WTO decision that applied the least-trade-restrictive requirement, see *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).
[121] Regarding this expression of the least-trade-restrictive test, also see *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.51, where the panel states: [I]t seems that the Appellate Body meant to imply that other, less trade restrictive measures existed and also that import prohibitions, because of their impact, had to be subject to stricter disciplines'.

the area of international environmental protection. The Appellate Body did not disagree with the panel on this issue in *Shrimp II*.

In its interpretation of Article XX(g) and the chapeau, the Appellate Body in the Shrimp case adopted the interpretation of the Appellate Body in the *Reformulated Gasoline* case.[122] One commentator has suggested that this interpretation makes the requirements of the chapeau synonymous with the 'necessary' test under Article XX(b).[123]

The question that arises is whether a trade measure taken under a multilateral environmental agreement would have to pass the least-trade-restrictive test under Article XX. It is reasonable to assume that this principle would apply to the manner in which a state implements trade measures under a MEA. Otherwise, the implementation process could be subject to abuse. The implementation would have to be non-discriminatory and transparent, and comply with the requirements for procedural fairness. However, it is unlikely that the least-trade-restrictive test would be applied to second guess the substance of measures chosen by the parties to the MEA. The WTO would have to show deference in this regard to the parties to the MEA. Otherwise, the MEA would have to be renegotiated to comply with the opinion of a WTO panel, a result that would be impractical and exceed the jurisdiction of the panel.

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[122] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).
[123] See Wold, above n 109.

NAFTA Article 104 applies the least-trade-restrictive principle to MEAs. NAFTA Article 104 provides that the specific trade obligations set out in listed MEAs prevail over NAFTA, subject to the proviso that 'where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement'.[124] In order for a measure to be the least inconsistent with the other provisions of the NAFTA, it would have to be the least inconsistent with the free movement of goods and services between the Parties; that is, the least trade-restrictive. It would be reasonable to apply a comparable least-trade-restrictive test to MEAs in the context of the Article XX chapeau.

VII. A Conflict between NAFTA and GATT

Neither the GATT nor any GATT panel decision has clearly set out whether Articles XX(b) or (g) prevail over international environmental agreements as between parties to

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[124] NAFTA Art 104 provides:
1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
(a) *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973;
(b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990;
(c) *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico and the United States; or
(d) the agreements set out in Annex 104.1,
such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with this Agreement. (emphasis added).
2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to the agreements listed in para 1, and any other environmental or conservation agreement.
Annex 104.1 currently lists only two agreements:
(1) The *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, October 28, 1986, and

both. The prevailing view of public international law is that the later law supercedes the earlier[125] and that the specific supercedes the general.[126] Applying the latter principle, the more specific trade obligations in the agreements listed in Article 104 would supercede the GATT provisions under international law as between parties to both.[127] Article 104 thus represents a codification of what the likely outcome would be were any of the listed agreements challenged before a WTO panel.

The NAFTA provides no express permission or prohibition regarding the unilateral assertion of jurisdiction over extraterritorial environmental matters via the imposition of trade restrictions. However, Article 104 expressly permits the use of trade measures to pursue extraterritorial environmental goals where such measures have been authorised by an international environmental agreement (CITES). Since the NAFTA provides no express permission to use trade restrictions to unilaterally assert jurisdiction over extraterritorial environmental matters, but expressly permits such measures to be taken

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(2) The *Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, August 14, 1983.

[125] See Brownlie, above n 50, note 48, 603, where the author states, '...it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject matter...'.
See McNair, above n 111, 219: 'Where the parties to the two treaties said to be in conflict are the same,...[i]f the provisions of the earlier one are general and those of the later one are special and detailed, that fact is some indication that the parties intended the special one to prevail.'
See also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 30 and 59.

[126] See McNair, ibid, 219: '[where] one treaty contains general provisions and the other special provisions *in pari materia*,...the maxim *generalia specialibus non derogant* comes into play - that is to say, "the specific prevails over the general"'.

[127] For example, it is unlikely that the GATT would be interpreted to 'liberalize' trade in endangered species. Art VIII of CITES requires the parties to penalize trade in specimens in violation of the Convention. Such a specific provision would prevail over the GATT's more general trade obligations under international law. The fact that CITES is given priority under NAFTA art 104(1)(a) thus represents a codification rather than an innovation.

pursuant to universally accepted[128] multilateral agreements, the implication is that the NAFTA prohibits the unilateral use of trade restrictions to pursue extraterritorial environmental goals.

Unlike the GATT, the NAFTA *expressly* permits a state to use trade restrictions to address environmental matters that occur outside its national territory, by international agreement. In this regard, the distinction between measures taken under international agreements and measures taken unilaterally is key to determining whether trade restrictions may be employed. Article 104 thus codifies the requirement implicit in the Tuna decisions that such measures must expressly or implicitly be intended to prevail over trade obligations, by agreement among the affected trading parties.

Article 104 implies that, where there is a conflict between trade obligations under NAFTA and environmental obligations under other agreements, the NAFTA obligations prevail unless the competing agreement is listed in Article 104 or Annex 104.1. The anticipated inclusion of further bilateral and multilateral environmental agreements in Article 104, via Annex 104.1, implies further that such agreements between the NAFTA Parties are to precede, and indeed replace, any resort to unilateral trade action.

Article 104 resolves the question of how to address MEA trade measures more explicitly and clearly than GATT. Extraterritorial environmental concerns must be addressed in the context of this provision. However, States that have a territorial connection with the

[128] This term refers to universal acceptance by the NAFTA parties, evidenced by inclusion in art 104 or

resources in the latter category have the right to employ trade measures under Article XX(g) to preserve the resources. Article 104 implies that it is not permissible to employ unilateral trade measures to address transboundary or global environmental concerns in the absence of a listed agreement. However, NAFTA incorporates Article XX(g) and customary international law. As a result, in the wake of the *Shrimp II* decision, there now exists a conflict between NAFTA Article 104 and Article XX(g).

The NAFTA conflicts clause provides one method of clarifying the relationship between MEAs and trade obligations. However, it is not the best way to resolve this question in the WTO context. The conflicts clause is a less flexible approach than leaving panels to apply the broad language of Article XX on a case-by-case basis. The conflicts clause requires negotiation each time a new MEA or international environmental issue arises, whereas the language of Article XX is sufficiently broad to obviate the need for ongoing negotiation. Moreover, the conflicts clause closes off options to take unilateral actions in situations of urgency that are consistent with customary international law and international environmental law.

The conflicts clause may function in the NAFTA context because there are only three parties involved and those parties have several bilateral and trilateral mechanisms in place to address transboundary environmental concerns in the region.[129] This makes the

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Annex 104.1.

[129] The NAFTA parties established a Commission for Environmental Cooperation and other trilateral mechanisms in the North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States, and the Government of the United States, 13 September 1993. See <www.cec.org> at 16 October 2003. There are approximately 200 transboundary

identification and negotiation of issues that require resolution far more feasible and quick than it is among the WTO membership. The size and diversity of the WTO membership, together with the increasing difficulty of achieving consensus among the members, would make it difficult to make a conflicts clause work in practice. A conflicts clause such as NAFTA Article 104 leaves insufficient flexibility to maintain consistency among the different branches of international law as they evolve. As the current situation with respect to NAFTA demonstrates, a conflicts clause may even create problems with respect to the internal consistency of the trade regime itself.

VIII. The Free Rider Problem

The authorization of unilateral trade measures to address transboundary environmental concerns creates a political problem for the WTO and potential inconsistencies with fundamental principles of WTO law. The effectiveness of such measures depends on the relative market power of the importing and exporting countries.[130] Thus, in practice, this

environmental agreements in the NAFTA region. See Commission for Environmental Cooperation, *Transboundary Agreements Infobase*, <http://www.cec.org/pubs_info_resources/law_treat_agree/transbound_agree/abouttrans.cfm?varlan=English> at 16 October 2003.

[130] In a different context, the panel recognized that the effectiveness of countermeasures could be affected by an imbalance in market power in *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WTO Doc WT/DS27/ARB/ECU24 (2000) (Decision by the Arbitrators), paras 73 and 76:

> [I]n situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.
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> Our interpretation of the 'practicability' and 'effectiveness' criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly.

mechanism is only available to WTO members with substantial markets—large developed and developing countries. While, in theory, this mechanism is available to all WTO members, the least-developed countries and small developing countries will not be able to use it to great effect. This makes it unacceptable politically, particularly in the current climate where WTO negotiations have bogged down due to the perception that the WTO benefits its more powerful members at the expense of its weaker members.[131] Indeed, this mechanism is yet another example of the inequality that is perpetuated when rules and negotiations disadvantage the already disadvantaged members.[132]

In addition, this development is inconsistent with other principles of international law and WTO law. Interpreting a legal right so that it disadvantages least-developed countries runs counter to the general principle of sovereign equality of States in international law.[133] Creating rights that are unavailable to developing and least-developed countries is also inconsistent with WTO provisions and decisions that require differential treatment of developing and least-developed countries that *favours* these categories of member.[134]

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[131] Divisions between developed countries and the developed and least-developed countries prevented the WTO from reaching consensus at the Ministerial Conference in Seattle, in 1999, and at the Ministerial Conference in Cancun, in 2003.

[132] The right to issue compulsory licenses on patents in the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994), art 31 is another example of a legal right that was in practice not available to the most disadvantaged WTO members, due to their lack of manufacturing capacity in the pharmaceutical sector. See Bradly J Condon and Tapen Sinha, 'Bargaining for Lives at the World Trade Organization: The Law and Economics of Patents and Affordable AIDS Treatment' (forthcoming).

[133] See Chapter 4.

[134] *Marrakesh Agreement Establishing the World Trade Organization* ('WTO Agreement'), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art XI, provides that, 'The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the ext ent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'. The *Decision on Measures in Favour of*

In essence, the ruling in *Shrimp II* represents an attempt to resolve a 'free rider' [135] problem. In the context of international environmental negotiations, each country has an incentive to 'free ride' on the other countries' efforts to protect the environmental resource at stake. In the *Shrimp II* case, Malaysia's refusal to participate in the sea turtle

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Least-Developed Countries, in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994), 440, art 1 provides: 'if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries… will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'. The WTO Agreement preamble also makes special reference to the needs of developing countries, 'especially the least developed among them'. The Dispute Settlement Understanding requires that 'Members shall exercise due restraint' in filing complaints against least developed countries and in asking for compensation or seeking authorization to suspend the application of concessions or other obligations. *Understanding on Rules and Procedures Governing the Settlement of Disputes*('DSU'), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994) Art 24(1). Other provisions relating to differential treatment are DSU, art 3(12), which gives developing countries the right to invoke the *Decision of 5 April 1966* (BISD 14S/18) when they bring a complaint against a developed country, and DSU, art 8(10), which permits a developing country to request that at least one member of the panel be from a developing country in disputes between a developing country and a developed country. Other WTO agreements also contain provisions regarding preferential treatment. GATT Part IV (Arts XXXVI, XXXVII, XXXVIII, Ad Art XXXVI, and Ad Art XXXVII), 'Trade and Development', gives preferential treatment to 'less-developed contracting parties'. Preferential treatment is also a feature of trade remedy law. See *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), Art 15 and *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), Art 27(2)(a) and Annex 7.

The legal definition of developing countries in international law generally has received relatively little attention in the legal literature. Guglielmo Verdirame has written an excellent article on this issue. See Guglielmo Verdirame, 'The Definition of Developing Countries under GATT and Other International Law'(1996) 39 *German Yearbook of International Law* 164. Also see Guy de Lacharrière, 'Aspects récents du classement d'un pays comme moins developpé'(1967) *Annuaire français de droit international* 703; Guy de Lacharrière, Identification et statut des pays moins developpé (1971) *Annuaire français de droit international* 461; Guy Feuer, 'Les différentes categories de pays en développement' (1982) *Journal du droit international* 1; Maurice Flory, *Droit international du développement* (1977); Jacques Bouveresse, *Droit et politiques du développement* (1990); Ernst-Ulrich Petersmann, 'Die Dritte Welt und das Wirtschaftsvolkerrecht' (1976) *Zeitschrift fur Auslandisches Offentliches Recht under Volkerrecht* 492; Francis Snyder and Peter Slinn (eds), *International Law of Development* (1987); Milan Bulajic, *Principles of International Development Law* (1993); F V García-Amador, *The Emerging International Law of Development* (1990); Wil D Verwey, 'The Principal of Preferential Treatment for Developing Countries' (1983) *Indian Journal of International Law* 343.

[135] The free rider concept may be defined as follows: 'The notion that those who do not contribute to some project may nevertheless benefit from it (free riders), evidenced in games such as the tragedy of the

protection program can be viewed as an attempt to avoid the cost of protecting the turtles and thus to free ride on the efforts of the other countries. As long as the other countries' participation achieves the goal of saving the turtle, Malaysia has no incentive to participate. By not participating, the free rider gets the benefit of the resource without paying the cost of maintaining the resource.

The *Kyoto Protocol* provides another example.[136] Assuming that greenhouse gas emissions provoke climate change that harms all countries, the reduction of emissions produces a benefit for all. However, there is an economic cost to reducing emissions. If one country (the free rider) refuses to pay the cost of participating while the other countries agree to pay the cost of reducing emissions, the free rider gains the benefit of reduced emissions without paying for the benefit. However, if the free rider is penalized for refusing to participate and the cost of the penalty exceeds the cost of participation, the free rider now has an incentive to participate in conserving the common resource.

The *Shrimp II* ruling resolves the free rider problem by allowing the use of trade barriers to penalize the free rider and thus to create an incentive for the free rider to participate in a multilateral environmental agreement. In this case, the penalty is the denial of access to the American market for Malaysian shrimp products. In theory, permitting WTO members to impose such trade barriers unilaterally should solve the free rider problem,

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commons and public goods contribution games.' Game Theory: Dictionary: Terms: Free Rider http://www.gametheory.net/Dictionary/FreeRider.html

[136] *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, (1992) 31 ILM 849 (entered into force 21 March 1994). *Kyoto Protocol*, opened for signature 16 March 1998, available at <http://unfccc.int/resource/convkp.html>, at 4 November 2003.

providing an incentive to free riders to participate in multilateral environmental protection efforts. Once the free rider is induced to participate, the penalty is no longer required. In theory, the threat of the penalty should be sufficient to induce participation, thus maintaining open markets while simultaneously facilitating multilateral cooperation on environmental issues. This looks like an ideal way to ensure that trade liberalization and environmental protection efforts are mutually supportive. Indeed, some argue that interpreting WTO rules to prevent such use of unilateral trade measures to protect the environment could exacerbate free-rider problems and thus inhibit the negotiation of cooperative solutions to global environmental problems.[137]

The problem with this theory is that it fails to take into account the impact of market size on the ability to impose adequate penalties.[138] The larger the market is the higher the cost of denying market access will be. This means that the effectiveness of this particular mechanism for resolving the free rider problem depends on the economic power of the

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[137] See, for example, Howse, above n 19, and Howard Chang, 'Carrots, Sticks, and International Externalities' (1997) 17 *International Review of Law and Economics* 309. Also see Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1. Richard Parker also argues in favour of the use of trade leverage. See Richard W Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12 *Georgetown International Environmental Law Review* 1.

[138] The OECD has also made this point, noting that market power influences the effectiveness of trade measures that are based on processing and production methods: 'For the most part, countries with small internal markets will not be able to impose trade restrictions successfully on large countries to which they export their products'. Organisation for Economic Co-operation and Development, above n 63. Gaines also discusses this issue, noting that, 'The real disparity lies not in which countries might feel adversely affected by such measures, but in which countries might reasonably be able to take advantage of permission to apply them. This inequity of opportunity to impose such measures…accounts for the vociferous opposition by developing countries to PPM-based measures and analogous 'product' requirements such as environmental packaging and labeling'.(sic) Gaines, above n 54, 427. Gaines argues that the analysis of uniform rules must be 'sensitive to their potential disparate effects', which could 'exacerbate rather than ameliorate the fundamental inequalities of trade'. Ibid, note 123. On the topic of equity, see Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (2000) 21 *Michigan Journal of International Law* 975.

member imposing the sanction.[139] If the free rider is an economic powerhouse, this mechanism becomes less effective.

Take the case of the decision of the United States to not participate in the *Kyoto Protocol.* Here, the United States is the free rider. In theory, the reasoning in *Shrimp II* could be applied to authorize unilateral trade measures against the United States in order to induce its participation in the agreement. The United States accounts for 23.5 per cent of world imports.[140] The European Union is the only WTO member that comes close to the United States on this measure, with 18.2 per cent.[141] Japan, China and Canada, the other three

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[139] The impact of market size on the effectiveness of trade sanctions has also been discussed in the context of WTO dispute settlement. Some have proposed that developing countries engage in 'collective sanctioning' in order to increase their leverage in this context. See B Hoekman and P C Mavroidis, 'Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries', *The WTO/World Bank Conference on Developing Countries in a New Millenium* (WTO Secretariat, 1999) (arguing that collective sanctioning is possible under the current WTO system) and Naboth van den Broek, 'Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports: Interdisciplinary Approaches and New Proposals' (2003) 37 *Journal of World Trade* 127 (arguing that reforms to the DSU are needed to make collective sanctioning fully effective and available and noting that it may be difficult in practice to find countries willing to participate in collective sanctioning). In *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU,* WTO Doc WT/DS27/ARB/ECU24 (2000) (Decision by the Arbitrators), paras 70-73 and 76, the arbitrators recognized that market power is a factor to be considered in evaluating the effectiveness criterion under DSU Article 22(3):

> [T]he term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.
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> One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.
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> Our interpretation of the 'practicability' and 'effectiveness' criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly.

[140] See Table 3.1.

[141] See Table 3.1.

members in the top five, together account for only 16.4 per cent of world imports. In contrast, even though Malaysia ranks twelfth in terms of its share of imports it still only accounts for 1.5 percent.

Table 3.1: Share of World Imports as a Measure of Economic Power (2001)

Importer	Share of World	Rank
United States	23.5%	1
European Union	18.2	2
Japan	7.0	3
China	4.9	4
Canada	4.5	5
Mexico	3.5	7
Malaysia	1.5	12
Australia	1.3	13
Thailand	1.2	14
India	1.0	18

Source: WTO, 'International trade statistics 2002'[142]

It is difficult to estimate the economic cost to the United States of implementing its *Kyoto Protocol* obligations, but one estimate put the cost at between $128 and $283 billion per year on average for the years 2008-2012 (in 1992 dollars).[143] Assuming this figure is accurate, to make the *Shrimp II* mechanism work, the WTO member imposing unilateral trade sanctions against the United States would need to ban American imports worth a comparable figure. With respect to the larger estimate, there is no single trading partner of the United States that comes close to being able to do so, even banning all

[142] Table I.6, Leading exporters and importers in world merchandise trade (excluding intra-EU trade), 2001, <http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i06.xls>, at 30 November 2002.
[143] Energy Information Administration, Impacts of the Kyoto Protocol on U.S. Energy Markets & Economic Activity, Report # SR/OIAF/98-03 (1998). <http://www.eia.doe.gov/oiaf/kyoto/execsum.html>, at 30 November 2002. Another study suggests that there could be zero or negative net costs to the United States of implementing the Kyoto Protocol. See Union of Concerned Scientists and Tellus Insitutute, *A Small Price to Pay: US Action to Curb Global Warming Is Feasible and Affordable* (1998), <http://www.ucsusa.org/publication.cfm?publicationID=8>, at 30 November 2002.

merchandise imports from the United States (using figures for 2001). Using the lower estimate, only Canada and the European Union could reach the amount (by 2008, Mexico might reach this sum too).

Table 3.2: Value of U.S. Exports to Top 5 Destinations, Billions of Dollars (2001)

Destination	Value
Canada	163.7
European Union	159.4
Mexico	101.5
Japan	57.6
South Korea	22.2

Source: WTO, 'International trade statistics 2002'[144]

Of course, any country that chose to impose trade restrictions on the United States in order to provide incentives for American participation in a multilateral environmental agreement runs the risk of American counter measures. Thus, even if a country's market were sufficiently important to provide an adequate incentive, the cost of American countermeasures would provide a deterrent. For example, Canada is the largest trade partner of the United States, which in theory places Canada in the best position to penalize the United States through trade barriers. However, the Canadian market receives only 22.4 per cent of American exports,[145] while the American market receives 87.2 per cent of Canada's exports.[146] It is pretty clear who would be penalized the most from a Canada-United States trade war. In comparison, Malaysia receives only 1.3 per cent of

[144] Table III.17: Merchandise Trade of the United States by region and economy, 2001, <http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii17.xls>, at 30 November 2002.
[145] Table III.16: Merchandise Trade of Canada by region and economy, 2001, <http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii16.xls>, at 30 November 2002.
[146] Table III.17, ibid.

American exports (and it ranked as the thirteenth largest destination for American exports in 2001).[147] However, Malaysia sent 26.3 per cent of its exports to the United States.[148]

When it comes to using trade measures to penalize free riders in multilateral environmental negotiations, economic clout counts because it makes equality of bargaining power non-existent. The implication is that, while the obligation to bargain in good faith may apply equally to all WTO members under the standard of review proposed in *Shrimp II*, the ability to use unilateral trade measures as a bargaining chip is anything but equal. As neutral as the statement of the standard sounds, in practice it serves to discriminate between WTO members based on the relative size and importance of their markets.[149] It benefits the economically powerful but not the economically weak members. The capacity of countries to contribute to multilateral environmental protection (both in terms of their environmental impact on the particular resource and their technological and financial capacity to contribute to its solution) and the capacity of WTO members to penalize free riders (with trade barriers) is asymmetrical. The standard set out in *Shrimp II* takes the former into account, but ignores the latter. In doing so, it runs the risk of violating the public international law principle of sovereign equality of

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[147] Ibid.

[148] Calculated using figures from Table III.17, ibid and WTO, 'International trade statistics 2002,' Table A4, World Merchandise Exports by Region and Selected Economy, 1991-01, <http://www.wto.org/english/res_e/statis_e/its2002_e/appendix_e/a04.xls>, at 30 November 2002.

[149] The right to use unilateral trade measures in Art XX is not all that different from another mechanism whose effectiveness is also based on economic power. This analysis applies as well to DSU provisions regarding the authorization of retaliatory trade measures to induce members to comply with DSB rulings. Here, the free rider seeks to benefit from the market access that comes with WTO membership without incurring the cost of opening its market to the same degree as other members. However, the DSU mechanism is better able to overcome asymmetries in economic power in most cases because the retaliatory trade measures are equivalent in value to the trade barriers that are penalized. Moreover, the value of trade involved is easier to calculate than the cost of participation in MEAs.

states and the WTO principle of non-discrimination.[150] These issues will be analysed in the next chapter.

IX. Conclusion

It is important to recall that the principle of *stare decisis* does not apply to decisions of WTO panels and that panel opinions on the potential GATT-consistency of measures taken under MEAs are only *obiter dicta*. Nevertheless, decisions rendered in the Shrimp cases will have persuasive value in future decisions of WTO panels and the Appellate Body. However, the primary focus of analysis must be on the provisions of the agreements themselves, which were drafted in a way that allows their interpretation to evolve over time to deal with shifting global priorities and the growing diversity of WTO membership.

Recent interpretations of existing GATT provisions have opened the door for multilateral environmental trade measures dealing with shared species and resources to be justified as exceptions under Article XX. While it appears unlikely that trade measures taken pursuant to a MEA against parties to the MEA will be challenged before the WTO,

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[150] One can argue that the implications of judicial settlement of international disputes for the equality of states may be no greater than negotiated solutions, since this legal principle does not reflect economic and political reality. Nevertheless, the judicial resolution of such fundamental legal issues represents an important shift, as noted by Philippe Sands:

> In the Shrimp/Turtle case, we have seen how an issue which previously would have been decided by international negotiation and diplomatic action – on the basis of an assumed equality of states but where in reality great discrepancies in sovereign power tilt the balance in favor of the economically and politically powerful – is instead subject to binding judicial decision.

Philippe Sands, 'Turtles and Torturers: The Transformation of International Law', Inaugural Public Lecture as Professor of Public International Law, University of London, 6 June 2000, <http://www.nyu.edu/pubs/jilp/main/issues/33/pdf/33p.pdf>, pp 527-559, 555, at 19 February 2003.

should such a case arise the measure would probably meet the standards set out in Article XX. Should measures be taken against non-parties, the treatment will be the same as for unilateral measures and the outcome of a WTO challenge will be determined in accordance with the *Shrimp* decisions.

There appears to be no need to introduce immediate changes to the WTO regime in order to deal with conflicts with MEAs. In particular, it does not appear to be either necessary or feasible to introduce a MEA conflicts clause in the WTO. While such provisions may be useful in regional trade agreements, they would be problematic in the WTO given the diversity of its membership.

Environmental policy choices do not fall under the jurisdiction of the WTO. However, trade measures do. There is a clear conflict between the general rule of Article XI and the obligation to use trade restrictions in certain MEAs. There is no conflicts clause in the WTO that determines which obligation is to prevail. However, Article XX provides exceptions to the Article XI general rule that reserves jurisdiction over environmental policy to national governments, subject to the requirements of the Article XX chapeau. The national governments can exercise their jurisdiction regarding the content of environmental policy alone or in concert with other national governments in MEAs. As long as the policy fits the parameters of Article XX (g), the trade restrictions in question will qualify for provisional justification under one of these two subheadings. I argued in Chapter 2 that the subject matter of Article XX(g) covers measures that address transnational and global environmental problems. Article XX(g) also requires a

jurisdictional nexus between the environmental problem and the country that implements a trade measure. Where there is no territorial nexus, the MEA provides a legal nexus that should satisfy this requirement. The implementing country must have a jurisdictional nexus in order to apply MEA trade restrictions against third parties or to otherwise apply trade measures outside the context of a MEA in order to meet the requirements of the *Shrimp* cases. Moreover a jurisdictional nexus is required in order to establish that the environmental problem affects the 'essential interests' of the country in question. This must be established to invoke the doctrine of necessity in customary international law in order to address the apparent inconsistency of such measures with the jurisdictional competence enjoyed by States in international law. This topic is the focus of Chapter 4.

The WTO has jurisdiction over the use of trade restrictions. That jurisdiction needs to be retained even with respect to MEA trade measures so that the WTO may supervise their implementation under the Article XX chapeau. It is necessary to retain this jurisdiction over the manner of implementation in order to ensure that WTO members do not abuse their rights under Article XX(g). Even if the WTO had a conflicts clause that determined that MEA trade obligations prevail over GATT obligations (or if the rules regarding conflicts between treaties led to the same conclusion), the implementation of the MEA obligations would still need to be subject to the requirements of the chapeau in order to safeguard against abuse.

This view accords with the intention of WTO and MEA parties to place trade policy in the jurisdiction of the WTO and environmental policy in the jurisdiction of the MEA. The

view that MEA trade restrictions qualify for provisional justification under Article XX(g) but nevertheless remain subject to WTO supervision under the chapeau provides a way to reconcile potential conflicts between the two sets of obligations.

It would be unwise to say that the DSB has no jurisdiction at all over trade measures implemented pursuant to MEAs, because a WTO member could then purport to take a measure under a MEA and thereby preclude DSB scrutiny altogether. As long as the MEA requires that trade measures be implemented in conformity with the requirements of the Article XX chapeau, any apparent conflict between the MEA and GATT obligations will be resolved. Even if the MEA contains no explicit requirement in this regard, the MEA should be interpreted in a manner that is consistent with GATT obligations where the MEA parties are GATT members.

The factors that the Appellate Body considered in permitting the unilateral measure in *Shrimp II* are not inconsistent with international environmental law or general international law. However, interpreting Article XX(g) as providing a right to use unilateral trade measures to address transboundary or global environmental problems is inconsistent with the customary rule of international law regarding the jurisdictional

nexus that is required for a State to regulate, the principle of sovereign equality, and differential treatment of least-developed and developing countries in WTO law. The next chapter will address these issues and seek to reconcile these apparent inconsistencies.

Chapter 4

The Sovereignty Prism: Equality, Extraterritoriality and Necessity

I. Introduction

Sovereignty is the linchpin of global governance. Sovereignty is the main obstacle to achieving global governance. International trade agreements represent the exercise of sovereignty. International trade agreements erode sovereignty. Sovereignty permits nations to protect the environment. Sovereignty prevents nations from protecting the environment. Sovereignty protects despots who violate human rights. Sovereignty justifies the removal of despots who violate human rights. Sovereignty is a legal principle. Sovereignty is a political principle. Sovereignty is not a principle at all.

'Sovereignty' is a multifaceted concept that appears capable of supporting virtually any argument in the field of international relations.

So, of course, there is debate over whether the rulings in the *Shrimp* cases represent an instance of deference to or intrusion upon national sovereignty.[1] For example, Sands

[1] The United States banned imports of tuna from nations whose fishermen used tuna-fishing methods that killed dolphins and imports of shrimp when fishing methods killed sea turtles. See *United States – Restrictions on Imports of Tuna,* GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 30 ILM 1594 (1991); *United States – Restrictions on Imports of Tuna,* GATT Doc DS29/R (1994) (Report by the Panel not Adopted), 33 ILM 839 (1994); *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58, 15 May 1998 (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4, 12 October 1998 (Report of the Appellate Body adopted 6 November 1998); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW, 15 June 2001 (Report of the Panel); WTO Doc

characterizes the *Shrimp* ruling as an example of 'the active role of courts in identifying the existence of norms where the international legislature…has refrained from doing so' or to 'fill in the gaps' of international law.[2] He argues that the 'new international judiciary' of permanent courts and tribunals that have been established in recent years has 'in many instances, shown itself unwilling to defer to traditional conceptions of sovereignty and state power' (the WTO judiciary representing but one example).[3] The creation of an international judiciary means that states have given up 'a degree of control in the "making" of international law, since the line between interpretation and legislation can often be a hard one to draw'.[4] Howse, on the other hand, argues that the *Shrimp* ruling does not represent a case of judicial activism, but rather an example of deference to the national sovereignty of the United States in the absence of clear WTO rules prohibiting the use of trade measures to achieve international conservation objectives.[5]

Others argue that sovereignty is not a meaningful legal concept[6] and that the real issue is how to allocate decision-making authority.[7] Nevertheless, the concept of State

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WT/DS58/AB/RW, 22 October 2001, (Report of the Appellate Body Adopted 21 November 2001). In both cases, the United States applied national laws regulating fishing methods to its own citizens and sought to apply the same standards to the citizens of other States. In Shrimp II, the United States addressed this issue by requiring that other countries adopt comparable standards, rather than the same law as the United States. In Shrimp II, the panel rejected Malaysia's argument that the American law violated Malaysia's sovereignty.

2 Philippe Sands, 'Turtles and Torturers: The Transformation of International Law', Inaugural Public Lecture as Professor of Public International Law, University of London, 6 June 2000, <http://www.nyu.edu/pubs/jilp/main/issues/33/pdf/33p.pdf>, pp. 527-559, at 552, at 19 February 2003.

3 Sands, ibid 553.

4 Sands, above n 2, 555.

5 Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491.

6 See Lord McNair, *The Law of Treaties* (1961), 757: 'Unfortunately, sovereignty is not a precise term and belongs more to political science than to law.' Jackson succinctly expresses the difficulty in using this term as follows: '"sovereignty" (whatever that means)'. See John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000), 186. Also see Louis Henkin,

sovereignty is the starting point for the analysis of the allocation of decision-making power under international law.[8] In the absence of customary or conventional rules of international law to the contrary[9], State sovereignty is the 'default' position in terms of decision-making authority.[10] However, sovereignty is an ambiguous concept whose meaning and content vary with the context.[11] Indeed, it may not even qualify as a norm of international law because its content is not sufficiently precise.[12] Nevertheless, it embodies the principle that one State does not have the jurisdiction to intervene in the internal affairs of another.

On one view, the *Shrimp II* ruling permits a violation of the principle of nonintervention. The unilateral measure represents an intrusion by the United States upon the sovereign right of other countries to regulate the activities of their fishermen in international waters[13] and in their own territorial waters. The United States thus exceeded the limits of

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International Law: Politics and Values (1995), 9: 'For international relations, surely for international law, it is a term largely unnecessary and better avoided.'

7 See Jackson, above n 6, 370.

8 See Ian Brownlie, *Principles of Public International Law* (2nd ed,1973), 299-301. Jurisdiction flows from the general legal competence of states, often referred to as 'sovereignty'. See ibid 291.

9 'Every State upon the recognition of its statehood by other States, is deemed to have accepted the body of customary international law recognized by the society of States, which includes the rule *pacta sunt servanda.*' McNair, above n 6, 758.

10 The sovereignty of states is plenary in the absence of specific legal constraints to the contrary. See *The S.S. 'Lotus'*, [1927] PCIJ (Ser A) No 10, 19.

11 See Jerzy Kranz, 'Réflexions sur la souveraineté' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996), 183, where the author states, 'La souveraineté fait partie des notions les plus controversies et les plus ambigues en droit international….toute discussion concernant la souveraineté doit distinguer entre ses divers aspects (politiques et juridiques, constitutionnel et international)….dans son évolution historique, la notion de souveraineté n'exclut pas la soumission au droit (naturel ou positif, national ou international).'

12 See Kranz, ibid 213.

13 See *Pacific Fur Seal Arbitration (United States v. Great Britain)* (Paris, 1893), reprinted in 1 John Bassett Moore, *International Arbitration History* (1898) 755-961 (holding that there was no basis in international law for the United States to apply its conservation standards to acts that took place outside its territorial limits, since the United States had neither a property interest in migratory seals that were born in

its jurisdiction (by seeking to regulate activities of non-citizens outside its territory) because of the intrusion into the jurisdiction of other States, even though the United States itself has a jurisdictional nexus to the turtles.[14] This view judges the compatibility of the American measure from the perspective of the exporting State's sovereignty.

Viewed from a different perspective, the *Shrimp II* decision represents an affirmation of American sovereignty over the products that it allows to be imported into its territory. This second view characterizes GATT Article XX as preserving the sovereignty or autonomy of WTO members in specific fields of public policy. WTO trade obligations limit the sovereign right to restrict imports. Article XX permits WTO members to act as though those obligations do not exist. In the absence of a clear agreement to accept those obligations, the law in effect reverts to the default position of national sovereignty, where the State is permitted to do anything in its jurisdiction that is not expressly prohibited (in this instance, to prevent a particular product from entering its territory).[15] This view judges the compatibility of the American measure from the perspective of the sovereignty of the importing State.

Whether one views the issue from the perspective of the importing or exporting country, what is at stake is where to draw the line when the jurisdiction of States overlaps. In the

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its jurisdiction nor the right to protect the resource from extinction at the hands of British vessels in international waters).

[14] In the *Shrimp* case the United States had a jurisdictional nexus that appears to comply with the requirements of both customary international law and international environmental law to the extent that it has an interest in the turtles, casting doubt on this aspect of the ruling in the *Pacific Fur Seal* case. However, the jurisdictional nexus with the turtles does not provide jurisdiction over the acts of non-citizens outside American territory. See Brownlie, above n 8 and below n 61.

[15] See *The S.S. 'Lotus'*, [1927] PCIJ (Ser A) No 10, 19.

absence of a clear agreement, this competition for jurisdiction over shared resources can be resolved by the rule of law or the relative power of States. In adopting a substantial body of rules to govern trade relations, WTO members have opted for the former.

Casting the debate in terms of national sovereignty clouds the issue. Nevertheless, more concrete expressions of the sovereignty concept can chart a course that promotes greater coherence between WTO law and the general body of international law.

Jurisdictional competence is one manifestation of the concept of sovereignty. Another is the principle of the sovereign equality of States. Article I of the *UN Declaration* requires States to conduct trade relations in accordance with the principles of sovereign equality and non-intervention.[16] In the event of any inconsistency between the *UN Charter* and other treaties, the former prevails.[17] These principles constitute customary international law.[18] DSU Article 3(2) requires the interpretation of WTO agreements in accordance with the customary rules of interpretation of public international law, which incorporate these principles by reference.[19] Thus, under international law, the exceptions in GATT Article XX must be interpreted and applied to conform to the principles of sovereign equality and non-intervention.

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[16] Article I of the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965) provides, 'State shall conduct their international relations in the economic…and trade fields in accordance with the principles of sovereign equality and non-intervention.'

[17] *Charter of the United Nations*, art 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[18] See *Military and Paramilitary Activities (Nicaragua v United States)*, 1986 ICJ 14 and discussion below.

[19] See Chapter 1.

This chapter is divided into four parts. The first part examines the sovereignty issue from the perspective of territorial jurisdiction. The second part examines the sovereignty issue from the perspective of sovereign equality. The third part considers how the necessity doctrine of customary international law might be used to reconcile the consistency of unilateral measures with both facets of sovereignty. The fourth part proposes that the WTO judiciary make a greater contribution to achieving coherence among different branches of international law.

II. Sovereignty and Territorial Jurisdiction

The principle of state sovereignty empowers countries to enter into agreements (treaties) with other countries in which they agree to cede the power to regulate certain matters unilaterally.[20] Under both GATT 1947 and GATT 1994, the United States has argued

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[20] However, treaty-making capacity is no longer confined to States. International organizations, such as the United Nations, also have the legal capacity to enter treaties. McNair, above n 6, 755. Sub-national governments (states, provinces) or colonies do not enjoy this status under international law. However, federal governments increasingly assume treaty obligations that affect the rights of sub-federal governments, a trend that complicates the ability and willingness of nations to allocate decision-making power to international bodies. In countries with federal systems, national constitutions divide regulatory powers between federal and sub-federal governments, constraining the legal authority of federal governments to use their treaty-making power to intrude on sub-federal jurisdiction. As a result, federal governments may refuse to allocate decision-making authority under both trade and environmental agreements in order to preserve the decision-making authority of sub-level governments. Alternatively, they may make their commitment to international obligations subject to acceptance by sub-federal governments or subject to lists of sub-federal reservations. As an example of the former, Canada's participation in the dispute settlement mechanisms of the North American Agreement on Environmental Cooperation is expressly made conditional upon the acceptance of the agreement by a majority of Canada's provincial governments, under Annex 41 of that agreement. See Bradly J Condon, 'NAFTA and the Environment: A Trade-Friendly Approach' (1994) 14 *Northwestern Journal of International Law & Business* 527, 542. As an example of the latter, American. commitments under the *General Agreement on Trade in Services*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1B, 33 ILM 1197 (1994) in the field of insurance are subject to an extensive list of state reservations, reflecting the allocation of regulatory power in insurance in the United States. See Bradly Condon, 'Smoke and Mirrors: A

that it has not ceded its national authority to the GATT/WTO to adopt international environmental policies independently (that is, unilaterally).

In *Tuna II*, the United States position was stated as follows:

> The United States stated that in becoming Contracting Parties to the General Agreement, countries did not agree to surrender their ability to take effective action to protect the environment, including the global commons.[21]

This argument was reiterated in *Shrimp II*:

> [T]he United States pointed out that the US measure did not affect Malaysia's sovereignty – the United States could not force any nation to adopt any particular environmental policy. In contrast, claims the United States, control of a nation's borders is a fundamental aspect of sovereignty, and the US measure is simply an application of its sovereign right to exclude certain products from importation. *Whether or not the United States, in acceding to the WTO Agreement, agreed to refrain from such actions is the subject of this dispute*. And…the Appellate Body Report addresses and resolves these issues. The Appellate Body found that the United States has a jurisdictional nexus with the respect to the sea turtles found in [Malaysia's] waters, and…found that the general design and structure of Section 609 falls within the scope of Article XX(g).[22]

Jackson characterizes political debates regarding the relinquishing of sovereignty under international agreements as being concerned with the allocation of decision-making authority.[23] This is a central issue that arises in the context of both trade agreements and

Comparative Analysis of WTO and NAFTA Provisions Affecting the International Expansion of Insurance Firms in North America' (2001) 8 *Connecticut Insurance Law Journal* 97.

[21] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted), para 3.10.

[22] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 3.145.

[23] See Jackson, *Jurisprudence*, above n 6, 370. He subdivides this issue into the subcategories of vertical and horizontal allocation of decision-making power. The vertical division allocates power between international, national (federal), sub-federal (states or provinces) and local decision-making bodies. The horizontal division allocates power between entities such as courts, legislatures, the executive and non-governmental actors, such as corporations. Thus, vertical allocation is relevant to decisions regarding the subject matter of international agreements while horizontal allocation has more to do with the design of decision-making procedures in institutions like the WTO, as well as the allocation of decision-making authority between different international institutions.

environmental agreements.[24] This is a constitutional aspect[25] of international law in the sense that it deals with the division of responsibility between different levels of government (national and supranational) and different institutions (legislatures, international organizations and the judiciary).

A core function of Article XX is to delineate the boundary between national autonomy and the international obligations of WTO members.[26] On one side of the line, decisions are taken by the WTO membership, using the various decision-making mechanisms that are available. On the other side, decisions are taken autonomously by the individual

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[24] With respect to the WTO, see Jackson, *Jurisprudence*, above n 6. With respect to environment, see 'The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decision Making' (2001) 114 *Harvard Law Review* 1769, arguing that politics and economics are more likely to form the basis for decision making in the context of multilateral environmental treaties. With respect to the allocation of environmental decision making between federal and state governments in a federalist system, see Richard L Revesz, 'Federalism and Environmental Regulation: A Public Choice Analysis' (2001) 115 *Harvard Law Review* 553. *Rio Declaration* principle 10 provides that, 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.' *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874. However, the issue is not so simple, as evidenced by the difficulty in allocation decision-making authority between supra-national, national and sub-national institutions. For example, in the European Union, the concept of subsidiarity echoes the principle laid out in the *Rio Declaration*. Nevertheless, debate continues over the division of authority between EU and national institutions on a wide range of subjects. Similarly, the Canadian Constitution of 1867 does not clearly divide regulatory authority in environmental matters between the federal government and the provinces. Neither constitutional interpretations by courts nor constitutional amendments by governments have made much progress in clarify the issue in the intervening years. It is thus unrealistic to think that the subject matter of environmental protection could be allocated in short order between a still-nascent system of international law and national governments, which still jealously guard their sovereign decision-making powers in most other fields.

[25] See John O McGinnis and Mark L Movsesian, 'The World Trade Constitution' (2000) 114 *Harvard Law Review* 511, comparing the WTO to the U.S. constitution. Also see Deborah Z Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39, noting some similarities of the judicial processes of the World Trade Organization dispute panels with those of a national constitutional court.

[26] Article XX is not the only WTO provision that fulfils this function. Another examples is Article XXI regarding security matters (dividing authority between national governments and the WTO and between the WTO and the United Nations).

WTO member using the decision-making mechanisms in their domestic legal systems.[27] At the international level, there is a further jurisdictional issue regarding the division of decision-making between different international bodies, in which Article XX also plays a role. By excluding certain areas from the application of WTO rules, Article XX exceptions leave them to be regulated nationally or in other international agreements.

Howse argues that international law supports the right of the United States to impose unilateral embargoes as an exercise of its sovereignty:

> [T]he sovereignty of states is plenary in the absence of specific legal constraints to the contrary. One does not presume, or presume lightly, that the sovereignty of states is restricted. Moreover, in the Nicaragua case, the International Court of Justice held that there was no rule of customary public international law that prevented a state from taking economic measures in response to policies of another state. In the circumstances, the anti-judicial-activism principle would weigh against imposing on the United States any legal constraint on its sovereignty not clearly authorized by the GATT treaty. Thus, in the presence of controversy over the limits of Article XX, a conservative judicial body would have adopted the interpretation that supposes the least interference with the sovereignty of the U.S.[28]

However, others take a different view of this notion of the 'plenary' sovereignty of states. Sands, for example, argues that in a context in which there were relatively few rules of international law, it was possible for the Permanent Court of International Justice (PCIJ) in the *Lotus* case[29] to say that states were permitted to do anything that they were not expressly prohibited from doing. However, modern international law is characterized by an excessive number of treaty rules, many of them ambiguous, that increases the likelihood of conflicts between different international obligations. Thus, in Sands view,

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[27] In countries with a federalist system, there is a further division of legislative authority between federal and state (or provincial) governments.

[28] Howse, above n 5, 520, citing *Military and Paramilitary Activities (Nicaragua v United States)*, [1986] ICJ Rep 14, 125-26 and *European Communities—Measures Concerning Meat and Meat Products(Hormones)*, WTO Doc WT/DS28/AB/R, WT/DS46/AB/R (1998) (Report of the Appellate Body) (invoking the principle of in *dubio mitius*).

the proliferation of rules of international law make this deferential approach to national sovereignty increasingly untenable.[30]

The Appellate Body appears to have accepted the American characterization of the sovereignty issue. In the *Shrimp* cases, it was clear that marking out this legal boundary between areas where WTO members have ceded sovereignty and where they have retained it is a principle function of GATT Article XX.[31] However, it is also clear that the boundary shifts with the facts of each case and the legal framework existing at the time of interpretation.[32] A more clearly defined boundary might defeat the purpose and role of Article XX. Hence the ambiguity of the language used in Article XX.[33] However, that boundary cannot be defined without reference to other international agreements (where WTO members may have ceded sovereignty or where the signatories may have further developed relevant international legal principles) and general public international law (the source of many relevant principles). Since international law is constantly evolving, the boundary must shift over time. This makes the boundary difficult to delineate in any general terms that would apply in all circumstances, making the ambiguities inherent in Article XX difficult to resolve other than on a case-by-case basis.

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[29] *The S.S. 'Lotus'*, [1927] PCIJ (Ser A) No 10, 18.
[30] Sands, above n 2, 548-549.
[31] See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 121 and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 137-138, characterizing the view that unilaterally determined policies are, to some degree, a common aspect of the Article XX exceptions as a principle central to the ruling.
[32] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), paras 5.51-5.52.

The panel in *Shrimp II* appears to have accepted the argument of the United States, that it did not agree to refrain from using trade restrictions to protect the global commons when it acceded to the WTO, but avoided getting into a debate over the nature of sovereignty:

> Malaysia contests the requirement of a 'comparable programme' as an interference with its sovereign right to determine its environmental policy. The Panel does not read the Appellate Body Report as supporting Malaysia's view. In our opinion, the Appellate Body did not contest the right of the United States to restrict imports of shrimp for environmental reasons…[34]

> At present, Malaysia does not have to comply with the US requirements because it does not export to the United States. If Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances. While we cannot, in light of [this] interpretation…find in favour of Malaysia on this 'sovereignty' issue, we nonetheless consider that the 'sovereignty' question raised by Malaysia is an additional argument in favour of the conclusion of an international agreement to protect and conserve sea turtles which would take into account the situation of all interested parties.[35]

The Appellate Body did not disagree with the panel on this point, nor shed much light on the 'sovereignty' issue. Rather, the focus of both the panel and the Appellate Body seems to be on disposing of the case in a way that resolves the immediate dispute and encourages the parties to settle issues of general international law in another forum. In this case, the panel appears to be saying that the best way for Malaysia to preserve its sovereignty is to exercise it by participating in the negotiation of an international environmental agreement where its situation can be taken into account. If the United States fails to negotiate in good faith, *then* Malaysia can seek a further review of

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[33] The Appellate Body acknowledged the ambiguity in *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), stating '[t]he text of the chapeau is not without ambiguity'.
[34] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.123.
[35] Ibid para 5.103.

American actions under Article 21.5 of the DSU.[36] In other words, the panel implicitly adopted the view that Malaysia's complaint was premature, because Malaysia should have first sought to defend its interests in the multilateral environmental negotiations before bringing a complaint before the WTO.[37] Moreover, the panel implied that Malaysia chose the wrong forum to argue that the American measure was inconsistent with sovereign equality and non-intervention.

Sands characterizes the *Shrimp* ruling as an example of the ability of international law:

> to identify broad community values which trump traditional sovereign interests…not on the basis of legal instruments which expressly and unequivocally support a limitation on state freedom or immunity, but rather on the basis of an interpretive approach which seeks to ascertain and then apply the presumed values of the international community.[38]

In his view, the WTO Appellate Body recognized a legal interest in migratory species 'where previously there had been none, under general international law and within the WTO context'.[39] However, this view is not entirely accurate, since the United States does

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[36] See ibid para 5.86, where the panel emphasizes that the United States is 'provisionally' entitled to apply the measure, 'subject to further control under Article 21.5 of the DSU'.

[37] In addition, Malaysia was encouraged to seek American certification of its turtle protection program in order to export shrimp to the United States. In effect, this requires Malaysia to consent to the intrusion of American officials in its internal affairs. Malaysia's consent could preclude the wrongfulness of the American actions under international law. See Article 20 of the draft *Articles on Responsibility of States for Internationally Wrongful Acts* and the accompanying commentary, International Law Commission, *Annual Report 2001*, Chapter IV, State Responsibility, <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>, 21 October 2003, 173-177. However, the validity of the consent might be vitiated by presence of coercion. See ibid, 174. Also see *International Military Tribunal for the Trial of German Major War Criminals*, judgment of 1 October 1946, reprinted in (1947) 41 *American Journal of International Law* 172, 192-194.

[38] Sands, above n 2, 552.

[39] Ibid 535. He cites the *Pacific Fur Seal* case to support the proposition that general international law did not previously recognize a legal interest in migratory species. Since the *Pacific Fur Seal* case did not involve the use of trade restrictions, it is not necessarily inconsistent with the view of sovereignty reflected in the *Shrimp* case. However, the Appellate Body's recognition of a 'jurisdictional nexus' between the United States and the migratory turtles does represent a departure from the *Pacific Fur Seal* case.

have an interest in the species, even if it does not have jurisdiction over non-citizens outside its territorial limits.[40]

According to Sands, globalization means that activities that were previously considered matters of domestic concern only have now become internationalized, providing conditions 'for new levels of lawmaking beyond the state'.[41] Ruling that the United States has a legitimate interest in the protection of migratory sea turtle implies that international law must find a way to recognize and give effect to such interests.[42] Thus, in Sands' view, the Appellate Body chose not to follow the path of deference to national sovereignty in the face of ambiguous rules.[43]

Another author makes a distinction between extraterritorial and extrajurisdictional laws, arguing that the latter is a more precise term given the 'extraterritorial' jurisdiction States enjoy over their own citizens while abroad.[44] However, this view does not resolve the

[40] See above regarding the jurisdictional competence of States and the discussion below of the necessity doctrine.
[41] Sands, above n 2, 538.
[42] Ibid 537.
[43] Ibid 536.
[44] See Richard H Steinberg, 'Understanding Trade and the Environment: Conceptual Frameworks' in Richard H Steinberg (ed), *The Greening of Trade Law* (2002), 1, 4. The jurisdiction to regulate can overlap. For example, country A may regulate the acts of person inside its territory and the acts of its citizens wherever they may be. When the citizens of country A are in the territory of country B, they may be subject to the laws of both A and B. Generally, the actions of individuals will be governed by the laws of the territory in which they find themselves. For example, citizens of the United States are required to file income tax returns regardless of where they reside. An American who works and resides in Canada will also have to file a tax return in Canada, which taxes people on the basis of residence rather than citizenship. Should this individual choose to disobey the law of the United States and not file a tax return there, the United States can do nothing to enforce its law as long as the person remains outside the territory of the United States, unless Canada agrees to help out. In the absence of an agreement, Canada would have no obligation to arrest or extradite the American citizen. However, should the person choose to return to the United States, he would be subject to arrest there. In practice, there is no conflict because Canada and the

problem of how to address jurisdictional conflicts. This view only considers the problem from the perspective of the State asserting extraterritorial jurisdiction. It ignores the perspective of the State that suffers the jurisdictional intrusion, which asserts the exclusive right to regulate activities inside its territory and the activities of its citizens.

Sovereignty is not absolute. Rather, the sovereignty of one State is limited by the sovereignty of others.[45] The central issue is to define where the jurisdiction of one State ends and another begins. Jurisdictional conflicts must be analysed from the perspective of both legal and territorial jurisdiction. The two are not mutually exclusive.

A. Legal Jurisdiction and State Responsibility

State sovereignty gives countries jurisdiction to regulate the acts of persons inside their territory and the acts of their citizens.[46] It gives countries the right to exploit their own resources as they wish, along with the responsibility to ensure that activities inside their borders do not cause damage to the environment outside their borders (in other countries or in international areas).[47] When the actions inside one country cause harm in the

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United States have signed agreements to resolve any conflicts, such as treaties regarding extradition and the avoidance of double taxation.

[45] As Kranz puts it, 'la souveraineté d'un Etat trouve ses limites dans celle d'un autre Etat.' Kranz, above n 11, 195. Delbruck confirms this view of sovereignty: 'Correctly understood, sovereignty as a principle of international law has never been absolute, but relative in the sense that the sovereignty of one state found its legal limits in the sovereignty of the other states. The rather oddly phrased article 2 (1) of the UN Charter, speaking of the 'sovereign equality' of the Member States, codifies this correct understanding of the concept of sovereignty.' Jost Delbruck, 'Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System' (2002) 9 *Indiana Journal of Global Legal Studies* 401, 427.Also see Hannah L Buxbaum, 'Conflict of Economic Laws: From Sovereignty to Substance' (2002) 42 *Virginia Journal of International Law* 931 (arguing that extraterritoriality jurisprudence shares with choice-of-law jurisprudence a theoretical foundation in notions of territorial sovereignty).

[46] See generally Brownlie, above n 8, 299-302.

[47] This principle is confirmed in the *Declaration of the United Nations Conference on the Human Environment* 5-16 June 1972, UN Doc A/Conf/48/14/Rev.1 and Corr.1 (1973), (1972) 11 ILM 1416

territory of another, recourse may be available at the International Court of Justice (ICJ) for countries that accept its jurisdiction.[48]

The classic case in this area is the *Trail Smelter Case*.[49] Cominco Ltd, a Canadian mining company, operated a smelter in the Canadian province of British Columbia. Its operations polluted a river valley in the American state of Washington.[50] The United States sued Canada for the damage that the pollution caused in American territory. Both countries agreed to accept the jurisdiction of an arbitration panel to settle the matter. The panel ruled in favour of the United States, confirming the responsibility of Canada in

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(Stockholm Declaration), Principle 21 (Stockholm Declaration) and the *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874. The *Rio Declaration*, Principle 2 states: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. Also see *General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources*, adopted December 14, 1962. *Restatement (Third) of Foreign Relations Law of the United States* § 601(b) (1986) also codifies this principle, providing that it is necessary for States to take measures to 'ensure that activities within its jurisdiction or control are conducted so as not to cause significant injury to the environment.' For a further discussion of the duty owed by States to protect the environment, see Brian Trevor Hodges, 'Where the Grass is Always Greener: Foreign Investor Actions Against Environmental Regulations Under NAFTA's Chapter 11, S.D. Myers, Inc. v. Canada' (2001) 14 *Georgetown International Environmental Law Review*, 367, 397-398 and Phillipe Sands, 'The "Greening" of International Law: Emerging Principles and Rules' (1994) 1 *Indiana Journal of Global Legal Studies* 293, 299-302. This principle is generally regarded as reflecting customary international law. See Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (1992), 90. The *Corfu Channel* Case, holding Albania responsible for damage to British warships caused by Albania's failure to warn them of mines in territorial waters, stands for a similar principle that it is 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states'. See *Corfu Channel (United Kingdom v Albania)*, ICJ Rep (1949) 22. Also see discussion of case in Birnie and Boyle, above n 47, 90.

[48] See *Nuclear Tests Cases (New Zealand v. France)* [1974] ICJ 457. Article 94 of the United Nations Charter states: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.'

[49] *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905.

[50] Neither the pollution nor the dispute has gone away. The American Environmental Protection Agency (EPA) has sought compensation from the company to clean up the pollution along a 210-kilometre stretch of the Columbia River that occurred between 1894 and 1994. Associated Press, 'EPA sets deadline for Canadian smelter' <www.globeandmail.com> at 18 September 2003.

international law to ensure that activities in its territory did not cause harm outside its territory.[51] However, international litigation of environmental disputes remains relatively uncommon and the law regarding the assessment of damages for environmental harm remains underdeveloped.[52]

In an international legal context in which State responsibility for environmental harm is difficult to enforce, trade sanctions on the part of a country with significant market power, or a group of countries whose combined markets are significant, provide another means to address transboundary and global environmental problems. The draft *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 49(1) permits an 'injured State [to] take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations'.[53] Thus, in general international law, there is a legal basis for taking such measures.

How would these rules apply in the circumstances of the *Shrimp* case? In international law, Malaysia has the responsibility to ensure that activities inside its territory do not cause damage to the environment outside its territory. Malaysia argued that its sea turtle conservation program was adequate, implying that it had met this obligation. The United

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[51] However, the decision is only binding on the parties. See, for example, the *Statute of the International Court of Justice*, which states: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' *Statute of the International Court of Justice*, art 59.
[52] See Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law* (2002). Of course, once a species is extinct, restitution is not possible and monetary damages are an inadequate form of compensation in any event.
[53] See International Law Commission, above n 37, 56. The use of countermeasures is subject to several conditions. See arts 49-54.

States used trade measures to induce Malaysia to meet this obligation in the manner that the United States deemed best.

An alternative to the unilateral use of trade measures would have been to seek the enforcement of Malaysia's international legal obligations in another forum, such as the ICJ. This would have permitted a legal determination of whether Malaysia's turtle conservation program was adequate to meet its international obligations. This determination could not be made in the context of a WTO dispute, since this issue is beyond the jurisdiction of the WTO judiciary.[54]

Setting aside the issue of whether Malaysia in fact breached its international obligations, the draft *Articles on Responsibility of States for Internationally Wrongful Acts* do not apply to the use of trade measures because the consequences flowing from the use of trade measures among WTO members is governed by the WTO Agreement.[55] Thus, in

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[54] The DSU only applies to the 'covered agreements' listed in DSU Appendix 1. None of these agreements contain obligations regarding State responsibility for extraterritorial environmental harm. See DSU Article 1. Also see Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535. While the WTO judiciary does not have jurisdiction to determine the State responsibility of Malaysia with respect to environmental protection, State responsibility has been addressed in WTO jurisprudence in the context of responsibility for measures affecting trade. See *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (1999) (Report of the Panel), para 9.42 and *United States—Sections 301-310 of the Trade Act of 1974*, WTO Doc WT/DS152/1 (2000) (Report of the Panel), para 7.80.

[55] Article 55 (*lex specialis*) of the draft Articles provides: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.' The commentary to Article 55 provides: 'It will depend on the special rule to establish the extent to which the more general rules on State responsibility…are displaced by that rule. In some cases, it will be clear from the language of a treaty…that only the consequences specified are to flow. Where that is so the consequence will be "determined" by the special rule and the principle…in article 56 will apply…An example…is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.' Article 56 provides: 'The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.' See International Law Commission, ibid 356-359. More generally, the *lex*

this instance, the provisions regarding countermeasures in the draft *Articles on Responsibility of States for Internationally Wrongful Acts* could not justify the American measures. Nevertheless, where the draft articles codify customary international law, they will apply to the interpretation of WTO provisions, along with other treaty and customary rules of international law that apply between the parties.[56] The draft Articles codify customary international law with respect to the doctrine of necessity, which may be invoked to excuse failure to comply with international obligations. I will discuss the application of the necessity doctrine after first analysing the relevant obligations.

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specialis rule in Article 55 only applies where there is 'some actual inconsistency' between two provisions that deal with the same subject matter or 'a discernible intention that one provision is to exclude the other'. See International Law Commission, ibid 358. Article 55 embodies the maxim *lex specialis derogat legi generali*, a general rule of customary international law that governs conflicts between treaties. See International Law Commission, ibid 356. Also see McNair, above n 6, 219.

[56] See Article 56, International Law Commission, ibid. Article 31.3(c) of the *Vienna Convention* provides that there shall be taken into account, together with the context, 'any relevant rule of international law applicable to the relations between the parties'. In Shrimp II, the panel held that Article 31.3(c) of the *Vienna Convention* required treaty rules that had been accepted by the parties to the dispute to be taken into account. *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.57. Also see Pauwelyn, above n 54; John Jackson, *The World Trading System* (1997) 25; Donald McCrae, 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) 3 *Journal of International Economic Law* 27; Donald McCrae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 *Recueil des Cours* 111; Ernst-Ulrich Petersmann, 'Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas' (1999) 2 *Journal of International Economic Law* 189.

B. Non-intervention and Unilateralism

Once a State enters a trade agreement, it assumes obligations that it is bound to fulfil with respect to all other signatories of the agreement.[57] That is, the State consents to limits on its freedom to regulate international trade unilaterally.[58]

The principle of non-intervention limits the ability of one State to interfere in the internal affairs of another.[59] This restricts the ability of all States to regulate acts outside their

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[57] The rule, *Pacta sunt servanda*, is expressed in art 26 of the *Vienna Convention*, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. One author argues that the *Vienna Convention* has altered its meaning: 'Until 1939,…doctrine worked on the conditions that lead towards the validity of treaties; the idea behind the 1969 Convention is that of invalidity, termination and suspension of the operation of treaties….the basic idea behind *pacta sunt servanda* has changed: the idea behind many of the rules that were codified was that under certain conditions the validity of pre-existing treaties could be challenged.' See Gerardo E do Nascimento e Silva, 'The Widening Scope of International Law' in *21st Century*, above n 11, 239. Also see *The Wimbledon*, [1923] PCIJ (Ser A) No 1.

[58] Commenting on the statement of the PCIJ in the Wimbledon, that 'the right of entering into international engagements is an attribute of State sovereignty,' McNair stated, '…it was necessary to point out the logical absurdity of the argument that an act done by a State in the exercise of its sovereignty, namely, the conclusion of a treaty, could be lawfully nullified by that State on the ground that the effect of the act was to limit its sovereignty. That was not only the effect but the object of the treaty.' McNair, above n 6, 754. GATT Article XXVII allows parties to withhold or withdraw trade concessions for non-parties.

[59] Article I of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States In Accordance with the Charter of the United Nations*, Annex to Resolution 2625 (XXV) of the United Nations General Assembly, adopted without vote October 24, 1970, provides: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State….No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind….Nothing in the foregoing…shall be construed as affecting…provisions… relating to the maintenance of international peace and security.' Article 3 states that the principles of the Declaration 'constitute basic principles of international law.' Brownlie notes that the 'legal significance of the Declaration lies in the fact that it provides evidence of the consensus among Members States of the United Nations on the meaning and elaboration of the principles of the Charter.' Ian Brownlie, (ed), *Basic Documents in International Law* (2nd ed, 1972), 32.With respect to the United Nations, the principle of non-intervention is reflected in UN Charter Article 2(7), 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

territorial limits or inside the territory of another State.[60] Extraterritorial laws are invalid under international law.[61] Nevertheless, the United States and, to a lesser extent, the European Union, have not resisted the temptation to use their economic power to promote changes to the internal political or legal regimes of other States.[62]

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[60] See Kranz, above n 11, citing s 402 of the *Restatement of the Law (Third) Foreign Relations Law of the United States* (1986): 'a state has jurisdiction to prescribe with respect to
(1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its national outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.'
Section 403 provides: 'Even when one of the bases for jurisdiction under s. 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.' Reasonableness is not only 'a basis for requiring states to consider moderating their enforcement of law that they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe.' (s. 403, Reporters' Note 10)

[61] As noted in Chapter 3, under customary international law, a State acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction. See Brownlie, above n 8, 299-301. This prohibition of extraterritoriality, which may also be described as an aspect of the principle of non-intervention, would qualify as a 'customary rule of international law', within the meaning of art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See also Brownlie, ibid 302. Both the WTO agreements and MEAs would therefore have to be interpreted in a manner consistent with the prohibition of extraterritoriality. In general, on the legality of extraterritorial measures under present international economic law, see Petros Mavroidis and Damien Neven, 'Some Reflections on Extraterritoriality in International Economic Law: A Law and Economic Analysis', in *Melanges en hommage a M. Waelbroeck* (1999), 1297-1325 and Harold G Maier, 'Jurisdictional Rules in Customary International Law, in Karl M Meesen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (1996), 64-73.

[62] With respect to the European Union, see Diego J Linan Nogueras and Luis M Hinojosa Martinez, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 *Columbia Journal of European Law* 307. With respect to the United States, see (regarding the Helms-Burton law): Rene Lefeber, 'Frontiers of International Law: Counteracting the Exercise of Extraterritorial Jurisdiction' (1997) 10 *Leiden Journal of International Law* 1; Peter Glossop and Kelly Harbridge, 'International Law and the Private Right of Action in Helms-Burton', in *Canadian Council on International Law: Fostering Compliance in International Law* (Proceedings of the 25th Annual Conference, 1996), 148, 165-68; H Scott Fairley, 'Exceeding the Limits of Territorial Bounds: The Helms-Burton Act' (1996) 34 *Canadian Yearbook of International Law* 161, 189-95; Andreas F Lowenfeld, 'Congress and Cuba: The Helms-Burton Act' (1996) 90 *American Journal of International Law* 419, 430-32; Rupinder Hans, 'The United States' Economic Embargo of Cuba: International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995' (1996) 5 *Journal of International Law and Practice* 327, 340-44; Jonathan R Ratchik, 'Cuban Liberty and the Democratic Solidarity Act of 1995' (1996) 11 *American University Journal of International Law and Policy* 343, 362-64; Luisette Gierbolini, 'The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum' (1997) 6 *Journal of Transnational Law and Policy* 289, 301-04; and Anthony M. Solis, 'The Long Arm of U.S. Law: The Helms-Burton Act' (1997) 19 *Loyola International and Comparative*

In general, each country's jurisdiction ends at its territorial limits (which includes the sea twelve nautical miles from shore), with the exception of powers to regulate certain matters within the 200-nautical-mile exclusive economic zone in coastal waters.[63] Thus, no single country has jurisdiction to regulate the common areas of the world.[64] Laws regulating the global commons arise through the customary practice of the nations of the world or through treaties.[65] Even where a treaty exists, a country that refuses to participate in the treaty generally will not be bound by its rules[66], unless the treaty

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Law Journal 709, 736-38. Also see Todd Doyle, 'Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law' (2002) 24 *Houston Journal of International Law* 279 (with respect to money-laundering policy in the OECD) and H Lowell Brown, 'The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery' (1999) 22 *Hastings International and Comparative Law Review* 407 (analysing extraterritorial criminal jurisdiction under international law). Regarding the constitutionality of extraterritorial laws in the United States, see Andreas F Lowenfeld, 'U.S. Law Enforcement Abroad: The Constitution and International Law' (1989) 83 *American Journal of International Law* 880; Lea Brilmayer, 'The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal' (1987) 50 *Law and Contemporary Problems* 11. For a discussion of the integration of customary international law into American federal common law, see Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815. Since 1992, the United Nations General Assembly has passed a number of resolutions objecting to the American economic embargo against Cuba. The most recent, on 4 November 2003, saw 179 countries vote against the embargo, with two abstentions and three votes against the resolution (the United States, Israel and the Marshall Islands). Dolia Estévez, 'La ONU condena el embargo a Cuba', *El Financiero* (Mexico City), 5 November 2003, 36.

63 See *United Nations Convention on the Law of the Sea*, arts 3, 55-57. In its Exclusive Economic Zone, *inter alia*, a State enjoys 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living….' *United Nations Convention on the Law of the Sea*, art 56(a).

64 Resources in international waters have been considered common property. However, the property rights of States in these resources are counterbalanced by an obligation of reasonable use that requires them to take into account conservation needs. See *Icelandic Fisheries*, [1974] ICJ Rep 3. However, the obligation of reasonable use has generally been too vague and general to be of practical use. See Birnie and Boyle, above n 47, 119.

65 See, for example, *United Nations Convention on the Law of the Sea* and *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies*, reproduced in Brownlie, *Basic Documents*, above n 59.

66 The Latin maxim, *privatis pactionibus non dubium est non laedi jus caeterorum* (there is no doubt that the rights of others [third parties] cannot be prejudiced by private agreements), (see H Black, *Black's Law Dictionary* (5th ed,1979), 1076), is reflected in the GATT amending formula. Article XXX:1 provides: 'Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall

expresses a customary rule of international law that is recognized as binding on all States.[67] When no country has exclusive jurisdiction, what can occur is the 'tragedy of the commons'.[68] Shared resources tend to be over-exploited.[69] The shared jurisdictional competence of States in the global commons thus can have serious environmental consequences.

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become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.'

The applicable rule of international law, which flows from the principle of state sovereignty, has been clearly and authoritatively stated as follows:

'The rule that a treaty cannot impose obligations upon a "third State" is well established.': McNair, above n 6, 310.

'A treaty may not impose obligations upon a State which is not a party thereto.': Article 18 of the *Harvard Research Draft Convention on Treaties*, cited in McNair, ibid 310.

'A treaty does not create either obligations or rights for a third State without its consent': *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 34.

[67] See art 38 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980):

'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.' For example, the *Vienna Convention* has been treated by the International Court of Justice as expressive of customary international law binding on parties and non-parties alike. See Stephen M. Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision' in *21st Century*, above, n 11, 541; *Territorial Dispute (Libyan Arab Jamahariya/Chad)*, [1994] ICJ Rep 21-22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain: Jurisdiction and Admissibility*, [1995] ICJ Rep 21-22.

[68] See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243, reprinted in Bruce Ackerman et al (eds) *Perspectives on Property Law* (1995), 132 (arguing that economic ideas, such as Adam Smith's 'invisible hand', where individuals working to benefit themselves benefit the public as a whole, have led to the ruin of common areas around the world).

[69] A good example is the conflict that occurred over cod in the North Atlantic. The members of the North Atlantic Fisheries Organization (NAFO) agreed to limit the quantity of fish that each fishing nation could take each year, in order to preserve the resource for all. Each fishing nation agreed to annual quotas that limited the catch of its fishermen and agreed to enforce those quotas against its citizens. However, Spain would not agree to limit the number of fish its fleet could catch in international waters. With cod stocks dropping to precarious levels, Canada's fishermen (whose territory is closest to the Grand Banks) were losing their livelihood. Legally however, nothing could be done to force the Spaniards to comply. Nevertheless, Canada chose to seize a Spanish vessel that was fishing in international waters, arrest her crew, and seize the catch. Spain accused Canada of violating international law. Canada replied that it acted out of necessity given the Spanish refusal to limit its catch. The matter was ultimately settled by negotiation, but the incident demonstrates the limits of international law in dealing with the regulation of the global commons. Without legal obligations or economic incentives, the nations of the world are unlikely to exploit international resources in a sustainable manner. Where there is potential or actual economic gain at stake, countries may be unwilling to enter into agreements governing the activities of their citizens in international waters. See *Fisheries Jurisdiction (Spain v. Canada)*, [1998] ICJ Rep 431. Also see discussion of this case in the context of the necessity principle in International Law Commission, above n 37, 200-201.

While no country has jurisdiction to regulate fishing by foreign citizens in international waters, each country may regulate the acts of its own citizens. One way to provide countries with economic incentives to regulate the activities of their fishermen in international waters is to impose trade restrictions in important markets for the products that are thereby produced. Until *Shrimp II*, such trade bans were successfully challenged under GATT as violations of trade rules that were not saved by exceptions for environmental measures in GATT Article XX. The holding in *Shrimp II* appears to be at odds with customary international law regarding jurisdictional competence because the American measure seeks to regulate the acts of non-citizens outside its territory and with the principle of non-intervention because it permits one State to intervene in the internal affairs of another.[70]

The ICJ has recognized the principle of non-intervention as customary international law.[71] The principle of non-intervention flows from the concept that all States are sovereign equals and thus enjoy the right to freely decide matters within their domestic jurisdiction. The other side of this coin is that States are restricted from intervening, directly or indirectly, in the internal or external affairs of any other State.[72] In its broadest expression, the duty of non-intervention condemns 'any form of interference' against the

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[70] The panel in *Shrimp II* appears to have recognized this problem when it said, 'If Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances.' *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.103.
[71] *Military and Paramilitary Activities (Nicaragua v United States)*, [1986] ICJ Rep 14, 106.
[72] *Military and Paramilitary Activities (Nicaragua v United States)*, [1986] ICJ Rep 14, 108.

personality of a State or its political, economic, or cultural elements.[73] Nevertheless, the application of this principle remains unclear in the realm of economic coercion.

C. Economic Coercion and Non-intervention

As with the issue of sovereignty, there are two sides to the coercion coin. From the perspective of exporting countries, particularly developing countries, the use of trade barriers to induce changes to their internal regulatory regime is an act of coercion that violates the non-intervention norm in international law.[74] From the perspective of the

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[73] See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965), principle 3, para 1 and *General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States*, GA Res 290 (IV), UN GAOR, 4th Session, 13, UN Doc A/1251, 13 (1949), para 1. Also see Hodges, above n 47, 400-401 and Wesley A Cann, Jr, 'Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism' (2001) 26 *Yale Journal of International Law* 413, 439-440.

[74] Gathii notes that international legal opinion in developed and developing countries diverges on the issue of whether economic coercion violates non-intervention. Siding with the developing country view, he argues persuasively that it does. See James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996, 2028-2033. Public international lawyers base their argument on either of two views: (1) that each country has a sovereign right not only to determine with which countries it may have economic interactions, but also to impose whatever economic restrictions it wishes on other states or (2) that, if a norm prohibiting the exercise of economic coercion between states exists, the exercise of one country's economic sovereignty against another could be considered a legitimate reprisal or countermeasure. See Gathii, 2028. He does not argue that coercion violates the non-intervention norm in customary or treaty law. Rather, he bases his argument on three United Nations General Assembly resolutions that recognize economic coercion as a violation of national economic sovereignty: (1) the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965), which provides that 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law'. This declaration fortifies the *General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States*, GA Res 290 (IV), UN GAOR, 4th Session, 13, UN Doc A/1251, 13 (1949), paragraph 2, which provides: 'No state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.' (2) the *Resolution of Permanent Sovereignty Over Natural Resources* GA Res 2635, UN GAOR, 25th Session, Supp No 30, 126, UN Doc. A/8028 (1970); and (3) the *Charter of Economic Rights and Duties of States*, GA Res 3821, UN GAOR, 29th Session, Supp No 31, 50, UN Doc A/9631 (1974). Chapter 1 (b) provides: 'Economic as well as political and other relations among States shall be governed, inter alia, by the following principles... sovereign equality of all states.' See Gathii, ibid 2029-2030. Also see Bhupinder Chimni, 'Towards A

importing country that introduces the trade barrier, or that makes market access conditional upon changes to the exporting country's environmental policy, market access merely provides an economic incentive to protect the environment.[75] Since the effectiveness of this category of unilateral trade measure depends on market power, it is not surprising that developed countries tend not to view these measures as a form of economic coercion that violates the norm of non-intervention.[76] Regardless of the legal arguments on one side or the other, the intention of such measures is clearly to intervene in the internal affairs of other States. However, under *Vienna Convention* Article 52, unlike the use of force, the use of economic coercion to induce States to enter treaties does not void those treaties.[77] Efforts to add economic coercion to the use of force as a ground for voiding a treaty were unsuccessful.[78]

Third World Approach to Non-Intervention: Through the Labyrinth of Western Doctrine' (1980) 20 *Indian Journal of International Law* 243. Cann acknowledges that there is no clear prohibition against the use of economic sanctions for political and ideological purposes, noting that the International Court of Justice declined to hold that an American embargo constituted a form of indirect intervention. See *Military and Paramilitary Activities (Nicaragua v United States)*, [1986] ICJ Rep 14, 126 ('At this point, the Court had merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.'). However he argues that '[c]ommon sense suggests that the whole purpose of such coercion…is actually designed to intervene in the internal or external affairs of another nation and to influence the "choices" being made by that sovereign'. Cann, above n 73, 440.

75 If one accepts the argument that WTO members have reserved the right to refuse market access for certain classes of products under Article XX, then market access is an incentive rather than a sanction. There are those who argue that GATT provides no general positive right of market access, but rather prohibits specific methods of denying market access. See Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249, 257 and Sanford E Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27 *Columbia Journal of Environmental Law* 383, 412.

76 See Gathii, above n 74, Cann, above n 73 and Chimni, above n 74.

77 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 52 ('A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.')

78 Silva discusses the negotiating history of *Vienna Convention* art 52. Various delegations sought to add the words 'including economic and political pressure' following the 'use of force'. These proposals were withdrawn after a compromise in which the Conference adopted a resolution solemnly condemning 'the threat or use of pressure in any form, military, political or economic, by any State, in order to coerce

Even if one accepts the argument that economic coercion does not violate sovereign equality or non-intervention, the fact remains that access to the right to use unilateral trade measures under Article XX depends on market power. Access to this right is thus conditional upon the size and the level of development of WTO members, making such a legal right inconsistent with equality and fairness.

The trade obligations in the GATT should act as a means of preventing economically powerful States from using economic pressure to force weaker States to accept obligations they would otherwise not enter into. In this way, the WTO system would reinforce the principle of sovereign equality of States and the corresponding duties expressed in the preamble of the *UN Declaration* ('Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence of any State…').[79] Thus, if a State does not wish to alter its domestic environmental policy or to enter into a MEA, the use of trade sanctions as a method to compel the state to do so could be counteracted by a complaint to the WTO.

Where a WTO member accepts MEA obligations, the availability of recourse to the WTO to challenge economic coercion strengthens the validity the MEA obligations by reducing

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another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent.' See Silva, above n 57, 239-40.

[79] See Kranz, above, n 11, 194, 'Le principe de l'égalité des Etats interdit normalement d'étendre la competence legislative, executive our judiciaire d'un Etat au territoire d'un autre ou aux personnes relevant de la competence de celui-ci.'

the likelihood that they will be accepted under duress. Even though economic coercion would not void a treaty, the acceptance of obligations under duress undermines their legitimacy. To view MEA trade obligations as inconsistent with WTO law would run counter to the supporting role played by the latter in ensuring that the former have not been entered into under duress. However, the same can not be said for unilateral measures. In order to fortify the legitimacy and effectiveness of MEAs, unilateral trade sanctions imposed for the purpose of coercing a State to accept international environmental obligations[80] should be viewed as inconsistent with the principles of sovereign equality and non-intervention.

[80] While Malaysia has international legal responsibility to not cause harm to the external environment, the trade measures in *Shrimp II* were aimed at inducing Malaysia to enter a specific multilateral agreement that required that specific measures be taken to protect sea turtles. Malaysia maintained that it already employed measures that were adequate to protect sea turtles.

III. Sovereign Equality

General international law is based on the sovereign equality of States.[81] The validity of this concept has been questioned in the academic literature, based on the reality of inequality of power (hegemonic theory) or differences between liberal democracies and the rest of the world (liberal theory).[82] It has also been rejected as an organizational principle that is inconsistent with ecological imperatives.[83] Others argue that, while the principle of sovereign equality cannot remedy all inequalities in power, it can help 'to level the playing field' between developed and developing countries in international *fora* where it is embodied in a decision making structure based on 'one state, one vote'.[84] Still others reject the notion that equality should apply to States at all and question the fairness of the one state, one vote system.[85] The principle of sovereign equality also has been

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[81] *Charter of the United Nations*, art 2(1) states that it is 'based on the principle of the sovereign equality of all its Members'. A 1979 resolution confirmed the application of this principle. See *Inadmissibility of the Policy of Hegemonism in International Relations*, GA Res 34/103 (14 December 1979).

[82] Some adopt a hegemonic view of international relations and argue that the permanent members of the Security Council constitute a collective hegemony within the United Nations. See, for example, Detlev F Vagts, 'Hegemonic International Law' (2001) 95 *American Journal of International Law* 843, 847: 'A hegemon confronts customary international law differently from other countries. In terms of the formation of customary law, such a power can by its abstention prevent the emerging rule from becoming part of custom…. If a custom has crystallized, the hegemon can disregard it more safely than a treaty rule and have its action hailed as creative.' Also see Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) *British Yearbook of International Law* 1; Paul B Stephan, 'Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation' (1998) 27 Stetson Law Review 1341; and John R Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 *Transnational Law and Contemporary Problems* 1. Others question equality asserting that a different law prevails among liberal democracies than in the rest of the world. See generally Jose E Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* 183.

[83] See for example Michael M'Gonigle, 'Between Globalism and Territoriality: The Emergence of an International Constitution and the Challenge of Ecological Legitimacy' (2002) 15 *Canadian Journal of Law and Jurisprudence* 159.

[84] See Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757, 768, citing *Right of Passage over Indian Territory*, 1960 ICJ Rep, 37.

[85] For example, Daniel Bodansky argues as follows: 'Supporters of the "one state, one vote" rule usually cite as justification the principle of sovereign equality—a basic axiom of the traditional system of

challenged in the field of international human rights law, in the courts,[86] domestic legislation[87] and in the academic literature.[88] More generally, sovereign equality has been questioned as a basis for determining the jurisdiction of States in international law.[89]

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international law, which, in essence, transposed liberalism to inter-state relations. According to this view, states—like individuals—are free and equal in the state of nature. Just as individual equality implies the principle of "one person, one vote," sovereign equality justifies the "one state, one vote" rule. The problem with this reasoning is that it fails to provide any justification for the initial equation of states and individuals. In liberal theory, the right of individuals to equal respect flows from the fundamental character of personhood. But there is nothing fundamental about the state; it is merely a social and historical construct, which exists to serve human ends. Even supporters of states rights would generally agree that these rights are merely means to some other end, such as stability or order, not ends in themselves. Thus, there is no intrinsic reason to treat states as equals. Nor is there any equitable reason, given the actual disparities among states in population, power, and wealth. To put it bluntly, why should Nauru, with a population of approximately seven thousand, have an equal say in global issues as China or India, with populations one hundred thousand times as large? Why should the Alliance of Small Island States have forty-two votes in the United Nations, while the United States, comprising fifty semi-sovereign states and a population more than ten times as large, has only one?' Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 614. Charnovitz also criticizes the principle of sovereign equality and the one state, one vote rule on the basis of population distribution. He points to the permanent seats in the UN Security Council and the weighted voting in the IMF as examples of how the nation-state members of international organizations lack equal rights in the governance process. He concludes that in the UN context, '[t]his principle does not seem to mean that governments have a sovereign right to equal participation in U.N. processes. Rather, it means that governments are equally sovereign vis -a-vis each other.' See Steve Charnovitz, 'Transnational and Supranational Democracy: The Emergence of Democratic Participation in Global Governance' (2003) 10 *Indiana Journal of Global Legal Studies* 45, 48-49. Also see Matthew S Dunne III, 'Redefining Power Orientation: A Reassessment of Jackson's Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System' (2002) 34 *Law and Policy in International Business* 277.

[86] United Kingdom House of Lords, (Spanish request for extradition). *Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (no. 3). [1999] 2 Wlr 827.

[87] The *Female Genital Mutilation Act*, 22 U.S.C. 262K-2 (West Supp. 1998) targets the practice of female circumcision outside of the United States. The Act instructs American representatives to the World Bank and other international financial institutions to withhold loan funds from nations which have a 'known history' of such practice if these nations do not implement educational programs 'designed to prevent the practice of female genital mutilation'. Erika Sussman, 'Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996' 1998 31 *Cornell International Law Journal* 193, 195.

[88] George K Walker, 'Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals' (2002) 18 *American University International Law Review* 35, 104 (arguing that necessity doctrine justifies intervention to save human lives even if it violates sovereign equality): 'Even if the non-intervention principle associated with the Charter's Article 2(4) prohibitions on threats to, or use of force against, a state's territorial integrity or political independence is a jus cogens norm, there may be countervailing jus cogens norms associated with humanitarian and human rights law.' Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38 (Arguing that moving from sovereignty to subsidiarity provides a possible foundation for reconciling the concern of international law for the order of states with the concern of human rights law for the welfare of individuals). Also see Antonio Cassese, 'Ex injuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23. For an excellent analysis of

It is beyond the scope of this thesis to enter into theoretical or philosophical debates over whether the principle of sovereign equality is compatible with environmental imperatives, human rights, democratic liberalism, or the existing distribution of population or wealth. The principle of sovereign equality continues to be reaffirmed in general international law as a central principle governing international relations, most recently with respect to principles and guidelines for international negotiations. [90] Moreover, it continues to be applied in WTO law, either explicitly or implicitly. I will therefore focus on the general application of this principle in WTO law and, in particular,

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the legality of conditioning market access on human rights performance, see Diego J Linan Nogueras and Luis M Hinojosa Martinez, above, n 62.

[89] For a fine example of philosophical efforts to create a new conception of sovereignty, see Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311 (proposing a 'cosmopolitan pluralist conception of jurisdiction' that 'aims to capture a jurisdictional middle ground between strict territorialism on the one hand and expansive universalism on the other' to address the complaint that 'a territorialist approach to jurisdiction fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries'). Berman, 491. Also see Ryan Goodman and Derek Jinks,' Toward an Institutional Theory of Sovereignty' (2003) 55 *Stanford Law Review* 1749, 1779: 'From a realist perspective, it is difficult to understand why powerful states would accept this nonhierarchical structure, especially as it limits their ability to intervene in, and override opposition from, far less powerful states. The contemporary understanding of sovereign equality is, of course, linked to the struggle against colonialism. Although subjugation of foreign peoples might still serve powerful states' security interests, such objectives are per se no longer appropriate for legitimate actors in the international community. Empire is simply not an acceptable principle for organizing a modern state's interests or identity.'

[90] A draft resolution, subsequently adopted by the Sixth Committee, 'reaffirmed certain principles of international law relevant to international negotiations—namely sovereign equality, non-intervention, non-use of force, the peaceful settlement of disputes, the duty to fulfil international obligations in good faith, the invalidity of an agreement resulting from the threat or use of force and the duty to cooperate. It also set out the following guidelines: (1) negotiations should be conducted in good faith; (2) states should take account of the importance of engaging in the process the participation of other states whose vital interests are directly affected by the matters under discussion; (3) the purpose and object of negotiations must be compatible with the principles and norms of international law; (4) states should adhere to the mutually agreed framework for conducting negotiations; (5) states should endeavor to maintain a constructive atmosphere during negotiations and refrain from conduct which might undermine the process; (6) states should focus on the main objectives of negotiations; and (7) states should strive to continue to work toward a mutually acceptable and just solution in the event of an impasse in negotiation.' See Virginia Morris and M-Christiane Bourloyannis-Vrailas, 'The Work of the Sixth Committee at the Fifty-Third Session of the UN General Assembly' (1999) 93 *American Journal of International Law* 722, 731.

the issue of whether unilateral trade measures are consistent with international legal obligations that flow from the principle.

The principle of sovereign equality finds at least four applications in WTO law: the WTO principle of nondiscrimination; the WTO practice of decision making by consensus; [91] dispute settlement; and preferential treatment. The implicit purpose of all four manifestations of sovereign equality is to ensure equal access to WTO rights.

The principle of nondiscrimination is not expressed as a specific obligation in WTO law. Rather, it finds expression in the application of national treatment and MFN obligations in various WTO agreements. Nevertheless, the principles of sovereign equality and nondiscrimination can inform the interpretation of WTO law at a more theoretical level, by providing a conceptual framework. Specifically, these principles support the view that legal rights that are available to all WTO members on their face must be interpreted to provide equal access to WTO rights in practice.[92] Casting the debate in terms of equality provides an overarching framework in which to consider the consistency of WTO

[91] The practice of decision making by consensus dates back to the nineteenth century and is based on the principle of sovereign equality. See Jose E Alvarez, 'Globalization and the Erosion of Sovereignty: The New Treaty Makers' (2002) 25 *Boston College International and Comparative Law Review* 213, 218. (noting that, 'in accordance with the principle of sovereign equality, decisions were usually taken on the basis of unanimity'.)

[92] In *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/142/AB/R, AB-2000-2 (2000) (Report of the Appellate Body), para 78, the Appellate Body found the prohibition of discrimination under GATT art I:1 to include both *de jure* and *de facto* discrimination. In the context of international environmental law, the principle of non-discrimination has been used to support equal access to legal rights for transboundary litigants. See OECD Secretariat, ´Report on Equal Access in OECD Member Countries, in OECD, *Legal Aspects of Transfrontier Pollution*, 54 and Birnie and Boyle, above n 47, 197-201.

jurisprudence with both the foundational elements of WTO law and the general principles of international law.

In the area of dispute settlement, the principle of sovereign equality has been invoked explicitly in the WTO context with respect to the authorization of countermeasures. In *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* the panel permitted the United States to suspend tariff concessions and related obligations in the wake of the European Union's failure to comply with a ruling of the Dispute Settlement Body. Among its reasons for not including losses incurred in trade between the United States and non-EU countries in their assessment, the panel stated:

> A right to seek redress for that amount of nullification or impairment does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States. In fact, a number of these WTO Members have been in the recent past, or are currently, in the process of exercising their rights under the DSU. Moreover, our concern with the protection of rights of other WTO Members is in conformity with public international law principles of sovereign equality of states and the non-interference with the rights of other states….[93]

The panel implicitly accepts that the principle of sovereign equality requires the interpretation of WTO rules in a manner that promotes equal access to legal rights. Ironically, in this instance the application of the principle of sovereign equality works against the developing countries, since their development status impairs their ability to take advantage of the right to seek redress.[94] The panel failed to recognize that equal

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[93] *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WTO Doc. WT/DS27/ARB (1999), paragraph 6.14.

[94] Cann makes this point in the context of GATT Article XXI: 'Developing countries, and especially least-developed countries, generally have no ability to retaliate, no ability to receive compensation for damages incurred, and no ability to achieve any sort of effective redress under the nullification or impairment

access to rights requires a consideration of the economic circumstances of WTO members.

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU') provides for compensation or the suspension of concessions where a WTO member fails to implement rulings within a reasonable period of time.[95] Where a WTO member with significant market power (such as the United States or the European Union) fails to comply with a ruling, if a small developing country withdraws concessions, the withdrawal of concessions may cause more harm to an import-dependent developing country than to the WTO member that has failed to comply.[96] At the same time, the developing country may not have the diversity of exports needed to make effective use of compensation, which permits the non-conforming member to make concessions in other areas in order to compensate for the violation of market access for another product. Thus, to provide equal access to the right to use countermeasures, the DSU must be amended to permit developing countries to make effective use countermeasures.[97]

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provisions of [GATT] article XXIII. The suspension of concessions or other obligations on the part of the target is truly meaningless when a two-way embargo has been imposed. As a result, there is very little impetus for developed countries to avoid "wrongful" decisions. If one may assume, for the sake of argument, that a developed country "wrongfully" imposes a security-based economic sanction, it need not fear the imposition of any penalty. In this sense, the developed country actually has very little to lose. In light of political expediencies at home, it thus becomes apparent that political leaders may err on the side of imposing the sanction.' Cann, above n 73, 445.

95 *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 22.

96 See *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WTO Doc WT/DS27/ARB/ECU24 (2000) (Decision by the Arbitrators), paras 73 and 76, in which the arbitrators recognized that an imbalance in market power may affect the effectiveness of countermeasures used pursuant to the DSU.

97 There are currently several proposals being considered at the WTO to address this situation. Mexico has proposed an amendment that would permit developing countries to transfer the right to take

Some interpret a statement by the panel in *Tuna I* (that '[a] contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own') as an application of the principle of sovereign equality in the trade and environment context.[98] In this instance, the panel implied that access to WTO rights should not depend on the uniformity of environmental policies. This decision can also be viewed as denying the right to use economic coercion to intervene in the internal affairs of other States in the context of GATT.

Given the acceptance of the principle of sovereign equality in customary international law[99] and in WTO law, it is odd that this principle was ignored in the *Shrimp* cases. Given its role in compensating for the inequality that flows from levels of economic development, it is even odder that this principle was not considered in the context of a dispute involving the intrusion on the internal affairs of a developing country, even if the WTO judiciary believed the issue to fall outside of its jurisdiction.[100]

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countermeasures to another WTO member that can use it effectively. See WTO Doc TN/DS/W40. Another proposal is to require those who fail to comply with rulings to pay compensation in cash (rather than in the form of concessions) where small developing countries are involved. *Seminario Sobre el Sistema de Solución de Diferencias en la OMC*, Mexico City, 25-28 November 2003.

98 *United States – Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) (Report by the Panel not Adopted), 30 ILM 1594 (1991), paragraph 6.2. See Kuei-Jung Ni, 'Contemporary Prospects for the Application of Principle 12 of the Rio Declaration' (2001) 14 *Georgetown International Environmental Law Review* 1, 6. Also see Kriangsak Kittichaisaree, 'Using Trade Sanctions and Subsidies to Achieve Environmental Objectives in the Pacific Rim' (1993) 4 *Colorado Journal of International Environmental Law and Policy* 296, 306: 'It is doubtful whether, in international law, the United States can assert the right to protect the life or health of human and animals in international areas or within the territory of other states. Compliance with domestic law of another state in spite of the fact that there is no international legal obligation to do so is contrary to the notion of sovereign equality.'

99 See *Military and Paramilitary Activities (Nicaragua v United States)*, [1986] ICJ Rep 14.

The preferential treatment accorded to developing and least-developed countries in the WTO may be viewed as a means to compensate for inequality of circumstances in order to promote legal equality.[101] Preferential treatment implicitly recognizes that the development status of WTO members affects access to WTO rights.[102] For example, the

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[100] This appears to be the view taken by the panel in paragraph 5.103, cited above. However, the principle still could have been considered with respect to its effect on the interpretation of Article XX.

[101] See Chapter 3, n136 for a list of provisions providing preferential treatment and academic literature on differential treatment. There is little WTO jurisprudence regarding the interpretation and application of WTO provisions relating to preferential treatment. In *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc WT/DS141/R (2000) (Report of the Panel), para 6.232, the panel stated in the context of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994):

'We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.'

In *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/R (1997) (Report of the Panel), paras 7.272-7.273, the panel addressed the legal significance of the reference in the *Agreement on Import Licensing Procedures*, art 1(2) to developing country Members:

> With respect to Article 1.2's requirement that account should be taken of 'economic development purposes and financial and trade needs of developing country Members', the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members. In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2. Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement.

Two panels have made reference to the Preamble of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), which recognises 'that there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.' See *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/R6 (1999) (Report of the Panel), para 7.2 and *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WTO Doc WT/DS46/RW (2000) (Report of the Panel), para 6.47, note 49.

[102] Cann makes an argument with respect to the use of the GATT Article XXI security exception that applies with equal force to the use of unilateral measures under Article XX: '[T]he WTO is founded upon the basic premise of "non-discrimination" among nations. Despite this fact, the agreement specifically encourages discrimination in favor of less-developed countries. By doing so, the agreement implicitly recognizes that its mandates must always be adjusted to take into consideration the various stages of development of its Member States…. The most relevant statement in this regard is found in article XXXVII, paragraph 3(c). It provides that the developed contracting parties shall "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement... ."' He notes further that, with regard to the American embargo of Nicaragua, Egypt argued that when invoking the provisions of article XXI, 'due regard should be given to the essential interests of developing countries in the spirit of Part IV' and that 'particular attention should be drawn to Article XXXVII:3(c).' See GATT Council, Minutes of Meeting held on 29 May 1985, GATT

developing and least-developed countries generally do not have the market power to use unilateral trade measures as effectively as the United States or the European Union. This creates a situation of unequal access to the right to use unilateral trade measures under GATT Article XX(g).[103] Unequal access to this right is inconsistent with preferential treatment, since it creates a situation in which the opposite occurs.[104] Moreover, as the 2003 decision of the WTO to amend TRIPS Article 31 indicates, unequal access to rights is both politically and legally unacceptable in the contemporary WTO context.[105]

International law is not entirely clear regarding the legality of unilateral trade measures aimed at changing the internal law of another State or inducing acceptance of MEA obligations. International law is ambiguous regarding the consistency of economic coercion with the principle of non-intervention. Given the absence of international consensus and the decision of the ICJ in the *Nicaragua* case, the inconsistency of economic coercion with the principle of non-intervention can not be established as a

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Doc C/M/188, 12 (28 June 1985). Several other States also took the position that special caution should be used when the target is a developing country and that the American actions against Nicaragua actually violated Part IV of the Agreement. See ibid, 5, 7, 10, 12, 13-14, 16. See Cann, above n 73, 443-444. Also see *United States—Trade Measures Affecting Nicaragua*, Unpublished Panel Report, 1986 WL 363154, L/6053, PP 5.2, 5.15 (Oct. 13, 1986) (unadopted).

[103] See discussion of this point in Chapter 3.

[104] Cann makes the same argument with respect to the use of the GATT Article XXI security exception: 'Economic sanctions may only be effectively employed by those with economic strength and the history of economic sanctions supports the argument that targets tend to be economically weak and lacking in the ability to retaliate.' See Cann, above n 73, 445, citing Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered* (2d ed, 1990), 95.

[105] The political context surrounding the *Decision of 30 August 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc IP/C/W/405, <www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003, is discussed briefly in Chapter 1. The right to issue compulsory licenses on patents in TRIPS Article 31 was in practice not available to the most disadvantaged WTO members, due to their lack of manufacturing capacity in the pharmaceutical sector. For a detailed analysis of this topic, see Bradly J Condon and Tapen Sinha, 'Bargaining for Lives at the World Trade Organization: The Law and Economics of Patents and Affordable AIDS Treatment' (forthcoming).

customary rule of international law. Nevertheless, the intended purpose of such measures is clearly to intervene in the internal affairs of the targeted State. Moreover, such measures can not be considered consistent with the principle of non-intervention, given the divergence in the views of States on the issue. Thus, such measures violate the spirit, but not the letter of the law. Despite the obligation in general international law to conduct international trade relations in accordance with the principles of sovereign equality and non-intervention, the perverse result of the foregoing analysis is that economic coercion does not break the rules even when it takes the form of trade sanctions even though the use of unilateral trade measures to intervene indirectly in the internal affairs of other States undermines the principle of sovereign equality.

In the WTO context, unilateral measures may be viewed as a legitimate exercise of the sovereign right of States to control the entry of products into their territory with respect to the policy areas covered in Article XX. However, the impact of such measures on the sovereign equality of targeted States and the unequal access to the right to use such measures is inconsistent with the application of the principle of sovereign equality to the interpretation of WTO agreements. When economic coercion is used to induce acceptance of MEA obligations, those obligations do not become void. Nevertheless, when MEA obligations are accepted under duress their legitimacy and effectiveness are undermined. If trade and environmental obligations are to be mutually supportive, then economic coercion can not be considered acceptable in the WTO.

Even if the illegality of such measures is uncertain in the context of general international law, they may be found inconsistent with WTO law.[106] Regardless of whether economic coercion violates customary international legal obligations, unilateral import bans violate the legal obligations of GATT Article XI. Since the principle of non-discrimination may be viewed as a concrete expression of the principle of sovereignty, indirect attacks on sovereign equality generally should be considered unjustifiable discrimination in the Article XX chapeau.

However, a finding that such measures are generally inconsistent with WTO law does not require that they be disallowed in all cases. The principle of necessity may be invoked under customary international law 'to excuse the non observance of international obligations' in exceptional circumstances.[107] The jurisdictional nexus that the importing country has with the environmental problem is relevant to determining whether necessity applies. This provides a link between the ruling in *Shrimp II* and the general body of international law that provides a way to reconcile the divergent views of WTO members

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[106] Support for the view that internal consistency of WTO law is required may be found in *Brazil—Measures Affecting Desiccated Coconut*, WTO Doc WT/DS22/AB/R (1997) (Report of the Appellate Body), 17, in which the Appellate Body invoked the WTO Agreement Preamble in the context of the integrated WTO system that replaced the old GATT 1947: 'The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system. This can be seen from the preamble to the WTO Agreement....' Also see *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/AB/R, AB-1999-8 (1999) (Report of the Appellate Body), para 81: 'Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.' The duty to interpret a treaty as a whole is supported by the following international jurisprudence: *Competence of the ILO to Regulate Agricultural Labour* [1922] PCIJ, B, 2 and 3, 23; *Ambatielos Case* [1953] ICJ Rep 10; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15; and *Rights of Nationals of the United States in Morocco* [1952] ICJ Rep 176, 196-199.

[107] Judge Dionisio Anzilotti, *Oscar Chinn* [1934] PCIJ, A/B 63, 113.

and the international community and promote greater coherence between different branches of international law.

IV. Necessity

The type of unilateral measure employed in *Shrimp II* is inconsistent with GATT Article XI. The jurisdictional nexus between the United States and the turtles and the transboundary nature of the environmental problem qualify the measure for provisional justification under Article XX(g). The obligation to conduct international trade relations in accordance with the principles of sovereign equality and non-intervention support the view that such measures constitute unjustifiable discrimination under the Article XX chapeau.

The necessity doctrine may be invoked to excuse actions that are inconsistent with the international obligations of a State. However, necessity may not be invoked unless an 'essential interest' of the acting State is involved. Necessity thus requires a jurisdictional nexus. The necessity doctrine provides a coherent framework in which to resolve the issue of where to draw the line between the jurisdiction of one State and another State when they overlap, in the absence of an international agreement.

The draft *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 25, codifies customary international law regarding necessity as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(a) The international obligation in question excludes the possibility of invoking necessity; or
(b) The State has contributed to the situation of necessity.[108]

The draft Articles are not concerned with the content of the international obligation in question.[109] The content of WTO trade obligations falls under the jurisdiction of the WTO.[110] However, in order to ensure that interpretations of Article XX are consistent with customary international law, the application of Article XX to unilateral measures should be consistent with the doctrine of necessity. In the circumstances of the *Shrimp* case, justifying the American measure in a manner consistent with the doctrine of necessity is the only way to ensure that Article XX is thus interpreted.[111] Even if one accepts the argument that the United States did not agree to refrain from using unilateral measures to protect the transnational or global environment, and that they are thus consistent with its WTO obligations, the use of such trade measures nevertheless undermines other international obligations regarding sovereign equality and non-intervention. I will therefore consider whether the interpretation of Article XX(g) in the *Shrimp* cases is consistent with the doctrine of necessity and how this doctrine might inform the interpretation of Article XX(g) in future cases.

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[108] The International Court of Justice held that these conditions reflect customary international law in *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 40-41, paras 51-52.
[109] See International Law Commission, above n 37, 61.
[110] See ibid 61.
[111] The draft articles provide other circumstances that preclude wrongfulness, but they are not applicable in this instance. See Article 20 (Consent by a State to the commission of the act in question), Article 21 (Self-defence in conformity with the Charter of the United Nations), Article 22 (Countermeasures), Article 23 (*force majeure* making it materially impossible to perform the obligation), Article 24 (distress, to save human lives) and Article 26 (Compliance with peremptory norm). With respect to Article 26, the only peremptory norms that are clearly accepted and recognized are the prohibitions of aggression, genocide,

In order to invoke necessity, there must be 'an irreconcilable conflict between an essential interest…and an obligation of the state invoking necessity'.[112] It is subject to strict limitations in order to safeguard against possible abuse.[113] In this regard, necessity plays the same role as the Article XX chapeau, the conditions of which serve to guard against abuse of the Article XX exceptions.

The following conditions in Article 25 are relevant here[114] and must be cumulatively satisfied: (1) there must be an 'essential interest' of the State invoking necessity; (2) that interest must have been threatened by a 'grave and imminent peril'; (3) the act in question must have been the 'only way' of safeguarding that interest; (4) the act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and (5) the State invoking necessity must not have 'contributed to the occurrence of the state of necessity'. The State invoking necessity is not the sole judge of whether these conditions have been met.[115]

A. Essential Interest

Necessity has been invoked in several cases to address environmental threats, including threats to transnational migratory species in international waters. In the 'Russian Fur Seals' controversy of 1893, the Russian government invoked necessity to prohibit sealing

slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. See ibid 208.

[112] Ibid 195.

[113] Ibid.

[114] The international obligations in question do not exclude the possibility of invoking necessity.

in international waters to address the danger that a fur seal population would be exterminated by unrestricted hunting.[116] In the *Fisheries Jurisdiction* case, Canada invoked necessity to protect straddling fish stocks of the Grand Banks that were threatened with extinction. The *Coastal Fisheries Protection Act of 1994* enabled Canada to take urgent action and, pursuant to the Act, Canadian officials seized a Spanish fishing ship in international waters.[117] In March 1967, the British government decided to bomb the Liberian oil tanker *Torrey Canyon*, which had run aground on submerged rocks outside British territorial waters, after all other attempts to prevent oil spill damage to the British coastline had failed.[118] None of these cases were resolved judicially.[119] Nevertheless, they suggest that the American interest in migratory sea turtles would qualify as an 'essential interest'.

The concept of 'essential interest' is relevant to determining the jurisdictional nexus that is required under Article XX(g). It would cover situations where the environmental problem is transnational or global and has an environmental impact in the territory of the country. However, a geographic connection is not necessarily the only means of

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[115] *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 40-41, paras 51-52.
[116] 86 *British and Foreign State Papers* 220, cited in International Law Commission, above n 37, 197.
[117] *Fisheries Jurisdiction (Spain v Canada)*, [1998] ICJ Rep 431, cited in International Law Commission, above n 37, 200-201.
[118] *The 'Torrey Canyon'*, Cmnd 3246 (London, Her Majesty's Stationery Office, 1967), cited in International Law Commission, above n 37, 199.
[119] In the *'Russian Fur Seals'*, case the measure was temporary and Russia offered to negotiate a long term solution with the British. In the *'Torrey Canyon'* case, no international protest resulted and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 970 UNTS 211, was concluded to cover future cases. In the *Fisheries Jurisdiction* case, the ICJ held that it had no jurisdiction, and two subsequent agreements were negotiated: *Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks*, Brussels, 20 April 1995, 34 ILM 1260 (1995) and *Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 8 September 1995, A/CONF 164/37. See International Law Commission, above n 37, 197-201.

establishing the country's interest in the matter. Where there is a MEA, parties to the MEA have a legal interest in the issue. For example, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES') establishes a legal nexus between its parties and the endangered species whether or not the species occurs in the territory of the country.[120] In the absence of a geographic or legal connection, it would be difficult to establish that the country has an essential interest or jurisdictional nexus with the environmental problem unless one accepts the argument that all States have an interest in preserving global biodiversity.[121]

B. Grave and Imminent Peril

The peril has to be objectively established and has to be imminent in the sense that it is proximate.[122] This does not exclude that 'a "peril" appearing in the long term might be held to be "imminent" as soon as it is established', since 'the realization of that peril, however far off it might be, is not thereby any less certain and inevitable'.[123] A measure of uncertainty about the future (in environmental cases, there if often scientific uncertainty) is permissible if the peril is clearly established by reasonably available evidence.[124] The case of sea turtles threatened with extinction appears to qualify under

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[120] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975).
[121] American President Bill Clinton appeared to be advocating this view when he said that 'international trade rules must permit sovereign nations to exercise their right to set protective standards for…the environment and biodiversity'. See Bill Clinton, speech at the celebration of the 50th anniversary of GATT, 17 June 1998, <www.wto.org>, cited in Massimiliano Montini, 'The Necessity Principle as an Instrument of Balance' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001), 135, 136, n 3.
[122] International Law Commission, above n 37, 202.
[123] *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 42, para 54.
[124] International Law Commission, above n 37, 203.

this condition, since their status was objectively determined under CITES. Moreover, the Appellate Body in *Shrimp* accepted that the situation was urgent.

C. Only Way

According to the International Law Commissison commentary to Article 25, this term 'is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations'.[125] Thus, both unilateral trade measures and MEA trade measures taken against non-parties (or parties that do not implement their MEA obligations) could meet this condition in principle. Whether the means proposed to address the problem are the only ones available in the circumstances of a particular case is a separate issue.

In environmental cases, there may be scientific uncertainty and diverging expert opinions regarding the best means of tackling a problem.[126] The effectiveness of the chosen measure in resolving the problem is thus relevant to the determination of necessity. In the *Shrimp* case, it is not clear how effective a unilateral trade measure would be in preventing the extinction of sea turtles, particularly since the result may simply be diversion of the shrimp exports to other markets. Nevertheless, the fact that CITES categorized the sea turtles as threatened with extinction and consensus had been reached in two regional conservation agreements regarding appropriate conservation methods suggests that other ways of preventing their extinction had not been effective. Had this

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[125] Ibid.
[126] Uncertainty regarding how and whether to address global warming is a good example. See Chapter 3.

issue been addressed directly in the *Shrimp II* case, the American measure may have met this condition of the necessity test.

Whether or not a negotiated solution is an available alternative to unilateral action (or multilateral action against a third party) will depend on the facts of the case. In this regard, in the *Shrimp I* case, unilateral trade action was clearly not the only way to address the problem. Negotiations had succeeded in the Americas and subsequent negotiations achieved agreement among the countries around the Indian Ocean except for Malaysia. With respect to the negotiation alternative in *Shrimp II*, however, the unsuccessful effort to include Malaysia in a negotiated solution provided evidence that this route was not available in the circumstances.

The 'only way' condition of the necessity doctrine suggests that there is a duty to negotiate prior to employing unilateral trade measures in circumstances where time permits this course of action. In cases of sudden, unexpected environmental disasters, such as oil spills, this option will not be available until after the fact. However, in most cases involving the conservation of exhaustible natural resources the exhaustion of the resource should be sufficiently foreseeable to permit time for negotiation. Thus, in the context of GATT Article XX, the necessity doctrine implies a duty to negotiate before taking unilateral action to conserve transboundary or global resources, due to the subject matter.

In the *'Russian Fur Seals'* and *Fisheries Jurisdiction* cases, unilateral actions preceded negotiations to resolve the issues. However, in the *Fisheries Jurisdiction* case, Canada had made an effort to resolve the problem in multilateral negotiations in the North Atlantic Fisheries Organization before taking unilateral action. In the *'Russian Fur Seals'* case, this did not occur. However, this case occurred in the nineteenth century, when the necessary scientific data took longer to gather and receive. The unilateral action was taken on a temporary basis just prior to the beginning of hunting season. These factors suggest that there may have been inadequate time to resolve the question through negotiation prior to the start of the hunting season and distinguish the case from the *Shrimp II* situation.

D. Serious Impairment of an Essential Interest of the Targeted State

This condition requires that 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective'.[127] Does the prevention of the extinction of sea turtles outweigh the interest of Malaysia in the American export market? Does it outweigh the collective interest in the global trading system? It did in the opinion of the panel and Appellate Body. While the American measure raises serious issues regarding the proper construction of Article XX and the relationship between developed and developing countries in the WTO, restricting trade in one product between two countries constitutes a relatively insignificant disruption of global merchandise trade. Does it outweigh Malaysia's interest in maintaining its

sovereign equality? Given the current state of international law, this measure was not inconsistent with the principles of sovereign equality or non-intervention. On balance, it is reasonable to assume that the American measure would not be found to seriously impair an essential interest in these circumstances that would outweigh saving sea turtles from extinction. However, there is insufficient evidence to make a definitive determination on this point because the necessity doctrine was not argued explicitly in the *Shrimp* case. For example, it is not possible to determine the ecological and economic impact that the extinction of sea turtles would have on marine ecosystems and fish stocks, nor is there information available on the economic impact of the trade embargo on the incomes of shrimp fishermen in Malaysia.

E. Contribution to State of Necessity

For a plea of necessity to be precluded under this condition, 'the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral'.[128] If one views the absence of a multilateral agreement as contributing to the state of necessity in the *Shrimp I* case, the lack of effort on the part of the United States to conclude an agreement with the affected countries could constitute a bar to the plea. Thus, a duty to negotiate may also be relevant to determining the outcome under this condition. However, the duty would have been met in *Shrimp II*.

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[127] International Law Commission, above n 37, 204, citing *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 46, para 58.
[128] International Law Commission, ibid 205.

With respect to the American contribution to the reduction in sea turtle populations, killing turtles inadvertently, due to a lack of scientific knowledge rather than a lack of effort, would not bar a plea of necessity.

Based on the available information, the circumstances in *Shrimp II* appear to meet the conditions for invoking the necessity doctrine. However, because the necessity doctrine was not explicitly addressed, it is difficult to say with certainty whether all of the conditions would be met. Nevertheless, the *Shrimp* case represents a contribution on the part of the WTO judiciary to the development of this doctrine in international law, not just WTO law. Generally speaking, the necessity doctrine is consistent with the least-trade-restrictive test that has been applied in WTO jurisprudence.[129] However, the application of both the necessity doctrine and Article XX to international environmental concerns would benefit from further development.

It would be useful for the WTO judiciary to make explicit reference to the necessity doctrine, as codified in the draft Articles, when interpreting Article XX. Indeed, it would be useful for the WTO judiciary to systematically address the relevant rules of international law when interpreting WTO obligations and exceptions in order to ensure coherence, and to do so explicitly. This would facilitate the coherent evolution of WTO law and other branches of international law, as well as the internal coherence of WTO law.

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[129] See Montini, above n 121. See discussion of the least-trade-restrictive test in Chapters 2 and 3.

V. The Role of WTO Panels in Achieving Coherence in International Law

This section suggests how the WTO can use the above analysis to play an active role in achieving greater coherence between WTO law, international environmental law and general international law.[130] The jurisdiction of the WTO judiciary is restricted to the interpretation of covered agreements. This bars the WTO judiciary from determining the content of obligations in treaty or customary international law. However, the WTO judiciary is required to take these other obligations into account when interpreting the covered agreements. Thus, while the ability of the WTO judiciary to influence other branches of international law is restricted, a significant contribution can be made to achieving coherence in international law.

In this context, the WTO has been called upon to rule on matters involving public international law. In the *Hormones* case, the Appellate Body stated:

> The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[131]

This decision is consistent with the jurisdictional limits of the WTO judiciary regarding the definition of the content of customary international law. Moreover, it demonstrates an

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[130] On the dangers raised by unilateralism for contemporary international law, see the different contributions to the conference held at the University of Michigan Law School, Unilateralism in International Law: A United States-European Symposium (2000) 11 *European Journal of International Law* 1.

appropriate level of deference to national governments by not imposing an obligation when it is not clear that they have accepted it. In this case, Canada and the United States were clearly of the view that the precautionary principle is not (yet) crystallized as a principle of customary international law. However, all parties to the dispute, as WTO members, had accepted the more concrete formulation of aspects of the principle found in the *Agreement on the Application of Sanitary and Phytosanitary Measures*,[132] providing a more solid basis for the Appellate Body to make its ruling.

The situation regarding the content of sovereign equality is analogous. While the WTO judiciary does not have the jurisdiction to define the content of this principle in general international law, they do have the jurisdiction to ensure that their interpretations of the covered agreements are consistent with more concrete manifestations of this principle in WTO agreements.

It is also appropriate that the Appellate Body defer to the jurisdiction of the ICJ to determine whether a principle of customary international law has or has not emerged.[133]

[131] *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body), para 123.
[132] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).
[133] The *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994)does not clearly set out what the relationship is between the WTO Dispute Settlement Body and the International Court of Justice. However, the draft International Trade Organisation Charter contemplated appeals to the World Court in some circumstances, providing a basis for the development of a body of international law that applies to trade relationships. See Jackson, *Jurisprudence*, above n 6, 170. Also see *Havana Charter for an International Trade Organization*, Articles 92-97 in UN Conference on Trade and Employment – Final Act and Related Documents, UN Doc. E/Conf. 2/78 (1948) and Clair Wilcox, *A Charter for World Trade* (1949), 159 at 305-308.

This is a wise course to follow. The ICJ is better placed to perform this task. Moreover, since the WTO agreements came into force, international trade law has been more fully integrated into the system of international law than the GATT was.[134] Panels and the Appellate Body both follow the customary rules of treaty interpretation, and make reference to other principles of international law, when interpreting the WTO agreements. If the WTO begins to rule on the status of principles in international law, it increases the risk of divergent opinions arising in different international 'courts', a development that is best avoided. For this reason alone, it is 'imprudent' for the DSB to take on this task. Jurisdictional boundaries thus contribute to coherence in various fields, including international trade law and international environmental law.

However, WTO tribunals need to ensure that their application of *accepted* principles of customary international law are consistent with the general body of international law, in order to avoid the 'fragmentation of international law'.[135] The necessity doctrine is a case in point. Unlike the precautionary principle, the necessity doctrine *has* been accepted as forming part of customary international law. The *Shrimp* rulings contribute to the

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[134] See Jackson, *Jurisprudence*, above n 6, 181, where the author states, '…the Appellate Body has made it reasonably clear that general international law is relevant and applies in the case of the WTO and its treaty annexes, including the GATT. In the past there has been some question about this, with certain parties arguing that the GATT was a 'separate regime' in some way insulated from the general body of international law. The Appellate Body has made it quite clear that this is not the case….'

[135] See Ian Brownlie, 'Some Questions Concerning the Applicable Law in International Tribunals' in *21st Century*, above n 11, 763. He states, at 763-764, 'It is beyond question that public international law constitutes an applicable law, and may be indicated as such…by the determination of a tribunal….The question is…to what extent specialised areas of international law…may constitute discrete forms of applicable law, forming bodies of law independent of the parent body….'International Environmental Law' has tended to develop as a wholly academic personality, developed in ignorance of the practice of States and organizations….It is the principles of State responsibility which are applicable and which need developing. To encourage the fragmentation of international law will have retrograde effects.' Also see,

development of this doctrine even though they do not do so explicitly. In future cases of this kind, the WTO judiciary needs to incorporate a consideration of the doctrine of necessity and ensure that its decisions are consistent with its content. It is within their jurisdiction to do so.

In *Shrimp II*, the panel formulated a standard of review to apply in determining whether a WTO member was entitled to use unilateral trade measures with respect to international environmental issues.

> [T]he Panel feels it is important to take the reality of international relations into account and considers that the standard of review of the efforts of the United States on the international plane should be expressed as follows: whether the United States made serious good faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries.[136]

However, the panel also recognized that 'no single standard may be appropriate'.[137] The Appellate Body rejected the panel's view that the United States should be held to a higher standard given its scientific, diplomatic and financial means. In this regard, the Appellate Body noted that the principle of good faith applies to all WTO members equally, but otherwise did not object to the standard of review formulated by the panel.[138]

This aspect of the *Shrimp* case is relevant to determining whether the American measure met the requirements of the doctrine of necessity. In failing to consider the doctrine of

Louis B. Sohn, 'Enhancing the Role of the General Assemb ly of the United Nations in Crystallizing International Law', in *21st Century*, above n 11, 549.

[136] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.73.

[137] Ibid para 5.77.

necessity, both the panel and the Appellate Body missed an important opportunity to contribute to the development of greater coherence between WTO law and customary international law.

VI. Conclusion

Generally speaking, powerful developed countries take a different view of sovereign equality than do developing countries.[139] The view of the former sees economic coercion as a permissible form of intervention in the affairs of the latter, while the latter do not. I will use the term *de jure* inequality to refer to the former view and the term *de jure* equality to refer to the latter.

Both views are self-serving. It is in the interest of powerful developed countries to promote a view of international law that favours the economically powerful. It is in the

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[138] See ibid para 5.76 and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), para 134, footnote 97.

[139] I base this generalization on the practice of the United States and the European Union and the views expressed by many American academics. I recognize that there is no single view of international law even within the American academic community. Indeed, I have shown in this chapter that there is vigorous debate in that community regarding international legal theory. However, that community is the primary source of theoretical challenges to the concept of sovereign equality. Here, I use the term 'powerful developed countries' to refer to the United States and the European Union, even though the latter is not a 'country', technically speaking. In the use of the term developing countries, I include least-developed countries. According to Adolfo Aguilar Zinser, divergent views of international law also exist in the context of the United Nations Security Council, between the permanent members and those who hold seats on a rotating basis. Adolfo Aguilar Zinser Representante Permanente de México ante la ONU (Permanent Representative of Mexico at the United Nations), Address at the Instituto Tecnológico Autónomo de México, 28 October 2003. Thus, divergent views flow not only from disparities in economic power, but also political and military power. The permanent members of the Security Council are the United States, France, Great Britain, China and Russia.

interest of developing countries (and small developed countries[140]) to oppose that view and to promote *de jure* equality to counterbalance the reality of *de facto* inequality. However, while powerful developed countries can settle for the leverage that *de facto* inequality gives them in international economic relations, the other nations of the world cannot accept *de jure* inequality. Thus, in a contest between these two views of international law, *de jure* equality should win the day.

Divergent views of sovereign equality should be easier to reconcile in the WTO context than in the United Nations context, because the stakes are higher for the State in the realm of peace and security, where its very existence may be at stake. International legal theorists who challenge equality generally are concerned with its implications for military security and human rights, which fails to take the WTO context into account. In the international trade context, the existence of the State is not at stake. Moreover, the needs of the State are different in the trade context, even if it is a hegemon.[141] Even the hegemon needs a degree of predictability in the realm of trade law in order to provide a more favourable global business environment for its business interests. Thus, it is more likely that compliance with the international rule of law will win out over the desire to avoid constraints on the unilateral exercise of State power in the international trade

[140] I do not place any of the members of the European Union in this category because trade policy falls within the jurisdiction of the European Union rather than its member States.

[141] Vagts makes this point with respect to hegemonic international law: 'But the historical record shows that it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted. Moreover, those subject to its domination may need clear indications of what is expected of them. The hegemon is also a trading party and the world of trade needs rules. While Bolton's national security world may be rather free of rules, his colleague, Special Trade Representative Robert Zoellick, has to operate in the highly legalized universe of the World Trade Organization.' Vagts, above n 82, 845.

context than in the security context. Moreover, in the WTO context, all members benefit from a functioning dispute resolution system.

The promotion of *de jure* equality is not only more feasible in the trade context than in the security context. It is also necessary for the WTO to embrace *de jure* equality, for both political and legal reasons.

Politically, the WTO has to embrace a view of international law that is capable of bridging the divide and serving the interests of all members. Only *de jure* equality can do this. Moreover, the majority of WTO members are developing countries. Collectively, they represent the majority of the world's population, if not its wealth.[142] The developing country members of the WTO have begun to assert themselves in WTO negotiations, notably in the Seattle, Doha, and Cancún Ministerial Conferences. In particular, they have rejected the practice of the 'Quad' (European Union, United States, Japan and Canada) of setting the agenda for WTO negotiations. In this political context, the WTO must resist attempts to erode the principle of sovereign equality.

There are also strong legal arguments in favour of *de jure* equality in the context of WTO law. *De jure* inequality is inconsistent with several of the WTO's fundamental procedural and substantive rules: non-discrimination; preferential treatment for developing countries; decision making by consensus; and the use of trade sanctions only through recourse to the

[142] Arguments that reject the notion of sovereign equality and one State, one vote based on representation-by-population arguments seem to ignore this fact.

DSB.[143] Moreover, the fundamental premise of the WTO is to govern trade relations based on the rule of law, not power. Unilateralism is the antithesis of multilateralism. Therefore, in a multilateral institution such as the WTO, unilateralism can only be permitted as a last resort, in accordance with the doctrine of necessity.

Where strict adherence to *de jure* inequality would produce perverse results, necessity may be invoked in order to address the specific circumstances on a case-by-case basis. The necessity doctrine provides a way to address such situations without eroding *de jure* equality. The integrity of the body of law that flows from the concept of sovereign equality will be compromised if another path is chosen, be it in the context of WTO law, international environmental law, or general international law.

Hard cases do not have to make bad law. The WTO judiciary cannot afford to let ambiguous legal analysis leave the impression that it will acquiesce in the erosion of fundamental principles of international law and WTO law or, worse still, give into pressure to create some form of 'hegemonic international law'. Those who advocate the replacement of *de jure* equality with other forms of international governance that suit their present circumstances are short-sighted. While the WTO judiciary needs to take a flexible approach to interpretation that permits the body of international law to evolve

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[143] With respect to the latter, see *United States—Sections 301-310 of the Trade Act of 1974*, WTO Doc WT/DS152/1 (2000) (Report of the Panel adopted on 27 January 2000), holding that sections of the Trade Act that authorized trade remedies against American trade partners were not inconsistent with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 23.2(a) or (c) or GATT 1994 due to American undertakings to pursue remedies for violations of its WTO rights through the DSU rather than unilaterally.

over time, the fundamental principles that govern relations between WTO members must remain capable of application over centuries, not decades. This requires a clear and coherent analysis of the relationship between WTO law and the general body of international law of which it forms a part.

Unilateral measures are inconsistent with preferential treatment for developing countries, the promotion of equal access to WTO rights, and, more generally, the goal of governing trade relations pursuant to multilateral rules. In exceptional cases, necessity may be invoked to address urgent environmental issues where the acting State has a jurisdictional nexus to the environmental problem. The requirement of an 'essential interest' makes such a jurisdictional nexus mandatory. This means that unilateral measures can only be justified for transnational or global environmental issues where the acting State has a territorial connection. Otherwise an applicable MEA obligation must provide the jurisdictional nexus through the legal interest that the MEA gives the acting State. Where there is no geographic or legal jurisdictional nexus, unilateral measures will not meet this requirement of the necessity doctrine and will be incapable of justification under Article XX.

Clarity of analysis is not incompatible with a flexible, evolutionary interpretation of international law. In this regard, the ambiguous language of Article XX serves a useful purpose. The broad language of Article XX leaves interpretative room available to achieve the coherence that is necessary for both WTO law and general international law to stand the test of time. Ambiguous language leaves room for the WTO to take into

account the evolution of *de jure* equality and the necessity doctrine in both WTO law and general international law. It also leaves room for the WTO to take into account shifts in the allocation of decision making authority as international environmental laws and institutions evolve. Finally, broad language in Article XX lessens the need to employ legislative mechanisms to resolve conflicts among WTO members and gives the WTO judiciary greater latitude to resolve conflicts on a case-by-case basis. These decision making mechanisms are the subject of the next chapter.

Chapter 5

From Revolution to Evolution: The Role of Ambiguity

I. Introduction

This chapter will analyse whether and how the ambiguity in Article XX should be resolved in light of its role with respect to the 'constitutional' division of authority between national governments and the WTO, the division of authority between different international organizations and the ability of Article XX to facilitate evolutionary coherence between different branches of international law. How should the ambiguity be resolved in the short term, medium term and long term?

In the case of conflicts between WTO rules and MEAs, the best short-term solution may be to do nothing. After all, the problem is theoretical. There have been no disputes involving MEA-WTO conflicts. Moreover, the existing rules and dispute settlement mechanisms may prove to be adequate should any real conflict arise. The current rules appear to be adequate to address the issue of unilateral measures employed to induce participation in MEAs, provided such measures are allowed only as a last resort in accordance with the doctrine of necessity. To choose to do nothing is to recognize that 'more law is not necessarily better'.[1]

[1] I do not know whether to attribute this phrase to Robert Hudec or to Joel Trachtman. The insight belongs to the former while the words were written by the latter. See Joel P Trachtman, 'Robert E. Hudec (1934-2003)' (2003) 97 *American Journal of International Law* 311, 313.

In the medium term, the WTO dispute resolution system is available to resolve ambiguities on a case-by-case basis.[2] The value of this approach is that it would generate new ideas, produce a larger body of jurisprudence and allow flexible practices to develop over time. This 'litigation' option facilitates an evolutionary approach to developing coherence between WTO law and other branches of international law, akin to the course of evolution followed by GATT dispute resolution over its first four decades.[3] The strength of this approach is its flexibility. The principle weakness lies in the lack of predictability. The ambiguity remains. Moreover, panel decisions cannot alter the obligations of WTO members;[4] nor do they bind future panels.[5] Thus, beyond the case at hand, panel decisions have persuasive value only. Moreover, panels may choose to exercise 'judicial restraint' and explicitly or implicitly leave the matter for the members

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[2] For a discussion of the difference between litigation between governments and litigation in the domestic realm, see Robert E Hudec, 'Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments' (1987) 72 *Minnesota Law Review* 211.

[3] See John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (2000), 439-440. He notes that the GATT clauses setting up the dispute resolution procedures were 'sketchy', but developed into a full and largely effective procedure over four decades of trial and error and general practice.

[4] See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2): 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

[5] See Jackson, *Jurisprudence*, above n 3, 388-389: 'Clearly, the general international law rule suggests that there is no strict precedential effect such as *stare decisis*….The WTO text…seems to suggest that the WTO system does not give power to the panels to create any formal interpretations, i.e. any formal precedents. Thus, the panel reports are binding only on the parties to the particular proceeding….' See also *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1197 (1994) ('WTO Agreement'), art IX(2): The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements…The decision to adopt an interpretation shall be taken by a three-fourths majority of the members.'

themselves to resolve.[6] Judicial restraint is not an excuse to fail to take *all* the relevant non-WTO rules into account in judicial opinions so that greater coherence may be achieved between different branches of international law. Nevertheless, given the limitations of panel interpretations and the prospect of judicial restraint, the litigation option provides a limited means to resolve ambiguities in the relationship between trade and environmental law.

Over the long term, it may become necessary to negotiate a resolution of the ambiguities. This 'negotiation' option requires a choice not only of substance, but of form and procedure. The basic procedural options include adopting a formal interpretation of existing obligations, granting a waiver of existing obligations, and negotiating the adoption of amendments, new provisions or agreements. New provisions could range from a simple addition to the general exceptions contained in GATT Article XX to the negotiation of a new agreement. For example, a new Article XX exception might permit measures 'necessary to implement obligations contained in a multilateral environmental agreement'. A more ambitious goal would be to negotiate an agreement on minimum standards of international environmental protection following the precedents set by the

[6] See Jackson, *Jurisprudence*, above n 3, 443. He cites the example of the *Tuna* case, in which the panel stated: '…if the Contracting Parties were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the Contracting Parties were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the Contracting Parties to impose such limits and develop such criteria.' *United States—Restrictions on Imports of Tuna*, GATT BISD, 39th Supp, 155, GATT Doc DS21/R (1991) 30 ILM 1594, 1623 (Report by the Panel not Adopted).

Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS')[7] or the *Agreement on Trade-Related Investment Measures* ('TRIMS')[8]—perhaps an *Agreement on Trade-Related Aspects of Environmental Protection* (TREPS) or an *Agreement on Trade-Related Environmental Measures* (TREMS). But such ventures would raise difficult and controversial issues regarding the proper scope of the WTO mandate and the allocation of decision-making responsibility between international bodies and between international bodies and national governments.

The principal benefit of the negotiation option is that it would enhance predictability by resolving current ambiguities and provide a long-term solution. However, this implies a trade off in terms of flexibility and would entail making difficult choices. For example, negotiating a TREPS or TREMS agreement would be challenging and likely require concessions in other areas to entice members to sign on. Given the difficulties WTO members already have reaching consensus on the Doha agenda, it would not be feasible to commence negotiation of new agreements for several years.

Shrimp II appears to have resolved the issue of what would happen if trade measures were applied to nations who have chosen not to agree to the MEA after a concerted effort to negotiate their inclusion. If a 'rogue' WTO member chose to threaten the global environment, trade sanctions could be imposed, unilaterally or multilaterally. The *Shrimp*

[7] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994).

cases indicate that trade measures taken pursuant to MEAs between parties to the MEA, if ever challenged before a WTO panel, will likely pass the test under Article XX, provided that they are non-discriminatory and adhere to principles of transparency and procedural fairness. However, the *Shrimp* decisions do not completely resolve the legal ambiguities in the trade and environment area.

Before *Shrimp II*, it seemed clear that unilateral trade measures aimed at coercing other nations to adopt specific environmental policies in the absence of any multilateral agreement would not be GATT-consistent. In much of the academic debate over trade and environment before *Shrimp II*, particularly among advocates of unilateralism, there was the concern that trade rules may impede efforts to address serious global environmental problems, such as climate change and ozone depletion.[9] The starting point for the arguments of many American commentators was the assumption that the WTO/GATT decisions have produced unsatisfactory results because they failed to allow the United States to unilaterally determine how to deal with multilateral environmental

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[8] *Agreement on Trade-Related Investment Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).

[9] See for example, Sean Fox, 'Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere' (1996) 84 *Georgetown Law Journal* 2499, arguing that economic and legal arguments support allowing States to use trade measures when necessary to promote their legitimate interests in protecting the global atmosphere. See also Jennifer A Bernazani, 'The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures' (2000) 15 *Connecticut Journal of International Law* 207, who proposes the addition of an exception to Article XX that would allow unilateral trade action where there is no MEA in place, there is a critical environmental situation, and negotiation efforts have failed to find a multilateral solution. Also see Shannon Hudnall, 'Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization' (1996) 29 *Columbia Journal of Law and Social Problems* 175, who notes that some kinds of unilateral measures are permitted in Article XX, subject to jurisdictional limitations.

issues.[10] Many therefore argued that it was necessary to make changes to the WTO regime, using WTO decision-making procedures to provide further guidance to the WTO panels and Appellate Body. If WTO members are unable to agree to resolve their differences using legislative mechanisms, they will, in effect, be leaving the decisions to the judiciary to resolve. The question of how to clarify the relationship between WTO law, international environmental law and public international law is therefore an important one.

The issue of how to reach decisions on controversial issues goes far beyond the trade and environment debate. What is at stake is the division of decision-making authority between the legislative and judicial branches of the WTO. WTO decision-making mechanisms provide a system of checks and balances to constrain decision-making by the WTO as an institution that 'would be too intrusive on sovereignty'.[11] However, where the WTO membership is unable to agree on how to resolve ambiguities in WTO law through legislative mechanisms, the task of 'filling in the gaps' may fall to the WTO judiciary.

The judicial resolution of some legal ambiguities might not reflect the views of many WTO members. The ruling in *Shrimp II* on the use of unilateral measures is just one

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[10] For an discussion of this issue that takes into account the developing country perspective, see Rita M Wisthoff-Ito, 'The United States and Shrimp Import Prohibitions: Refusing to Surrender the American Goliath Role in Conservation' (1999) 23 *Maryland Journal of International Law and Trade* 247. It is worth noting that the United States has agreed to avoid the unilateral resolution of trade disputes under section 301 of the *Trade Act of 1974* in order to comply with its WTO obligations. See *United States—Sections 301-310 of the Trade Act of 1974*, WTO Doc WT/DS152/1 (2000) (Report of the Panel).
[11] Jackson, *Jurisprudence*, above n 3, 185.

example.[12] The work of the GATT and WTO on trade and environment has consistently expressed a preference for multilateral solutions over unilateral actions. The Group on Environmental Measures and International Trade[13] concluded that multilateral solutions to transboundary or global environmental problems would prove more effective and durable than unilateral measures.[14] More recently, the WTO Committee on Trade and Environment reported that most member delegations considered that GATT Article XX did not permit a member to impose unilateral trade restrictions to protect the environment outside its jurisdiction.[15] The analysis in Chapters 3 and 4 shows that these views are consistent with the relevant principles of international environmental law and *de jure* equality among the members States of the WTO. However, unilateral measures may be necessary in exceptional circumstances. Provided they are taken in accordance with the doctrine of necessity, they should be allowed in rare cases.

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[12] Another example is the negative reaction of the WTO membership to the decision of the Appellate Body to adopt a procedure for leave to submit written arguments from NGOs in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body). See *Minutes of WTO General Council Meeting of 22 November 2001*, WTO Doc. WT/GC/M/60 (23 January 2001), available at <http://docsonline.wto.org/gen_home-asp> at 25 July 2002. Also see David A Wirth, 'Case Report on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*', 96 *American Journal of International Law* 435 (2002).

[13] This group was the first institutional framework created by the GATT to address trade and environment issues. It was created in 1971, but did little work in this area until some twenty years later. See *Trade and Environment in the GATT/WTO (Background Note by the Secretariat)*, prepared for the High Level Symposium on Trade and Environment, held at WTO Headquarters in Geneva, March 1999, paragraph 1, reproduced in Hakan Nordstrom and Scott Vaughan, WTO Special Studies, *Trade and Environment*, Annex I [hereinafter Background Note].

[14] Report by Ambassador H Ukawa (Japan), Chairman of the Group on Environmental Measures and International Trade, 49th Session of the Contracting Parties, GATT Doc L/7402, 2 February 1994, reproduced in Nordstrom and Vaughan, ibid, Annex II [hereinafter Ukawa Report].

[15] See Background Note, above n 13, paragraph 55. Another delegation expressed the opinion that nothing in Article XX indicated that it only applied to environmental protection within the territory of the country invoking the exception. See ibid.

This chapter questions whether changes are needed to achieve greater coherence between WTO law and other branches of international law. This chapter analyses the WTO mechanisms that may be used to implement changes to WTO law, assesses the likelihood that sufficient agreement can be reached among WTO members to use these mechanisms, and analyses the legal effect of different decision-making procedures. This chapter then concludes with a synthesis of the issues that have been analysed in this thesis.

II. The Need for Change: The Pros and Cons of Ambiguity

Many are uncomfortable with the level of ambiguity found in the WTO rules regarding the compatibility of environmentally motivated trade barriers with the WTO agreements. There has been extensive criticism of the existing trade law regime by environmental NGOs and academic commentators and numerous proposals have been made for reforms. In general, the aim of these proposed reforms is to clarify the application of WTO exceptions to environmental trade barriers through authoritative interpretations, waivers, or amendments. Such proposals reflect a lack of faith in the ability of the WTO judiciary to interpret WTO provisions in a manner that is compatible with international environmental protection.

Striking the right balance between flexibility and predictability in legal rules is a fundamental issue that confronts legislators and the judiciary in many areas of law. In some areas, such as property and contract law, the balance favours predictability. In other areas, such as constitutional law, the expanse of time covered by norms favours flexibility. For example, in the environmental field constitutional jurisdiction to pass

environmental laws in Canada remains murky but neither the federal nor provincial governments have taken concrete steps to clarify the situation.[16] Ambiguity regarding substantive norms and the allocation of decision-making power in the environmental field flow from the nature of the beast. The environment is everywhere and environmental laws can affect every other field of law, making the division of legislative authority by subject matter an extraordinarily complex task. Thus, the appropriate level of ambiguity varies with the subject and purpose of the legal rule in question, even in domestic law.

In international agreements, ambiguity is also a consequence of the compromises needed to reach agreement between a large number of States in international treaty negotiations.[17] At the same time, the specificity of international legal obligations is important because specific obligations may prevail over general obligations in the event of a conflict between treaties (in the absence of a conflicts clause that states otherwise).[18] However, ambiguity in the rules governing international relations is not necessarily bad.[19]

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[16] See Bradly Condon, 'Federal Environmental Protection in Mexico and Canada' in Stephen Randall and Herman Konrad (eds), *NAFTA in Transition* (1996), 281-294; Bradly Condon, 'Constitutional Law, Trade Policy and Environment: Implications for North American Environmental Policy Implementation in the 1990s' in Alan R Riggs and Tom Velk (eds), *Beyond NAFTA: An Economic, Political and Sociological Perspective* (1993), 222-230; R Northey 'Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium' (1989) 29 *Osgoode Hall Law Journal* 127.

[17] Philippe Sands, 'Turtles and Torturers: The Transformation of International Law', Inaugural Public Lecture as Professor of Public International Law, University of London, 6 June 2000, <http://www.nyu.edu/pubs/jilp/main/issues/33/pdf/33p.pdf>, 527-559, 549, at 19 February 2003.

[18] See Lord McNair, *The Law of Treaties* (1961), 219: 'Where the parties to the two treaties said to be in conflict are the same,...[i]f the provisions of the earlier one are general and those of the later one are special and detailed, that fact is some indication that the parties intended the special one to prevail.'
See also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 30 and 59.

[19] For a contrary view, see Moragodage C W Pinto, '"Common Heritage of Mankind": From Metaphor to Myth, and the Consequences of Constructive Ambiguity', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st* Century (1996), 249, who criticizes the use of 'constructive ambiguity' in international agreements to paper over a lack of agreement between the parties. In particular, he criticizes the use of 'emotive metaphors' whose lack of precision lead to lengthy and costly efforts to determine the

Indeed, many international environmental instruments, such as the *Rio Declaration*,[20] are even more ambiguous than the WTO rules.[21] Ambiguity may be intentional.[22] The more diverse are the interests at stake and the longer the time frame involved, the higher the level of ambiguity may have to be to secure agreement in the negotiation of new norms.[23]

Where provisions are general (and thus more ambiguous), as is the case with the GATT Article XX exceptions, they can be clarified incrementally through their application to specific cases.[24] In the environmental context, one author has argued that incremental

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legal obligations that are to be derived from the term. While his critique focuses on the term 'common heritage of mankind', it also applies to the concept of sustainable development. Whether ambiguity in international obligations is good or bad depends on the context. For example, in the context of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994), ambiguity regarding the right of WTO members to issue compulsory licenses for export required that the agreement be amended. The WTO document that resolved this issue introduced further ambiguities that may encourage litigation that would frustrate the purpose of the decisions. See *Decision of 30 August 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc IP/C/W/405, available at <www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003, and Bradly J Condon and Tapen Sinha, 'Bargaining for Lives at the World Trade Organization: The Law and Economics of Patents and Affordable AIDS Treatment' (forthcoming).

[20] *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/ Rev.1 (1992) 31 ILM 874.

[21] The Rio Declaration consists primarily of principles elaborating the concept of sustainable development. Ibid. One author expresses the view that, 'only as specific normative implications are defined for an ever larger number of contexts and actors, will the ambiguity inherent in the basic Rio formulations diminish over time.' See Gunther Handl, 'Sustainable Development: General Rules versus Specific Obligations' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 35, 36.

[22] See for example Anthony D'Amato, 'Purposeful Ambiguity as International Legal Strategy: The Two China Problem' in Jerzy Makarczyk (ed), *21st Century*, above n 19, 109. See also Aust, noting, 'For multilateral treaties, the greater the numb er of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces much wording which is unclear or ambiguous.' Anthony Aust, *Modern Treaty Law and Practice* (2000), 184.

[23] For example, Handl advocates 'an incremental approach to clarifying the specific legal implications of 'sustainable development'' to gradually 'expand the limits of general consensus'. Handl, above n 21, 43.

[24] Jackson argues that the aim of Vienna Convention Articles 31 and 32 is to resolve 'any facial ambiguities in treaty text.' Jackson, *Jurisprudence*, above n 3, 151. Thus, panels are in theory capable of resolving the ambiguities regarding MEAs through the application of these rules of interpretation. Howe ver, if the line is crossed where panels would be altering the obligations by unduly stretching the meaning of provisions, they may choose to defer to the WTO members, who may use WTO decision-making mechanisms to resolve the ambiguity.

clarification of existing obligations may be preferable to creating new norms with respect to the concept of sustainable development in international environmental agreements.[25] In the case of Article XX, the same case can be made. Article XX has never been tested in a case involving trade measures implemented under MEA obligations, and might never be. Moreover, as I argued in Chapter 2, Article XX would benefit from judicial interpretations that (1) clarify the subject matter of Article XX(b) and (g) based on proximity of interest and (2) clarify the proper place of the least-trade-restrictive test and its relation to the necessity doctrine. Negotiating more specific provisions before the existing provisions have been tested fully may prove counterproductive and unnecessarily restrict future options.[26]

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[25] Handl argues that creating new obligations before existing obligations are clarified may be self-defeating, because it reflects a lack of concern for the effectiveness of the norms already enacted. 'Environmental legislation without concern for the effectiveness of the norms enacted, or the commitments states enter into, amounts to legal window-dressing and as such is self-defeating.' Handl, above n 21, 43. Ambiguous language permits the WTO judiciary to have recourse to supplementary means of interpretation, including non-WTO agreements reached between the parties to the dispute. It thus facilitates the consideration of MEA obligations and other international legal obligations in the interpretations of Article XX. In *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc WT/DS103/AB/RWT/DS113/AB/R, AB-1999-4 (1999) (Report of the Appellate Body), para 138, regarding Canada's Schedule the Appellate Body stated:

> Indeed, the language is general and ambiguous, and, therefore, requires special care on the part of the treaty interpreter. For this reason, it is appropriate, indeed necessary, in this case, to turn to 'supplementary means of interpretation' pursuant to Article 32 of the Vienna Convention. In so doing, we are unable to share the apparent view of the Panel that the meaning of the notation at issue is so clear and self-evident that there was 'no need to also examine the historical background against which these terms were negotiated.

Also see European Communities—Customs Classification of Certain Computer Equipment, WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, AB-1998-2 (1998) (Report of the Appellate Body), para 92:

> The application of these rules in Article 31 of the Vienna Convention will usually allow a treaty interpreter to establish the meaning of the term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:
>
> > '... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'
>
> With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.

Also see *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTO Doc WT/DS69/AB/R, AB-1998-3 (1998) (Report of the Appellate Body), para 83, in which the Appellate Body found that a bilateral agreement between two WTO Members could serve as 'supplementary means' of interpretation for a provision of a covered agreement.

At the same time, it is important to recognize 'the need of the international commercial system for predictability in the resolution of disputes.'[27] The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU') recognizes this need, and assigns the role of clarification of existing obligations to the WTO Dispute Settlement Body ('DSB'):

> The dispute settlement system of the WTO is a central element in providing security and *predictability* to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions* of those agreements….[28]

However, this role is limited by the doctrine of judicial restraint, under which panels limit their decisions to the interpretation and application of the least number of provisions necessary to resolve the dispute before them.[29] Thus, in the absence of a dispute involving MEA trade obligations, WTO panels are unlikely to fulfil this task with respect to the application of existing GATT provisions to MEAs.[30] Nevertheless, the interpretations of Article XX(g) in the WTO jurisprudence provide sufficient guidance to

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[27] Blackmun J in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985).

[28] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2). In *Japan—Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body), 31, the Appellate Body made the following general statement about WTO rules and the concept of 'security and predictability':

> WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.

[29] In *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (1997) (Report of the Appellate Body), 19, the Appellate Body stated:

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.

Also see *European Communities - Trade Description of Sardines*, WTO Doc WT/DS231/R (2002) (Report of the Panel), WTO Doc WT/DS231/AB/R, AB-2002-3 (2002) (Report of the Appellate Body).

[30] It is perhaps for this reason that the issue was placed on the Doha negotiating agenda. See Chapter 1.

be able to predict with some confidence the circumstances in which MEA trade measures and unilateral trade measures would pass scrutiny.

III. WTO Decision-Making Procedures

The WTO sets up various legislative mechanisms that could be used to avoid or address conflicts between trade liberalization and international environmental protection. If reforms are deemed necessary, choices must be made regarding the best mechanism to use. Options in this regard include Ministerial Declarations and Decisions, an authoritative interpretation, a waiver of obligations, and amendments to the relevant agreements.

The appropriateness of each mechanism to resolve ambiguities or disputes depends in part on its legal effect and the feasibility of rallying the necessary number of votes. Where the issue is politically sensitive, the members may prefer to take a decision by consensus rather than take a decision by vote even if there are sufficient votes to make a decision using one of these mechanisms.[31] Indeed, the practice of decision making by

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[31] For example, at the Doha Ministerial Meeting, the WTO members chose to adopt a Ministerial Declaration on TRIPS by consensus despite the difficulty in achieving consensus on the wording of the document. The purpose of the Declaration was to clarify the effect of TRIPS on access to patented medicine in developing countries to treat diseases such as AIDS. A large number of developing country members insisted this issue be resolved to their satisfaction before they would agree to a negotiating agenda for a new round of trade negotiations. For a more detailed discussion of the political and legal context surrounding the adoption of this Declaration, see Bradly Condon, 'The Twin Security Challenges of AIDS and Terrorism: Implications for flows of trade, capital, people and knowledge', in Ross P Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (2003), 251. The TRIPS Declaration left one particularly difficult issue to be resolved later (how to ensure that countries lacking manufacturing capacity could avail themselves of the right to issue compulsory licenses on patents). Of the 144 WTO members, 143 reached agreement on how to resolve this issue (with the United States opposed). Nevertheless, the WTO membership chose to continue efforts to reach an agreement by consensus, and

consensus reinforces the *de jure* equality of WTO members and the consistency of WTO decision making procedures with the principle of sovereign equality.

A. Ministerial Declarations and Decisions

As a general rule, the WTO is required to continue the GATT practice of 'decision-making by consensus',[32] which is defined as 'no Member, present at the meeting when the decision is taken, formally object[ing] to the proposed decision'.[33] Thus, consensus does not require unanimity. As a general rule, where a decision cannot be reached by consensus, the matter is decided by voting.[34] Decisions of the Ministerial Conference and General Council are taken by a majority of the votes cast, unless otherwise provided.[35] In contrast, decisions of the General Council sitting as the Dispute Settlement Body must be taken by consensus.[36] Authoritative interpretations, decisions, and waivers come under the heading of 'Decision-Making' procedures in the *Marrakesh Agreement Establishing the World Trade Organization* ('*WTO Agreement*'), but the rules differ regarding the

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agreed to amend TRIPS Article 31. See *Decision of 30 August 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc IP/C/W/405, available at <www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003. For a detailed analysis, see Bradly Condon and Tapen Sinha, 'Bargaining for Lives at the World Trade Organization: The Law and Economics of Patents and Affordable AIDS Treatment' (forthcoming).

[32] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX: 1.

[33] Ibid art IX: 1, footnote 1.

[34] Ibid art IX: 1.

[35] Ibid art IX: 1. While the Ministerial Conference and the General Council both consist of all WTO members, generally the former is composed of members' trade ministers, while the latter consists of members' ambassadors to the WTO. Similarly, members may assign different individuals to work in different WTO bodies, such as WTO Councils and Committees charged with overseeing different agreements and issues, depending on their seniority and specific areas of expertise. See generally World Trade Organization, 'Whose WTO is it anyway?', <www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#ministerial> at 31 March 2003.

number of votes and procedures followed for each.[37] Waivers and authoritative interpretations of GATT obligations must be approved by a three-fourths majority.[38] A simple majority of WTO members may issue Decisions under GATT[39] and the *WTO Agreement.*[40] There is no provision that states how many votes are required to issue a Ministerial Declaration. The practice is to reach consensus on Ministerial Declarations, which accords with the general rule.[41]

In disputes over the interpretation of WTO obligations, WTO panels only have jurisdiction to hear complaints brought under 'covered agreements' (Multilateral Agreements on Goods, GATS and TRIPS), the *WTO Agreement* and the DSU.[42]

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[36] Ibid art IX: 1, footnote 3; *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 2(4).

[37] See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX. This article applies to decisions in general. However, it does not apply to certain types of decisions that are governed by distinct procedures. For example, decisions under a Plurilateral Trade Agreement, including decisions on interpretations and waivers, are governed by the provisions of those agreements (art IX:5). Decisions relating to amendments and accessions are governed by art X and XII, respectively.

[38] See ibid art IX(3), (4). See also, GATT Article XXV and Chris Wold, 'Multilateral Environmental Agreements and the GATT: Conflict and Resolution?' (1996) 26 *Environmental Law* 841.

[39] See GATT Article XXV and Wold, ibid.

[40] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX:1.

[41] Ibid art IX: 1. This practice has been evident at recent WTO Ministerial Conferences. The lack of consensus at the 1999 Seattle meeting and the 2003 Cancun meeting stalled progress in WTO negotiations. At the 2001 Doha meeting, compromises were reached in order to achieve consensus on the content of the negotiating agenda, particularly with respect to pharmaceutical patents, agricultural subsidies and trade remedy laws. See *Ministerial Declaration, Fourth Ministerial Conference*, Doha, Qatar, adopted 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, available at <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> at 30 June 2002. Also see Elizabeth Olson, 'Drug Issue Casts a Shadow on Trade Talks', <www.nytimes.com>2 November 2001 and Steven Chase, 'Drug patent skirmish threatens WTO talks', *Globe and Mail* (Toronto), 9 November 2001, B6.

[42] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'), 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 1. The application of the

Ministerial Decisions and Declarations are not 'covered agreements'.[43] Thus, Ministerial Decisions and Declarations may not form the basis of a complaint. However, they may influence the interpretation of the covered agreements and thereby provide a defence against complaints.[44] WTO panels and the Appellate Body have considered Ministerial Decisions and Declarations in their interpretation of the WTO covered agreements, including the *Declaration on the Relationship of the WTO and the IMF*,[45] the *Decision on Trade and Environment*.[46] Nevertheless, the legal effect of Ministerial Decisions and Declarations remains unclear.[47]

The *WTO Agreement* makes no mention of 'Declarations' at all. Nor do the DSU, GATT 1947 or GATT 1994. However, the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* includes a long list of Ministerial Decisions

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DSU to Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each agreement. See DSU Appendix 1.

[43] Ibid art 1 defines covered agreements as those listed in Annex 1 of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994) and Decisions and Declarations are not listed there.

[44] See Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535. Generally, sources of international law other than the covered agreements apply in WTO disputes provided 'that both disputing parties are legally bound by them and it is done in the examination of WTO claims.' See Pauwelyn, 563. Thus, 'a defending party can invoke only those rules by which both itself and the complaining party are bound'. See Pauwelyn, 566.

[45] *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc. WT/DS56/AB/R (1998) (Report of the Appellate Body) paras 65 and 69.

[46] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

[47] See James Thuo Gathii, 'The Legal Status of the Doha Declaration on Trips and Public Health Under the Vienna Convention on the Law of Treaties' (2002) 15 *Harvard Journal of Law and Technology* 291 (arguing that given the divergent interpretations of the TRIPS Agreement, the Doha Declaration should now be regarded as an interpretive element in the interpretation of the TRIPS agreement under customary international law). Gathii notes that the Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) referred to Paragraph 16 of the Singapore Ministerial Declaration, which summarized the 1996 Report of the Committee on the Trade and the Environment, to support its findings, referring in particular to the

and Declarations.[48] Where not otherwise provided in the *WTO Agreement* or Multilateral Trade Agreements, the WTO is guided by GATT decisions, procedures and customary practices.[49] The Vienna Convention also recognizes state practice as a source of law.[50] Thus, clues as to the legal effect of Ministerial Declarations may be found in GATT and WTO practice.

One example of WTO practice regarding Declarations is the *Declaration on the TRIPS Agreement and Public Health*, adopted at the Doha Ministerial Conference in 2001.[51] This Declaration was adopted by consensus. The WTO implemented certain provisions of the TRIPS Declaration in the form of a Decision and a Waiver.[52] The TRIPS Declaration provides, 'We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016…'.[53] Section 5 applies to patents and Section 7 applies to the protection of

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Report's emphasis on 'multilateral solutions'. However, he also notes that the United States has maintained that Doha was a political declaration with no legal authority. See Gathii, 315.

48 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994), 439-475.

49 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art XVI:1.

50 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(b).

51 *Declaration on the TRIPS Agreement and Public Health*, 14 November 2001, WTO Doc WT/MIN(01)/DEC/2, 20 November 2001, <www.wto.org> at 30 November 2001.

52 *Decision of the Council for TRIPS of 27 June 2002, Extension of the transition period under Article 66.1 of the TRIPS Agreement for least-developed country members for certain obligations with respect to pharmaceutical products*, WTO Doc IP/C/25, <www.wto.org> at 14 July 2002. *Least-developed country members— obligations under article 70.9 of the trips agreement with respect to pharmaceutical products*, waiver submitted to the WTO General Council for approval on 8 July 2002, <www.wto.org> at 30 July 2002.

53 *Declaration on the TRIPS Agreement and Public Health*, 14 November 2001, WTO Doc WT/MIN(01)/DEC/2, 20 November 2001, <www.wto.org> at 30 November 2001, para 7.

undisclosed information. The TRIPS Decision formalizes paragraph 7 of the TRIPS Declaration, using the same language. While this suspension of obligations takes the form of a Decision, the effect is to *waive* these obligations for least-developed countries for the stated period of time.[54] The TRIPS Waiver waives the obligations of least-developed countries to provide exclusive marketing rights to patent owners until 2016.[55]

Does the fact that certain aspects of the TRIPS Declaration were implemented using other WTO decision-making procedures provide evidence of the intended legal effect of the remainder of the TRIPS Declaration? There are two good reasons to believe that it does not. First, this choice of procedures reflects the procedural requirements of the *WTO Agreement* with respect to the *suspension* of obligations, which differ from the procedure for merely *interpreting* obligations. Second, WTO practice with respect to Decisions and

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[54] The *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994) ('TRIPS') already allowed least-developed countries and developing countries to delay providing patent protection for pharmaceuticals. Least developed countries could delay intellectual property protection generally until 2006 (TRIPS art 66.1). Developing countries could do so until 2000 (TRIPS art 65.2). With respect to patents however, developing countries could delay protection until 2005 if they did not provide patent protection for a particular area of technology when TRIPS obligations came into effect in 1995. Less than twenty developing countries fit this description. See WHO/WTO, *WTO Agreements and Public Health*, 22 August 2002, 47, note 13, <www.wto.org> at 22 March 2003. The effect of the Decision, for least-developed countries, is to waive their obligations to provide patents for pharmaceuticals until 2016, at which point the exemptions may be extended further. Decisions to waive obligations that are subject to a transition period must be taken by consensus only, not by three fourths of the members as with waivers in general. *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX: 3(a), footnote 4.

[55] WTO members have to permit patent applications to be submitted during the transition period for pharmaceutical products (TRIPS art 70.8). If the country then approves the sale of the product, and a patent has been filed and granted in another WTO member after 1 January 1995, the patent applicant must be given 'exclusive marketing rights' for five years even though there is no patent (TRIPS art 70.9). These obligations have been in force since January 1, 1995 and have been applied in a dispute involving India. See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (1997) (Report of the Appellate Body). The TRIPS Waiver provides, 'The obligations of

Declarations indicates that the *language* used is more important than the *title* used for the document in terms of its effect on interpretation.

The *Decision on Trade and Environment* can be categorized as a non-interpretative decision, since it contains no formal interpretations of WTO provisions.[56] The Decision itself simply requires the establishment of the Committee on Trade and Environment and sets out its mandate. However, the preamble of the *Decision on Trade and Environment* nevertheless influenced the interpretation of Article XX(g) in the Shrimp case (by prompting the analysis of the multilateral environmental agreements listed in the preamble) and so appears to have some effect on interpretation. In contrast, DSU Article 3(12) gives developing countries the right to invoke the *Decision of 5 April 1966* when they bring a complaint against a developed country.[57] Moreover, certain provisions in the *Decision of 5 April 1966* prevail over DSU procedural rules where they differ. Thus, there is a category of decision whose substantive provisions can prevail over a WTO understanding. These two examples demonstrate that not all Decisions are alike. Decisions can differ in the degree of influence they have on a WTO panel's interpretation. Where a Decision constitutes a formal interpretation, it is binding on WTO panels, whereas a non-interpretative decision can merely influence a panel's interpretation of the covered agreements. Thus, the language used in the Decision is more important than the fact that it is called a Decision.

least-developed country Members under paragraph 9 of Article 70 of the TRIPS Agreement shall be waived with respect to pharmaceutical products until 1 January 2016'.

[56] *Decision on Trade and Environment*, adopted 14 April 1994 at the meeting of the Trade Negotiations Committee in Marrakesh, in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994), 469.

To determine the legal effect of the language used in Ministerial Decisions and Declarations on the rights and obligations of WTO members one must turn to the *Vienna Convention*.[58] The relevant obligations of the covered agreement must 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose',[59] together with 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions',[60] 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation',[61] and 'any relevant rules of international law applicable in the relations between the parties'.[62]

WTO practice indicates that the legal effect of Ministerial Decisions and Declarations depends on their content.[63] Neither mechanism appears to be suitable for resolving ambiguities with respect to trade and environment issues. Indeed, the use of these mechanisms could increase the ambiguity since it is difficult to predict how they might affect judicial interpretations of the covered agreements.[64]

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[57] *Decision of 5 April 1966*, GATT BISD 14th Supp, 18.
[58] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[59] Ibid art 31(1).
[60] Ibid art 31(3)(a).
[61] Ibid art 31(3)(b).
[62] Ibid art 31(3)(c).
[63] The United States, however, took the position that the TRIPS Declaration was merely a political statement that had no legal effect.
[64] Ministerial Decisions and Declarations are not 'covered agreement'. As a result, the WTO judiciary does not have jurisdiction to consider claims under these documents. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 11. Pauwelyn states the following: 'A WTO panel may only decide

B. Waivers

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a member by the *WTO Agreement* or any of the Multilateral Trade Agreements.[65] If a waiver decision concerning the *WTO Agreement* cannot be taken by consensus within 90 days, the decision to grant a waiver is taken by three-fourths of the Members.[66] A request for a waiver concerning the Multilateral Trade Agreements must be submitted initially for consideration by the relevant Council, which then submits a report to the Ministerial Conference.[67] In the interval between Ministerial Conferences, the WTO General Council may approve waivers.[68]

Waivers have a clear legal effect (though their parameters may be subject to interpretation). A waiver does not bind WTO panels to a particular interpretation of the obligation in question, nor influence its interpretation.[69] Rather, it suspends the operation of the obligation within the parameters set out in the waiver itself. Thus, like amendments, waivers form part of the covered agreements, rather than a separate source

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these other claims if the parties to the dispute in question grant it this jurisdiction ad hoc and by mutual consent, for example, by explicitly agreeing on special terms of reference pursuant to DSU Article 7.3 or by referring the dispute, including these other claims, to arbitration under DSU Article 25'. Pauwelyn, above n 43, 554.

65 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX: 3. There are specific procedures set out for waivers of GATT obligations, but the voting procedure is governed by Article IX. See Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994.

66 Ibid art IX: 3. However, decisions regarding obligations that are subject to a transition period can only be taken by consensus. See ibid art IX: 3(a), footnote 4.

67 Ibid art IX:3.

68 Ibid art IV:2.

69 See for example, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/R (1997) (Report of the Panel), para 164.

of interpretation.[70] While their language may still be subject to interpretation, like other provisions of the covered agreements, the legal effect of using these mechanisms is clearer than the legal effect of Ministerial Decisions and Declarations.

Waivers are not an appropriate mechanism to use to deal with the issue of unilateral trade measures to protect the extraterritorial environment. Waivers represent a very short-term solution because they expire.[71] A longer term solution would be more appropriate to address potential conflicts between trade obligations and international environmental obligations. The use of a waiver for unilateral measures would indicate that such measures are not permitted under Article XX, which would run counter to the *Shrimp II* interpretation of Article XX(g), and thus undermine an interpretation of Article XX that is consistent with the doctrine of necessity. In this regard, the use of a waiver could present an obstacle to achieving greater coherence between WTO law and customary international law. Moreover, unilateral measures are generally not permitted under the necessity doctrine unless the situation is urgent and efforts to reach a negotiated solution have failed. To require a State to negotiate a waiver in the WTO makes no sense in these circumstances. With respect to environmental matters, the appropriate forum for negotiations is not the WTO. Rather, environmental negotiations should be conducted on

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[70] Pauwelyn groups these mechanisms as follows: 'A distinction should be made between treaties or rules agreed upon by WTO members (such as amendments pursuant to Article X of the WTO Agreement or renegotiations under [GATT and GATS]) and rules set out in acts by WTO organs (such as waivers pursuant to Article IX:3…or DSB decisions to suspend concessions. The former…alter WTO covered agreements (and hence automatically become part of those agreements). The latter acts…are not strictly speaking part of WTO covered agreements. When applying such acts, the WTO judiciary is thus applying rules that are not part of WTO covered agreements.' See Pauwelyn, above n 43, note 194.

[71] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the

a bilateral, regional or multilateral basis in conformity with the general principles of the *Rio Declaration* and *Agenda 21*. For these reasons, waivers are not an appropriate mechanism for avoiding conflicts between WTO law and international environmental law.

C. Authoritative Interpretations

The *WTO Agreement* gives the Ministerial Conference and the General Council 'exclusive authority to adopt interpretations' of the *WTO Agreement* and the Multilateral Trade Agreements.[72] With respect to Annex 1 agreements (goods, services and intellectual property rights), interpretations must be based on a recommendation of the Council overseeing the particular agreement.[73] The decision to adopt an interpretation must be taken by a three-fourths majority of the Members (though, as noted above, the preference is to take decisions by consensus).[74] However, this mechanism cannot be used in place of the WTO amendment procedures.[75] Thus, this procedure may only be used to clarify provisions that are otherwise ambiguous, not to create new obligations or exceptions.

Dailey advocates an interpretation of Article 3(2) of the DSU to require panels to interpret the WTO agreements in accordance with customary rules of public international law, rather than simply the customary rules of *interpretation* of customary international

Uruguay Round, 33 ILM 1125 (1994), art IX:4, provides that waivers that do not expire after one year are to be reviewed annually to determine whether they should continue in force.

[72] Ibid art IX:2.

[73] Ibid art IX:2.

[74] Ibid art IX:2.

law.[76] This aspect of Dailey's proposal is unnecessary. The *Vienna Convention* already permits the customary rules of public international law to be taken into account in treaty interpretation.[77] Dailey goes on to argue that sustainable development has become accepted as a rule of customary international law. This is a difficult argument to accept given the vagueness of the concept.[78] Dailey's version of this 'principle' would oblige nations to exploit their resources in a manner that is sustainable (a view that is contrary to general international law).[79] Dailey proposes a WTO interpretation that would require panels to take greater account of this formulation of the 'principle' of sustainable development. However, the Appellate Body has already taken the concept of sustainable development into account, though not in the manner proposed by Dailey.[80]

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[75] Ibid art IX:2.

[76] Virginia Dailey, 'Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO' (2000) 9 *Transnational Law and Policy* 331.

[77] This point is discussed in Chapter 1. Also see *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(c), *Korea—Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (2000) (Report of the Panel), para 7.96 and Pauwelyn, above n 43, 542-543.

[78] See Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Lang, above n 21, 54, 58, noting that there is 'no generally accepted international legal definition of sustainable development'.

[79] Dailey, above n 75. State sovereignty gives countries the right to exploit their own resources as they wish, a view of international law that is confirmed by the *Declaration of the United Nations Conference on the Human Environment* 5-16 June 1972, UN Doc A/Conf/48/14/Rev.1 and Corr.1 (1973), (1972) 11 ILM 1416 (Stockholm Declaration), Principle 21 (Stockholm Declaration) and the *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874, Principle 2. See Chapter 4. Dailey acknowledges that the scope of the principle remains controversial, and adopts the consensus view as to the four core principles of sustainable development: intergenerational equity (preserving resources for the benefit of present and future generations), sustainable use (exploitation of resources at sustainable levels), equitable use (which takes into account the needs of other states), and integration (integrating environmental concerns into economic and other decision-making processes).

[80] In *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), the Appellate Body referred to the WTO preamble reference to sustainable development, contrasting it with the GATT 1947 preamble, in its reasons for justifying the American measure as a legitimate natural resource conservation measure under Article XX(g).

Dailey also advocates an interpretation of the necessity test in Article XX(b) to require that less trade restrictive alternatives to trade measures not be accepted as a reason to strike down trade measures unless they meet a test of substantially equivalent environmental effectiveness. Since several panels have already indicated that multilateral efforts are the primary less-trade-restrictive alternative to unilateral trade embargoes, it is difficult to see why the least-trade-restrictive principle needs to be re-interpreted to deal effectively with MEA trade measures. This proposed interpretation is also unnecessary.

Fletcher advocates the negotiation of an agreement on the interpretation of Article XX based on a proposal made by the European Union.[81] The European Union proposal included a provision that would explicitly resolve potential conflicts between the WTO and MEA trade measures that is similar to NAFTA Article 104 of the *North American Free Trade Agreement*.[82] However, the proposal was rejected by both developed and developing country members of the WTO. Some nations believed that the existing provisions were adequate to resolve any conflicts that might arise, while others feared that this would allow developed countries to use environmental measures to decrease

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[81] See Charles R Fletcher, 'Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements within the Existing World Trade Regime' (1996) 5 *Journal of Transnational Law and Policy* 341. The EU proposal included the following elements: (1) establishment of measures to ensure the effective implementation of measures to protect the environment, including the Basel Convention, the Montreal Protocol and CITES; (2) development of an interpretive document for GATT Article XX to set out clear criteria on the use of trade measures to enforce multilateral environmental agreements, including circumstances under which trade sanctions taken pursuant to a MEA, and applied to a GATT member which did not sign the MEA, can go against other GATT obligations; and (3) clarification of the circumstances under which the production process methods will qualify as GATT Article XX exceptions.

[82] *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, opened for signature 17 December 1992, 32 ILM 296 (1993) (entered into force 1 January 1994). The European Union proposal resembles NAFTA Article 104 insofar as it proposes the inclusion of the same MEAs and implies that MEA measures be implemented using the least-trade-restrictive alternative. See EU proposal, ibid.

market access.[83] Given the differences of opinion among WTO members on whether to adopt an authoritative interpretation of this kind, it appears unlikely that consensus could be achieved or that sufficient votes could be rallied for such a decision to take place. Moreover, seeking to insert a conflicts clause by way of an interpretation, rather than incorporating a conflicts clause through the amendment procedure, does not resolve the problems that a conflicts clause could cause.[84]

The authoritative interpretation mechanism is useful for overruling or confirming judicial interpretations where inconsistent judicial decisions create confusion regarding the state of the law. This mechanism is also useful to promote coherence between WTO law and the general body of international law, by overruling or confirming judicial decisions on the WTO application of generally accepted principles of general international law.[85] However, as I showed in Chapters 3 and 4, the decisions of the WTO judiciary in the trade and environment area are generally consistent with customary international law. The discrepancies that exist between the interpretations in the *Tuna* cases and the *Shrimp* cases do not need to be resolved through a formal interpretation because the *Tuna* cases were never adopted. Moreover, the task of resolving divergent views of States regarding

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[83] See Wold, above n 37. See also *Report of the Committee on Trade and Environment* (1996) WT/CTE/1, paragraph 176, reproduced in Nordstrom and Vaughan, above n , Annex III.

[84] The problems associated with a conflicts clause were discussed in Chapter 3.

[85] For example, in *The United Mexican States v Metalclad Corporation* (2001) BCSC 664, the requirement to treat foreign investors in accordance with international law was interpreted to exclude the concept of transparency, an obligation contained in many treaties, on the grounds that no evidence had been introduced to show that the concept of transparency formed part of customary international law. The NAFTA Commission subsequently adopted a formal interpretation confirming the court's interpretation to ensure that future arbitration panels would not read a transparency obligation into the minimum standard of treatment for foreign investors under NAFTA Chapter 11. See *NAFTA – Chapter 11 – Investment, Notes of Interpretation of Certain Chapter 11 Provisions* (NAFTA Free Trade Commission, 31 July 2001), <www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp> at 15 October 2001.

the content of general principles of international law, such as the principle of non-intervention, fall outside the jurisdiction of not only the WTO judiciary, but the WTO itself.[86]

At this stage of jurisprudential development, it would be premature to negotiate an authoritative interpretation regarding the effect of general international law on the interpretation of Article XX in environmental cases. While more research is needed to flesh out the relationship between WTO law and other branches of international law, the WTO judiciary already takes general international law into account in its interpretations. It would be unwise to negotiate an authoritative interpretation that directs the WTO judiciary to adopt a particular view of general international law. The WTO is not the proper forum in which to seek consensus on the content of general principles of international law. Moreover, the divergent views of WTO members on the European Union proposal suggest that such negotiations would be futile.

D. Amendments

There is a precedent for amending GATT Article XX to add new exceptions. GATT Article XX(h), allowing measures 'undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted…and not disapproved…or which itself is so submitted and not so disapproved', serves as an

[86] For a customary rule of international law to emerge, there must be universal consent. Since not all States are WTO members, it is beyond the capacity of the WTO to establish such consent. As a result, the codification of customary international law takes place in the United Nations context (for example, the work of the International Law Commission and the International Court of Justice), rather than the WTO.

example of the type of amendment that might be inserted in Article XX for MEA trade measures. Decisions to amend provisions of the multilateral agreements can be adopted through approval either by all members or by a two-thirds majority, depending on the nature of the provision concerned. Amendments only take effect for those WTO members which accept them.[87] However, in order to maintain the consistency of WTO obligations, decisions to amend GATT should be taken by consensus.

Adding a new clause to Article XX that specifically permits trade measures taken pursuant to MEAs is problematic. The benefit of adding a clause to Article XX is that the clause would clarify that the implementation of MEA trade measures would be subject to the tests of the chapeau.[88] However, such a clause would provide evidence that the WTO parties intend Article XI and other GATT obligations to apply to MEA trade measures. This would forestall an interpretation that Article XI is not intended to apply to MEA trade restrictions. Such a clause would invite challenges to MEA trade measures, challenges that have not yet occurred.

Moreover, since not all WTO members are parties to every MEA, the legal rights provided in a general MEA clause would not be available to all WTO members. This

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With respect to the emergence of customary rules of international law, see Oscar Schacter, 'New Custom: Power, Opinio Juris and Contrary Practice' in *21st Century*, above n 19, 531.

87 See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, 33 ILM 1125 (1994), art X and Pauwelyn, above n 43.

88 This can also be achieved by inserting the language of the chapeau into MEAs. For example, the *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, (1992) 31 ILM 849 (entered into force 21 March 1994), art 3.5 provides that 'measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a

would raise issues regarding the consistency of such a clause with the *de jure* equality of WTO members. As such, it would create divergence, rather than coherence, between legal rights under Article XX and the principle of sovereign equality, which underlies other GATT and WTO provisions.[89] Given existing jurisprudence, no amendment to Article XX is necessary to ensure coherence between WTO law, international environmental law and general international law in the treatment of MEA and unilateral measures. The argument that greater clarity is needed, while appropriate for certain classes of legal rights, does not support the amendment of Article XX to address MEA or unilateral trade measures.[90] Moreover, in the current WTO climate where members have difficulty reaching agreement on issues that divide developed and developing country members, it would be difficult to achieve an agreement regarding unilateral measures or MEA measures that are applied to third parties. Indeed, the fact that the WTO members left these issues out of the MEA negotiating mandate in the Doha Round is a sign of their lack of agreement.

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disguised restriction on international trade', which mirrors the language in the chapeau of GATT Article XX.

[89] The principle of sovereign equality finds at least four applications in WTO law: the WTO principle of nondiscrimination; the WTO practice of decision making by consensus; dispute settlement; and preferential treatment. The implicit purpose of all four manifestations of sovereign equality is to ensure equal access to WTO rights. See discussion in Chapter 4.

[90] For example, the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994) ('TRIPS'), art 31 required amendment because inequality of access to the right to use compulsory licensing could not be resolved with the necessary clarity by leaving the matter to judicial interpretation. Certainty regarding the right to issue compulsory licenses was necessary to provide equality of bargaining power between national governments that lacked pharmaceutical manufacturing capacity and the private sector. Because the language of Article 31 was too specific to interpret away the problem, it had to be amended. The context of Article XX (general exceptions that serve a constitutional function) is very different from TRIPS Article 31 (a specific exception to a specific set of obligations in the narrow field of patents). See the discussion of the TRIPS amendment, above n 19.

In order to fulfil its 'constitutional' function, Article XX requires broad language that is capable of flexible interpretations in a variety of situations. The addition to Article XX of a clause for MEA measures would introduce an element of inflexibility with respect to the allocation of decision-making authority over environmental issues between the WTO and national governments. The role of Article XX in promoting consistency between WTO law and the evolving principles of general international law requires flexible language that supports an evolutionary approach to interpretation. In contrast, the role of a conflicts clause is to resolve conflicts where it is not possible to interpret away the inconsistencies. Thus, more specific language in Article XX would increase the need for a conflicts clause by limiting opportunities to develop consistency.

At present, none of the WTO legislative mechanisms provides an appropriate method for resolving the ambiguity of Article XX in a manner that would promote consistency or avoid conflicts between GATT, international environmental law and general international law. The uncertain legal effect of Ministerial Declarations and Decisions could increase the ambiguity. Waivers have a clear legal effect, but would undermine the development of judicial interpretations of Article XX that are consistent with non-WTO rules of international law. Waivers would provide only short-term solutions that could create obstacles to achieving greater coherence between WTO law and other branches of international law. Given current jurisprudence on Article XX and the current difficulty WTO members have reaching agreements, it would be unnecessary and fruitless to engage in negotiations to adopt authoritative interpretations or amendments that would reduce the flexibility of the judiciary to use evolutionary interpretations of Article XX to

resolve the complex legal issues that are at stake. The WTO dispute resolution process provides the best mecha nism for developing further coherence between GATT, international environmental law and general international law.[91] Like democracy, the judicial development of law is imperfect, but it represents the best available alternative to develop coherence between different branches of international law. However, authoritative interpretations provide a useful mechanism for judicial decisions that diverge from this path, should the need arise in the future.

IV. The Standard of Review and Judicial Deference

Having advocated the path of judicial development of law, it is important to establish the parameters within which these developments take place. The judicial branch of the WTO cannot legislate. Rather, the task of the judiciary is to clarify the rights and obligations that have been created by the legislative branch of the WTO. For this reason, it is necessary to maintain a degree of ambiguity in the language of Article XX. The broad language of Article XX also facilitates the flexible division of legislative authority between the WTO and national governments, a task that must take into account the principle of sovereign equality.

The standard of review that WTO panels apply under Article XX has a direct impact on the allocation of decision-making authority between the national governments and international organizations. Two key issues regarding the standard of review to be applied by WTO panels is the degree of deference panels should show to the decisions of

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[91] I recognize that my training in common law may bias my perspective on the benefits of the judicial

national governments and to the decisions of other international bodies, including the WTO legislative branch itself.

With respect to deference to national governments, the DSU contains no explicit standard of review.[92] However, Article 3(2) incorporates the customary rules of public international law, which generally extend a high measure of deference to the right of domestic authorities to regulate matters within their own borders.[93] The point that WTO panels and the Appellate Body 'cannot add to or diminish the rights and obligations provided in the covered agreements' is emphasized by repetition in DSU Articles 3(2) and 19(2).[94] This standard of review shows considerable deference to the decision-making authority of the members *as a group*.[95]

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development of law.

[92] However, art 17(6) of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994) sets out a standard of review that applies only in antidumping cases. The *Decision on review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* requires a review of this standard after three years to consider whether it is capable of general application. For a discussion of these provisions and their negotiating history, see Jackson, *Jurisprudence*, above n 3. In the context of Article 17.6, he raises the question of the type of ambiguity required in a provision to permit different interpretations and thus trigger a panel's deference (at 144), arguing that the application of the rules of interpretation in *Vienna Convention* arts 31 and 32 should eliminate ambiguity.

[93] In *The United Mexican States v Metalclad Corporation* (2001) BCSC 664, 23, the court stated that the standard of review must take into account 'the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders'.

[94] In addition, Appellate Body reviews of panel decisions are limited to 'issues of law covered in the panel report and legal interpretations developed by the panel.' (DSU Article 17(6)). As noted by Jackson, this presents the difficulty of distinguishing between questions of law and questions of fact. See Steven P Croley and John H Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *American Journal of International Law*, 193.

[95] Jackson sees the allocation of power between the WTO members and panels as analogous to the allocation of power between the United States Congress and the specialized agencies of the United States executive set up to interpret and apply the laws passed by Congress, a distribution of power that rests in part on the standard of review United States courts apply to the decisions of those agencies. See Jackson, *Jurisprudence*, above n 3, 151.

The DSU cautions members that, 'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful'[96] and notes DSU provisions 'are without prejudice to the rights of Members to seek *authoritative* interpretation of provisions of a covered agreement through decision-making under the WTO agreement….'[97] These provisions imply responsibility on the part of WTO parties to recognize the limits to the jurisdiction of WTO panels, both in terms of their inability to legislate and in terms of the parameters of their legal jurisdiction. That is, the parties must make choices regarding the issues they raise and their choice of judicial forum.

The issue of standard of review and deference to national governments has arisen in many cases involving trade remedy laws, but a discussion of the standard as it is used in those cases is beyond the scope of this thesis.[98] Moreover, the argument that reviewing courts should show deference to specialized administrative agencies based on the relatively greater technical expertise of the latter does not apply to the trade specialists sitting as WTO panel members.[99] Jackson argues persuasively that the standard of review applied in judicial review of administrative action in a domestic context is not necessarily appropriate in the WTO context:

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[96] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(7).
[97] Ibid art 3(9).
[98] Jackson lists the following cases where the issue of deference has been raised: *United States—Section 337 of the Tariff Act of 1930*, BISD, 36th Supp (1990), 345; *Korea—Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, GATT Doc ADP/92 (1993), paras 208-213; *United States—Taxes on Automobiles*, GATT Doc DS31/R (1994), paras 5.11-5.15; and *United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT Doc ADP/8 (1992), paras. 43-67. See Jackson, *Jurisprudence*, above n 3.
[99] Jackson, *Jurisprudence*, above n 3, 154.

> The observation that national authorities, unlike agencies, are not accountable to the [WTO] membership at large speaks to the very purpose of the dispute settlement process, indeed the GATT/WTO Agreement itself – an agreement that, at bottom, seeks to overcome the significant coordination or collective-action problems that its membership otherwise faces. Absent the Agreement (or one like it), individual members have an incentive to erect trade barriers that may 'benefit' them individually, to the greater detriment of other members. Furthermore, absent some dispute settlement process for keeping members faithful to the Agreement, members have similar incentives to apply the Agreement in ways 'advantageous' to them. Further still, absent a standard of review for legal questions that prohibits self-serving interpretations of the Agreement that are *arguably* but not *persuasively* faithful to the text, members have an incentive to erode the agreement through interpretation.[100]

Jackson argues that 'effective international cooperation depends in part on the willingness of sovereign states to constrain themselves by relinquishing to international tribunals at least minimum power to interpret treaties and articulate international obligations'.[101] However Jackson also notes 'the need for some deference to national government decisions…[to] lessen the dangers of inappropriate unilateral reactions by governments and citizen constituencies of nation-state members of the WTO'.[102] Jackson argues that the appropriate standard will vary with the subject matter and adds that:

> panels should keep the relevant purposes, strengths and limitations of their institution in mind….At times…governments can justifiably argue that an appropriate allocation of power should tilt in favor of the national governments that are closest to the constituencies most affected by a given decision. [103]

This argument in favour of deference to national governments certainly applies to environmental problems that are contained within national borders. A similar argument can be made that WTO panels should show deference to multilateral environmental organizations with respect to transnational or global problems. In chapter 2, I argued that the former are the subject matter of Article XX(b), while the latter are the subject matter

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[100] Ibid 156.
[101] Ibid 158.
[102] Ibid 160.
[103] Ibid 160.

of Article XX(g). Thus, the degree of deference due to national governments will differ in the two subparagraphs, just as they do in these two contexts.

In the environmental context, several panels have made statements that are relevant to the standard of review. In Tuna II, the GATT panel discussed this issue in the context of Article XX:

> The reasonableness inherent in the interpretation of 'necessary' was not a test of what was reasonable for a government to do, but of what a reasonable govemment would or could do. In this way, the panel did not substitute its judgement for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second guessing of such actions.[104]

This standard of review is questionable, in that it is based on the standard used in judicial review of administrative agencies. It may be appropriate in the context of Article XX(b) measures aimed at domestic environmental problems to show this degree of deference to national governments. However, panels should be less deferential to national governments in the context of Article XX(g), where transnational or global environmental problems are at issue. The panel must not only consider the rights of the country enacting the measure, but also the rights of the other WTO parties, both under WTO agreements and with respect to general international law. The correct balance can not be achieved if the panel employs a standard of review that is too deferential to the national government enacting the measure.

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[104] *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel not Adopted), para 373.

In the *Hormones* case, the Appellate Body made a more concrete statement of standard of review that specifically addressed the division of jurisdiction between the WTO legislative and judicial branches, in the context of the *Agreement on Sanitary and Phytosanitary Measures*:

> The standard of review appropriately applicable in proceedings under the SPS Agreement, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.[105]
> ...
> In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.[106]
> ...
> In so far as legal questions are concerned …Article 11 of the DSU is directly on point, requiring a panel to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...'.[107]

Since the interests protected by national sanitary and phytosanitary measures lie within the territorial jurisdiction of the enacting country, it is appropriate to show a higher degree of deference in the context of this agreement than for unilateral measures that have extraterritorial reach.

In *Hormones*, the Appellate Body also made a general statement regarding the division of decision-making authority between national governments and the WTO:

> We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant

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[105] *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body), para 115.
[106] Ibid para 116.
[107] Ibid para 118.

> such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.[108]

The specificity of WTO obligations is thus relevant to determining the allocation of decision-making authority between national governments and the WTO.

Jackson argues that greater deference to national governments in the environmental policy area means that 'the treaty word 'necessary' in text like that of GATT Article XX…may need to be interpreted to recognize that governments should be authorized to have some choice among several government measures (not mandated to choose, e.g., the 'least restrictive' measure), as long as the choice does not unduly detract from the basic broader goals of the treaty.'[109] I agree that a greater degree of deference is due to national governments in the context of XX(b), but because the subject matter of Article XX(b) lies within the national territory. Deference is due for national government decisions regarding the environment inside their territory. However, the need for deference to international environmental agreements and institutions regarding transboundary environmental protection requires less deference to national governments that act unilaterally.

In *Reformulated Gasoline*, the Appellate Body made a more general statement regarding the degree of deference due to WTO members in the environmental field:

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[108] Ibid para 165.
[109] Jackson, *Jurisprudence*, above n 3, 159, note 71.

> WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.[110]

It is difficult to take issue with such a general statement. It could be read as referring not only to the unilateral determination of national environmental policies, but also the multilateral determination of transnational and global environmental policies in the context of MEAs and the multilateral determination of the relationship between WTO law and international environmental law by the legislative branch of the WTO.

The standard of review can not be the same in all cases; nor can the degree of deference WTO panels accord to national governments, the WTO legislative branch and decisions made in other international *fora*. The deference shown to national governments must vary with the proximity of interest between the national government and the environmental problem. The degree of deference due to the WTO legislative branch depends on the specificity of the provisions under consideration. The deference to decisions made in other international *fora* will vary depending on the subject (for example, the context of general international law is beyond the jurisdiction of the WTO judiciary) and the WTO members that are parties to any relevant treaties (for example, greater deference is due in the case of MEAs that have been entered into force for all of the parties to the dispute). There are thus many factors that must be taken into consideration in determining the parameters of judicial deference in environmental cases.

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[110] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), 30.

V. The Legal Effect of Panel Reports

Having advocated the path of judicial development of law, I must also consider the legal effect of panel reports.

In the context of GATT 1947, Jackson argued that where a panel report is adopted and results in the disputing parties conforming their practice to the conclusions and findings of the report, this provides evidence of practice establishing agreement regarding interpretation under the *Vienna Convention.*[111] Where later panels follow prior panel interpretations on the same issue, this provides further evidence of practice. However, the difficult issue to resolve is what constitutes sufficient practice under the *Vienna Convention.*[112]

Jackson also argued that the Council adoption of a panel report under GATT 1947 could be viewed as the equivalent of a resolution or decision by the Contracting Parties definitively interpreting the GATT, but doubted that this was the intention of adoption. Jackson notes that the practice of GATT parties was to treat adopted panel reports as binding on the parties, but not unadopted reports. The changes to WTO decision-making procedures introduced in the Uruguay Round do not state the legal effect of a panel

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[111] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(b). In *Japan—Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/ /R (1996) (Report of the Panel), the Panel found that panel reports adopted by the Contracting Parties constitute subsequent practice in a specific case.
[112] Jackson, *Jurisprudence*, above n 3, 129.

report, but nevertheless indicate that the panel decisions are binding on the parties.[113] The introduction of formal mechanisms for interpretation and amendment under WTO, combined with automatic adoption of panel and Appellate Body reports, will likely affect the legal impact of panel interpretations in terms of constituting practice under the *Vienna Convention*.[114]

The Appellate Body indirectly addressed the issue of the legal effect of its rulings in *Shrimp I*, chastising the panel for not following the analytical sequence established by the Appellate Body in the Gasoline case:

> [W]e enunciated the appropriate method for applying Article XX….[T]he analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence…'seems equally appropriate'. We do not agree.[115]

In *Shrimp II*, the Appellate Body reaffirmed its view of the legal effect of panel and Appellate Body reports that it had expressed in *Japan – Taxes on Alcoholic Beverages*:

> The reasoning in our Report in United States – Shrimp on which the Panel relied was not dicta; it was essential to our ruling. The Panel was right to use it, and right to rely on it….The Panel had, necessarily, to consider our views on this subject, as we…had provided interpretative guidance for future panels, such as the Panel in this case.
> …
> [I]n *Japan – Taxes on Alcoholic Beverages*, we stated that:
> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.

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[113] See ibid 165. The *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994) provides further that, 'the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements' (art 3(7)) and 'prompt compliance with recommendations or rulings of the DSB is essential….' (art 21(1)).

[114] See Jackson, *Jurisprudence*, above n 3, 168.

[115] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), paras 118-119.

This reasoning applies to adopted Appellate Body Reports as well.[116]

A panel ruling does not provide an 'authoritative interpretation' of a provision. While dispute panels are authorized to 'clarify' provisions by applying the rules of interpretation of the *Vienna Convention*,[117] interpretations by panels are not the same as interpretations under the *WTO Agreement.* DSU Article 3(9) makes a distinction between the provisions of the DSU and 'the rights of Members to seek authoritative interpretation of provisions…through decision-making under the WTO Agreement'. The *WTO Agreement* gives the Ministerial Conference and the General Council 'exclusive authority to adopt interpretations' of the *WTO Agreement* and the Multilateral Trade Agreements.[118] Whereas a panel interpretation only binds the parties to the dispute and does not have the effect of *stare decisis*, an 'authoritative interpretation' would be binding on all members in future disputes. Thus, the two avenues of interpretation have distinct legal effects.

Moreover, the ability of panels to provide innovative interpretations of substantive obligations is limited by DSU Article 3(5) and 3(8). A panel ruling must 'not nullify or

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[116] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body), paras 107-109, citing *Japan—Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body), 108. Regarding unadopted panel reports, the Appellate Body agreed with the panel in the same case that, 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant', at 15.

[117] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(2).

[118] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IX:2.

impair benefits accruing to any Member'.[119] An infringement of obligations 'is considered *prima facie* to constitute a case of nullification or impairment'.[120] Read together, these provisions restrict the ability of panels to interpret GATT Article XI as not applying to trade restrictions imposed under MEAs, since such an interpretation would impair the market access provided under Article XI and thus run counter to DSU Article 3(5). Such an interpretation of Article XI would affect WTO members whether or not they were signatories to the MEA. Thus, a panel would not be in a position to make such an interpretation of GATT Article XI. Such an interpretation of Article XI could only be made by the Ministerial Conference or the General Council, through the decision-making procedure of the *WTO Agreement*.

However, a panel may interpret and apply GATT Article XX(g) so as to permit the use of MEA trade restrictions between WTO members who are parties to the MEA on the basis that the parties themselves had already agreed to the restrictions. The ruling would not be the source of the restriction, but rather the parties themselves.[121] Moreover, DSU Article 3(8) presumes that the infringement of *obligations* constitutes nullification or impairment, but allows the presumption to be rebutted, under exceptions to the obligations such as those contained in Article XX. While DSU Article 3(5) prohibits rulings that nullify or impair benefits', it also prohibits rulings that 'impede the attainment of any objective of those agreements'. Since the WTO preamble sets out

[119] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(5).
[120] Ibid art 3(8). This provision may be viewed as a codification of a GATT panel ruling. However, the fact of the codification does not counteract the arguments being made here.

sustainable development and environmental protection as objectives, along with trade liberalization, and Article XX serves the role of balancing these potentially competing objectives, DSU Article 3(5) cannot be read to prohibit such an interpretation of Article XX.

The Shrimp decisions indicate the openness of the Appellate Body to considering MEAs in its interpretation of the GATT.[122] Indeed, it was the reference to such agreements in the *Decision on Trade and Environment* that seems to have encouraged the Appellate Body to consider the provisions of MEAs in reaching its decisions. However, a MEA (or other agreement between parties to a dispute) need not be mentioned in a WTO agreement to be considered by a dispute panel. Panels are required to address 'the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'.[123]

Panel reports are adopted by the DSB,[124] unless there is consensus not to adopt the report[125] – a condition that is met if no member present at the meeting of the DSB

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[121] Pauwelyn also makes this point. See Pauwelyn, above n 43, 566.

[122] The Appellate Body reviewed provisions of the following MEAs to support its argument in favour of multilateral solutions to resolve transboundary enviromental issues: *Rio Declaration on Environment and Development*, adopted 14 June 1992, Report of the United Nations Conference on Environment and Development 3, Rio de Janeiro 3-14 June 1992, UN GAOR, 47th Sess., 4 UN Doc A/Conf 151/5/Rev.1 (1992) 31 ILM 874, *Agenda 21*, Report of the United Nations Conference on Environment and Development 9, Rio de Janeiro 3-14 June 1992, UN Doc A/Conf.151/26/Rev.1, *Convention on Biological Diversity*, opened for signature 5 June 1992, UNEP/bio.Div./CONF/L.2, 31 ILM 818 (1992) (entered into force 29 December 1993), *Convention on the Conservation of Migratory Species of Wild Animals* and the *Inter-American Convention for the Protection and Conservation of Sea Turtles*, opened for signature 1 December 1996, 37 ILM 1246.

[123] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 7:2.

[124] Ibid art 2(1).

formally objects to the decision not to adopt the report.[126] While the DSB consists of the General Council wearing a different hat[127], the adoption of panel reports by the DSB cannot be viewed as raising the status of a panel's interpretation to the same level as an authoritative interpretation of the General Council. Such a view would render meaningless the provisions that distinguish between panel interpretations and authoritative interpretations and that set up distinct procedures for deciding the two types of interpretation.

The scope of panel rulings are limited to 'achieving a satisfactory settlement of the matter'[128] and 'cannot add to or diminish the rights and obligations'[129] of WTO members. In sum, authoritative interpretations under the *WTO Agreement* can be more intrusive than panel interpretations with respect to the rights of the WTO members.

The *Statute of the International Court of Justice* sets out a hierarchy[130] of sources of international law, in Article 38(1):

> The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted by law;

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[125] Ibid art 16(4).
[126] Ibid art 2(4), and footnote 1.
[127] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994), art IV:3.
[128] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 3(4).
[129] Ibid art 3(2).
[130] There is growing agreement among legal scholars that the order in which these sources are listed indicates the importance to be accorded to each. Thus, the opinions of publicists would be secondary to judicial decisions in this hierarchy. See J Starke, *Introduction to International Law* (5th ed, 1963), 52.

> the general principles of law recognized by civilised nations;
> (c) subject to the provisions of Article 59[131], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[132]

This provision is not directly applicable to the legal effect of different avenues of decision making in the WTO context However, it is consistent with the view that the rulings of the WTO judiciary, while an important part of WTO law, rank below the provisions of international agreements (which includes WTO agreements and MEAs) and customary international law. Maintaining broad, ambiguous language in GATT Article XX facilitates the role of the WTO judiciary in developing a body of jurisprudence that reconciles inconsistencies between these various sources of law as each evolves.

VI. Conclusion

The use of trade measures to address environmental concerns can be addressed at several different points in GATT. Where such measures do not violate national treatment or MFN obligations, either because they do not discriminate or because they apply different measures to distinguishable products, there may be no need to justify them under Article XX. However, where such measures take the form of import or export restrictions, they fail to meet the obligations set out in Article XI and have to be justified under Article XX.

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131 *Statute of the International Court of Justice*, art 59 states: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

132 Cahier argues that this provision should be interpreted to accord greater weight to judicial decisions than to publicists. However, he notes that, in theory, judicial decisions are not really a source of law, though they are treated as such in practice. See Philippe Cahier, 'Le role du juge dans l'élaboration du droit international' in *21st Century*, above n 19, 353. 'La tache du juge est d'appliquer le droit existant et non de le créer….Telle est la téorie, mais la réalité est beaucoup plus complexe….'

Arguing that Article XX should remain ambiguous is counter-intuitive. The task of the DSB is to clarify the provisions of WTO agreements in accordance with the customary rules of interpretation of public international law.[133] However, ambiguity facilitates an evolutionary interpretation of Article XX that takes developments in scientific knowledge and other branches of international law into account. The customary rules of interpretation of public international law amplify the range of interpretative methods that may be employed when the meaning of a provision is ambiguous.[134] Ambiguity permits Article XX to be used to promote greater coherence between WTO law and other branches of international law. Ambiguity also leaves the WTO judiciary with more room to fill in the gaps left by the WTO legislative branch at a time when the members have difficulty reaching agreement. However, these arguments in favour of ambiguity in Article XX do not apply across the board—the appropriate degree of ambiguity depends on the function of a particular provision.[135]

While it is clear that Articles XX(b) and (g) cover environmental trade measures, what remains unclear is the division of subject matter between these two headings. Where a measure does not clearly fit into one or the other, then the subject matter should be

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[133] DSU art 3(2).

[134] Vienna Convention art 32(a) provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure'.

[135] A good example is the right to issue compulsory licenses for patents in TRIPS. The ambiguity surrounding the manner in which countries that lack pharmaceutical manufacturing capacity could exercise this right created legal uncertainty that prevented countries from taking action to address serious health crises such as the HIV/AIDS epidemic. An agreement to amend TRIPS was needed to eliminate legal uncertainty in order to overcome the political inaction that resulted from the threat of legal action.

assigned based on the location of the environmental concern, with domestic concerns dealt with under XX(b) and transnational or global concerns dealt with under XX(g). This interpretation of Article XX—based on a doctrine of proximity of interest—is generally consistent with the case law, avoids redundant interpretations of the two subparagraphs, and is consistent with customary international law regarding the jurisdictional nexus required to invoke necessity. Article XX(b) and (g) leaves WTO members free to choose their environmental policies. However, once it is determined that the policy falls within the subject matter of one of these subparagraphs, the tests of the chapeau will determine whether the implementation of the policy goal is consistent with GATT.

Under the Article XX exceptions, the burden of proving that a measure qualifies for justification is on the country enacting the measure. To demonstrate that a trade restriction is necessary to achieve its stated environmental goal, an importing nation must prove that it is the least-trade-restrictive measure reasonably available to achieve the policy goal. While this test has not been applied by WTO panels in Article XX(g) to determine whether a measure 'relates to' conservation, in practice it has been applied under the chapeau. Since many aspects of the least-trade-restrictive test ultimately turn on the range of choices available to implement a particular policy goal, considerations related to this test are best placed in the chapeau analysis.

While Article XX has to be applied on a case-by-case basis, the body of cases to date provide a basis for summarizing the types of factors that are relevant to the analysis of the manner in which a policy goal is implemented. First, compliance with the measure must

be possible. The measure must therefore be clear as to what constitutes compliance. This may be viewed as an aspect of transparency. Second, there should be international consensus that trade restrictions are the most effective means available to achieve the measure's environmental goal. At the very least, there should be no international consensus that the trade restrictions are unnecessary. Third, where international cooperation is possible, genuine efforts to resolve the problem through international cooperation should have failed. Fourth, the measure must address a problem connected with the environment of the territory of the country enacting the measure. A measure is unlikely to qualify for justification under Article XX if it addresses a problem that does not affect the importing nation. Nor will it qualify if it purports to address a domestic problem, but does nothing to restrict domestic activities that are a cause of the problem.

In principle, the analysis under the chapeau should be the same whether the measure has been provisionally justified under Article XX(b) or (g). In practice, however, the facts of each case must dictate the appropriate factors to consider in a given situation. When an importing country uses trade restrictions to induce a change in the laws of another country, the importing country may have to take differences between countries into account. This factor might not come into play where the aim is only to protect the domestic environment of the importer.

With respect to their parties, MEAs fulfil the key requirements that were imposed on the unilateral measure in the *Shrimp* case. Most MEAs can be characterized as addressing transboundary or global resource conservation. Where a country does not have a

territorial nexus with the environmental problem, the MEA provides a legal nexus and may provide evidence that the subject matter is global, if not transnational. MEAs thus provide the jurisdictiona l nexus and cover subject matter that qualifies MEA trade measures for provisional justification under Article XX(g). The conclusion of the MEA fulfils the duty to negotiate. However, the fulfilment of the requirement for flexible and transparent application of the measure can not be assumed with respect to the implementation of MEA obligations in national law. MEA trade measures must therefore remain subject to WTO scrutiny under the chapeau analysis.

The general conclusion that can be drawn from WTO jurisprudence is that trade measures taken pursuant to MEAs would be consistent with GATT if implemented in a non-discriminatory and transparent manner between parties the MEA. However, WTO jurisprudence regarding unilateral measures does not apply to resources that are located entirely outside the jurisdiction of the importing country and some MEAs, notably CITES, require such 'extraterritorial' measures. However, the existence of a MEA that has been accepted by at least all of the WTO members that are parties to a dispute may be sufficient to categorize an environmental issue as global, rather than extraterritorial, thus providing a sufficient jurisdictional nexus in customary international law. With respect to international environmental law, both the *Rio Declaration* and *Agenda 21* indicate that multilateral agreement can justify the use of trade measures with respect to otherwise extraterritorial environmental problems. Thus, the MEA categorizes a problem as global or transnational and provides the necessary jurisdictional nexus. On this view, the jurisdictional nexus would be legal rather than territorial.

Where WTO parties agree in a MEA that trade restrictions may be employed to pursue specific environmental objectives, it is reasonable to assume that they intend the MEA obligations to prevail over the general prohibition of GATT Article XI. With respect to the implementation of MEA obligations, it is reasonable to assume that WTO parties intend MEA trade measures to remain subject to the Article XX chapeau requirements in order to prevent abuse. The implementation of MEA trade measures thus remain subject to the least-trade-restrictive test.

The application of MEA trade measures to third parties and the use of unilateral trade measures in the international environmental context are more controversial than MEA measures taken among parties. MEA trade measures applied against non-parties are analogous to the type of unilateral measure the United States applied against Malaysia in *Shrimp II*. Thus, they could be justified under Article XX(g) in the same fashion where they address transboundary or global environmental concerns. However, if they are aimed at extraterritorial environmental concerns, it is difficult to see how they could comply with customary international law or international environmental law. As a result, they would not be justifiable under any GATT interpretation that is consistent with these other branches of international law. However, if the subject matter and degree of global acceptance of the MEA permits the problem to be characterized as global, rather than extraterritorial, the measure could be justified under Article XX(g) as addressing a global issue.

A conflicts clause provides one method of clarifying the relationship between MEAs and trade obligations. However, it is not the best way to resolve this question in the WTO context. The conflicts clause is a less flexible approach than leaving panels to apply the broad language of Article XX on a case-by-case basis. The conflicts clause requires negotiation each time a new MEA or international environmental issue arises, whereas the language of Article XX is sufficiently broad to obviate the need for ongoing negotiation. Moreover, a conflicts clause may close off options to take unilateral actions in situations of urgency that are consistent with customary international law and international environmental law. The size and diversity of the WTO membership, together with the increasing difficulty of achieving consensus among the members, would make it difficult to make a conflicts clause work in practice. A conflicts clause leaves insufficient flexibility to maintain consistency among the different branches of international law as they evolve.

To meet the requirements of the *Shrimp* case, the implementing country must have a jurisdictional nexus to apply unilateral measures or MEA trade restrictions against third parties. To invoke the doctrine of necessity in customary international law, a jurisdictional nexus is required to establish that the environmental problem affects the 'essential interests' of the importing country. The analysis of the necessity principle should take place in the chapeau, where it can be applied in a uniform manner to measures under both Articles XX(b) and (g).

In the context of Article XX(g), the principles of sovereign equality and extraterritoriality limits the range of permissible policies. The factors that the Appellate Body considered in permitting the unilateral measure in *Shrimp II* are not inconsistent with international environmental law or general international law. However, interpreting Article XX(g) as providing a right to use unilateral trade measures to address transboundary or global environmental problems is inconsistent with the customary rule of international law regarding the jurisdictional nexus that is required for a State to regulate, the principle of sovereign equality, and differential treatment of least-developed and developing countries in WTO law.

International law is not entirely clear regarding the legality of unilateral trade measures aimed at changing the internal law of another State or inducing acceptance of MEA obligations. The inconsistency of economic coercion with the principle of non-intervention has not been established as a customary rule of international law. Nevertheless, the intended purpose of such measures is clearly to intervene in the internal affairs of the targeted State. Moreover, such measures can not be considered consistent with the principle of non-intervention, given the divergence in the views of States on the issue. Thus, such measures violate the spirit, but not the letter of the law.

In the WTO context, unilateral measures may be viewed as a legitimate exercise of the sovereign right of States to control the entry of products into their territory with respect to the policy areas covered in Article XX. When economic coercion is used to induce acceptance of MEA obligations, those obligations do not become void. Nevertheless,

when MEA obligations are accepted under duress their legitimacy and effectiveness are undermined. If trade and environmental obligations are to be mutually supportive, then economic coercion can not be considered acceptable in the WTO.

Even if the illegality of such measures is uncertain in the context of general international law, they may be found inconsistent with WTO law. Regardless of whether economic coercion violates customary international legal obligations, unilateral import bans violate the legal obligations of GATT Article XI. Since the principle of non-discrimination may be viewed as a concrete expression of the principle of sovereign equality, indirect attacks on sovereign equality generally should be considered unjustifiable discrimination in the Article XX chapeau.

However, a finding that such measures are generally inconsistent with WTO law does not require that they be disallowed in all cases. The principle of necessity may be invoked under customary international law to excuse the non observance of international obligations in exceptional circumstances. The jurisdictional nexus that the importing country has with the environmental problem is relevant to determining whether necessity applies. This provides a link between the ruling in *Shrimp II* and the general body of international law that provides a way to reconcile the divergent views of WTO members and the international community and promote greater coherence between different branches of international law.

The *Shrimp* case represents a contribution on the part of the WTO judiciary to the development of the doctrine of necessity in international law, not just WTO law. Generally speaking, the necessity doctrine is consistent with the least-trade-restrictive test that has been applied in WTO jurisprudence. However, the application of both the necessity doctrine and Article XX to international environmental concerns would benefit from further development.

It would be useful for the WTO judiciary to make explicit reference to the necessity doctrine when interpreting Article XX. Indeed, it would be useful for the WTO judiciary to systematically address the relevant rules of international law when interpreting WTO obligations and exceptions in order to ensure coherence. This would facilitate the coherent evolution of WTO law and other branches of international law, as well as the internal coherence of WTO law.

The interpretive role of the principle of sovereign equality in WTO law requires further development in both WTO jurisprudence and the academic literature. The most concrete expression of this principle in WTO law is the WTO practice of decision making by consensus. Moreover, the concept of equality is implicit in the WTO principle of non-discrimination and differential treatment based on the developmental status of WTO members. In order to achieve *de jure* equality among WTO members, WTO rights and obligations need to be designed or interpreted to compensate for the *de facto* inequality that exists among the members.

On their face, WTO provisions may apply equally to all members but not apply equally in practice. The right to issue compulsory licenses on patents under TRIPS was available in practice only to members that had sufficient pharmaceutical manufacturing capacity.[136] To achieve *de jure* equality, TRIPS had to be amended.[137] Similarly, the right to use countermeasures under the DSU may not be effective for small developing countries.[138] How to rectify this lack of *de jure* equality is one of the subjects of negotiation in the Doha Round. Both of these examples show that *de facto* inequality must be taken into account in order to achieve *de jure* equality.

The preferential treatment accorded to developing and least-developed countries in the WTO may be viewed as a means to compensate for inequality of circumstances in order to promote legal equality. Preferential treatment implicitly recognizes that the development status of WTO members affects access to WTO rights. The developing and least-developed countries generally do not have the market power to use unilateral trade measures as effectively as the United States or the European Union. This creates a situation of unequal access to the right to use unilateral trade measures under GATT Article XX(g).

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[136] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 1C, 33 ILM 1197 (1994).
[137] *Decision of 30 August 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc IP/C/W/405, <www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 10 September 2003.
[138] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round, Annex 2, 33 ILM 1197 (1994), art 22. See discussion of this point in Chapter 4.

Unilateral measures are inconsistent with preferential treatment for developing countries, the promotion of equal access to WTO rights, and, more generally, the goal of governing trade relations pursuant to multilateral rules. In exceptional cases, necessity may be invoked to address urgent environmental issues where the acting State has a jurisdictional nexus to the environmental problem. The requirement of an 'essential interest' makes such a jurisdictional nexus mandatory. This means that unilateral measures can only be justified for transnational or global environmental issues where the acting State has a territorial connection. Otherwise an applicable MEA obligation must provide the jurisdictional nexus through the legal interest that the MEA gives the acting State. Where there is no geographic or legal jurisdictional nexus, unilateral measures will not meet this requirement of the necessity doctrine and will be incapable of justification in Article XX.

The broad language of Article XX leaves interpretative room available to achieve the coherence that is necessary for both WTO law and general international law to stand the test of time. Ambiguous language leaves room for the WTO to take into account the evolution of *de jure* equality and the necessity doctrine in both WTO law and general international law. It also leaves room for the WTO to take into account shifts in the allocation of decision making authority as international environmental laws and institutions evolve. Finally, broad language in Article XX lessens the need to employ legislative mechanisms to resolve conflicts among WTO members and gives the WTO judiciary greater latitude to resolve conflicts on a case-by-case basis.

This thesis has sought to clarify the relationship between WTO law, international environmental law and general international law in order to avoid conflicts between trade liberalization and global environmental protection. I have concluded that these three branches of law are generally consistent with each other in this field. However, WTO jurisprudence would benefit from a more explicit analysis of the way that panel decisions fit into the general framework of international law. No law reforms are currently needed to facilitate this task. The current WTO rules are adequate to resolve conflicts between GATT and MEA provisions and to determine the circumstances in which unilateral measures should be permitted.

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