The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate

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I. INTRODUCTION

The most fundamental and divisive issue confronting the WTO in the trade/environment debate has been whether trade restrictions to protect the environment are permissible under the law of the GATT/WTO system. Although some multilateral environmental agreements require trade restrictions in order to be effective (the Basel Protocol on Hazardous Wastes,[1] for example), unilateral trade measures in response to other countries' failure to protect the environmental commons are hardly an adequate overall solution to environmental problems.[2] There is consensus in the

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1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, UN Doc. EP/IG.80/3, *reprinted in* 28 ILM 649 (1989).

2. Where trade measures are based upon the environmental practices of the exporting country, they only create an incentive for environmentally-friendly practices where producers are producing for export; a measure that conditions imports on an environmentally-

environmental movement that international cooperation is the best strategy for protection of the global environment. However, as Coase observed,[3] in a world where bargaining imposes transaction costs, cooperative solutions will be affected by background legal rules that establish rights or entitlements on which the parties can rely in the absence of negotiated agreement. It is possible that a rule that is highly restrictive of unilateral trade measures to protect the environment will lead to strategic behavior, and exacerbate hold-out problems, thereby increasing transaction costs and reducing the likelihood of *cooperative* solutions to global environmental problems.[4]

It is thus not surprising that environmentalists began to turn their attention to the trading system after a GATT dispute-settlement panel ruled that a United States embargo on non-dolphin-friendly tuna was illegal under GATT rules. The panel's ruling was particularly disturbing because the scheme did not obviously[5] target imports; it was enforced in tandem with domestic regulations that required United States fishers to use dolphin-friendly techniques. Article XX[6] of the GATT provides exceptions for measures that are "necessary" to protect human and animal life and health (XX(b)) and that are "in relation to" the "conservation of exhaustible natural resources" (XX(9)). The *Tuna/Dolphin*

friendly process or production method has no incentive effect on firms producing exclusively for the domestic market. On the other hand, where trade measures seek to change the environmental *policies* of the exporting country, the country in question may simply decide to pay the price for its lack of adequate environmental policies in the form of reduced exports rather than changing the policies. Thus, not only is environmental protection not improved, but one experiences the kind of economic welfare losses typically associated with trade restrictions. *See* ROBERT HOWSE & MICHAEL J. TREBILCOCK, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment, in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Alan O. Sykes & Jagdeep S. Blandiri eds., 1996).

3. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

4. Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L. REV. L. & ECON. 309 (1997).

5. There were arguably subtle elements of discrimination in that the rules were not identical for foreign and domestic producers, with the former required to adhere to a compliance regime entailing arguably higher compliance costs. However, as discussed in the text, the panel, rather than simply finding fault with the measure on these rather narrow grounds, created a sweeping rule against trade measures to protect the global environment.

6. The *Tuna/Dolphin* panels held that the measure was a violation of the GATT in the first place because, even if non-discriminatory, measures that distinguish products on the basis of their method of production (as opposed to physical characteristics of the products) are prohibitions on imports within the meaning of Art. XI of the GATT). This interpretation of the GATT is challenged by R. Howse and D. Regan, *infra* note 50.

panel held, however, that these exceptions only applied to measures protecting resources within the territorial jurisdiction of the enacting state.

Widely criticized, the *Tuna/Dolphin* ruling[7] was never adopted as a legally binding dispute settlement by GATT's membership.[8] Ignoring the text of the GATT treaty, the panel based its decision on an intuition that trade measures to protect the environment might somehow open the door to "green" protectionism, thereby threatening the market access negotiated in the GATT framework. A second *Tuna/Dolphin* panel, whose ruling went similarly unadopted, reaffirmed the earlier panel's rule, but based its decision on somewhat different grounds.[9]

Before the *Tuna/Dolphin* rulings, the prevailing view was that Article XX of the GATT decided any conflicts between free-trade rules and environmental norms in favor of the latter.[10] The *Tuna/Dolphin* panels tried to switch the preference in favor of the latter. Worse still, they approached the question solely from the

7. GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993).

8. Under the GATT, prior to the establishment of the World Trade Organization in 1995, in order to constitute a legally binding resolution of a dispute, a panel ruling had to be adopted by consensus of the member states, meaning their diplomatic representatives sitting as the Dispute Settlement Body. With the creation of the WTO, this rule was changed fundamentally. Panel rulings are automatically adopted, unless there is a consensus *against* adoption. Panel rulings, however, are subject to appeal to the WTO Appellate Body. The new negative consensus rule similarly applies to rulings of the Appellate Body.

9. GATT Dispute Panel Report on U.S.— Restrictions on Import of Tuna, June 16, 1994, 33 I.L.M. 839 (1994). In this second *Tuna/Dolphin* ruling, the panel rejected the territorial limitation that the first *Tuna/Dolphin* panel had placed on Art. XX, instead suggesting that Article XX (b) and (g) could not apply to measures that would only be effective in protecting the environment were other countries to change their policies. This restriction seems based on a misunderstanding of economics. Even if the exporting country does not change its policies, the reduction of imports of dolphin-unfriendly tuna will at the margin lead to less dolphin-unfriendly tuna being produced, and therefore fewer dolphins being killed. However, as noted in footnote 2, it is true that measures such as this are *under*-effective in protecting the environment, unless they induce the target country to change its policies. The panel was wrong to assume that there would be no positive environmental effect whatever, absent a policy change.

10. Thus, the opening paragraph of Article XX suggests that, subject to the conditions in the chapeau (that the measures not be applied in a manner that constitutes arbitrary or unjustified discrimination or a disguised restriction on trade) "*nothing* in this Agreement shall be construed so as to prevent" Members from taking measures for the purposes listed in the various heads of Article XX. Neither the language nor structure of Article XX excludes such measures even where they significantly limit or curtail trade liberalization, provided they are connected in the appropriate way to the objectives stated in the various paragraphs.

perspective of effects on liberalized trade. Traditionally, the GATT demonstrated respect for regulatory diversity and progressive government. But after *Tuna/Dolphin*, environmentalists—and others with concerns about how the trading system balances competing values—saw the GATT as a regime dedicated to the triumph of free trade over all other human concerns.[11]

In the *Shrimp/Turtle* case,[12] the Appellate Body (AB) repudiated the *Tuna/Dolphin* panel's approach to trade measures to protect the global environment. The AB ruled that there is no per se rule of impermissibility in the text of Article XX. Rather, the article imposes two requirements on trade measures that condition market access on other countries' policies. First, such measures must fit within one of Article XX's specific exceptions. Second, such measures must be applied in a manner consistent with Article XX's chapeau (preamble). That is, their *application* must neither give rise to unjustified or arbitrary discrimination between countries where the same conditions prevail, nor create a disguised restriction on international trade.

In *Shrimp/Turtle*, the AB held that the U.S. measure—which prohibited imports of shrimp from any country that did not have a turtle-conservation program comparable to that of the United States—fit the Article XX(g) exception for conservation of exhaustible natural resources. However, the AB also found that the U.S. measures had been applied in a way that violated the chapeau: by treating certain Asian countries differently than its trading partners in the western hemisphere, the U.S. had engaged in unjustified and arbitrary discrimination.

The AB report's subtle language and the fact that the ruling went against the United States' application of its environmental scheme blunted the impact the decision could have had. At first, few people fully appreciate that the AB was fundamentally changing the *Tuna/Dolphin* approach on the consistency of environmental trade measures with the multilateral legal framework for liberalized trade. Indeed, some environmentalists feared (and some free-trade advocates hoped) that the AB had made the stan-

11. *See, e.g.*, Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL'Y 711 (1998).

12. WTO Appellate Body Report on U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998) [hereinafter *Shrimp/Turtle*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm.

dard for application of environmental trade measures so high that the net effect of its decision on the status quo as represented by the *Tuna/Dolphin* rulings would be minimal.

In 2001 (3 years after its *Shrimp/Turtle* ruling), the AB clarified and elaborated on its original holding. One of the *Shrimp/Turtle* complainants, Malaysia, had challenged the corrective measures the United States had taken in response to the AB decision. This second AB panel held that the United States had brought its turtle-friendly trade measures into compliance with Article XX, and it underscored those aspects of its original ruling that constituted a fundamental departure from the *Tuna/Dolphin* approach.[13]

My purpose in this brief essay is not to consider the *Shrimp/Turtle* ruling in light of the policy-based critiques of the *Tuna/Dolphin* doctrine that I have developed at length in other scholarship. Instead, I have two more modest objectives. The first is to clarify the legal meaning of the rulings by the Appellate Body in *Shrimp/Turtle*, and particularly to address some misunderstandings, rather widespread in scholarly commentary, as to exactly what the AB decided, and especially what aspects of its ruling constitute valid legal precedent for future disputes. The second is to address criticism from some quarters that, especially in reversing the *Tuna/Dolphin* approach, the AB engaged in illegitimate judicial activism. Here, I shall argue that, in fact, once the role of the Appellate Body in the new WTO system, and within the general framework of international law, is properly understood, the decision could better be seen as an example of judicial caution or conservatism.

II. BACKGROUND TO THE AB RULINGS IN *SHRIMP/TURTLE*

Several species of sea-turtles are endangered.[14] To protect these species, in the 1980s the United States enacted measures to reduce the number of sea turtles killed by U.S. trawlers. The most important measure was a requirement that every U.S. trawler fishing waters inhabited by sea-turtles be equipped with a Turtle Ex-

[13] Report of the Appellate Body, U.S. – Import Prohibitions of Certain Shrimp & Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (October 22, 2001) [hereinafter *Shrimp/Turtle 21.5 Report*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm.

14. *See* The Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, app. I, 27 U.S.T. 1087, 1118; 993 U.N.T.S. 243, 257.

cluder Device (TED). In 1989, the United States attempted to impose the TED requirement on shrimpers elsewhere in the world.[15]

Section 609 contains several elements. First, it required the U.S. State Department to (1) commence negotiations "as soon as possible" for bilateral and multilateral agreements to protect sea turtles[16] and (2) promote other international environmental agreements to better protect sea turtles.[17] Second, it required the State Department to report to Congress within a year on the practices of other countries affecting the mortality of sea turtles.[18] Third, it prohibited the importation of any shrimp harvested using commercial fishing technologies that might harm sea-turtles, unless the exporting country is certified by the U.S. administration as having a regulatory program to prevent incidental turtle deaths comparable to that of the United States or is certified as having a fishing environment that does not pose risks to sea turtles from shrimping.[19] Until 1995, the State Department had only applied the requirements of this section to the greater Caribbean area, and did so on the basis of guidelines that permitted a country to be certified where it adopted a program to require shrimpers to use TEDs on their boats; a country could take up to three years to phase in the comprehensive program; further guidelines, issued in 1993, extended somewhat the final deadline by which a foreign country must implement its program in order to be certified. In 1995, environmental NGOs challenged before the U.S. Court of International Trade (CIT) the decision of the State Department to limit the application of Section 609 to the greater Caribbean area, as well as certain other interpretations that the State Department had made of the law.[20]

The CIT held that there was no statutory basis for limiting the law to the Caribbean region.[21] In a subsequent court action, the State Department asked the CIT to extend the deadline for appli-

15. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. 101-162, § 609, 103 Stat. 988, 1037-38 (codified at Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1537 (1994)).

16. *Id.* at § 609(a)(1), (2).

17. *Id.* at § 609(a)(3), (4).

18. *Id.* at § 609(a)(5).

19. *Id.* at § 609(b)(1), (2).

20. Earth Island Inst. v. Christopher, 20 C.I.T. 1221, 942 F. Supp. 597 (Ct. Int'l Trade 1996), *vacated on other grounds*, Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998).

21. *Id.* at 604-05.

cation of the embargo to other countries beyond 1996, arguing that because this deadline would provide inadequate opportunity for other countries to adopt the measures necessary in order to be certified, the result would be significant disruption of trade through the prohibition of imports, and serious damage to U.S. policy interests.[22] The CIT denied this request.[23]

This led the State Department to promulgate a set of guidelines for enforcement of the statute, which permitted entry into the U.S. of shrimp that were declared to have been *caught* with TED technology, even if the country concerned could not be certified as having a regulatory program comparable to that of the U.S. These guidelines were in turn challenged by the plaintiffs in the original action in further proceedings before the Court of International Trade. In this later ruling, the CIT held that Congress had intended that the main operative provision of Section 609, which banned shrimp caught with commercial fishing technology harmful to endangered species of sea turtles, in fact applied to all shrimp not originating from certified countries, regardless of whether the imported shrimp themselves were caught by boats equipped with TED technology.

On the day the CIT judgment was rendered, India, Malaysia, Pakistan and Thailand took the matter to dispute settlement at the WTO. The United States chose not to dispute explicitly the complainants' argument that the shrimp embargo was a violation of Art. XI of the GATT, which bans non-tariff prohibitions or restrictions on imports and exports. The United States based its defense of the measures strictly on the claim that they were justified under Arts. XX(b) or XX(g) of the GATT, which as noted above apply to measures, respectively, "necessary" for the protection of, *inter alia*, animal life, and "related to" the conservation of exhaustible natural resources.

While much of the legal argument of the parties, as well as their factual claims, addressed whether the embargo could be justified under Sections XX(b) or (g), the panel chose to pin its legal analysis exclusively on a consideration of whether the embargo satisfied the requirement of the Article XX chapeau. The AB paraphrased the panel's reading of the chapeau succinctly:

22. Earth Island Inst. v. Christopher, 20 C.I.T. 1389, 948 F. Supp. 1062 (Ct. Int'l Trade 1996).

23. *Id.* at 1070.

> [I]f an interpretation of the chapeau of Article XX were followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those Agreements would be threatened. This follows because if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, policy requirements. Indeed, as each of these requirements would necessitate the adoption of a policy applicable not only to export production . . . but also domestic production, it would be impossible for a country to adopt one of those policies without the risk of breaching other Members' conflicting policy requirements for the same product and being refused access to these other markets.[24]

The United States appealed this ruling, which ultimately led to the Appellate Body jurisprudence that is the subject of this essay.

III. UNDERSTANDING THE APPELLATE BODY RULINGS

In its first *Shrimp/Turtle* ruling, the AB did two things. First, it reversed certain key findings of the panel, including the finding that the Article XX chapeau creates a per se exclusion of unilateral trade measures to protect the global environment. Second, the AB went on to "complete the analysis"—an expression the AB has used in previous cases for the jurisprudential technique of going forward to apply the law as correctly understood to the facts of the dispute. This jurisprudential technique must be understood in light of the absence of any explicit authority of the AB to remand a case to the original panel for re-decision in light of the AB's clarification of the law.

The AB found three errors of law in the panel's treatment of the chapeau. First, the AB found the panel had erred by considering the chapeau before investigating whether the measures could be provisionally justified under one of the heads of Article XX. Most notably, Article XX(g) applies to measures "in relation to" the conservation of exhaustible natural resources. In a previous case, *Reformulated Gasoline*, the AB had set out the proper approach to Art. XX, which was to begin with a consideration of whether the

24. *Shrimp/Turtle*, *supra* note 12, ¶ 112.

measure could be justified under one of the heads of Article XX, and then only if there was such provisional justification, to consider whether the party maintaining the measure was in compliance with the chapeau.[25] Clearly, the *Shrimp/Turtle* panel had not followed this sequential approach to Art. XX analysis.

The sequencing of Art. XX analysis stipulated by the AB *in Reformulated Gasoline*, was not accidental or arbitrary. Rather, it was directly linked to the AB's understanding of the chapeau as directed to prevent abuse of a Member's rights under Art. XX. It is conceptually impossible to know whether a Member is abusing their rights until those rights have in the first instance been determined.

The second error of law in the panel's approach to the chapeau was that the panel ignored the fundamentally limited ambit of the chapeau. As the AB stressed in *Reformulated Gasoline*, the chapeau is concerned only with the application of measures, not whether the measures themselves are justified under Art. XX. In *Shrimp/Turtle*, the AB reiterated this point:

> In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied." In [*Reformulated Gasoline*], we pointed out that the chapeau of Article XX "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"(emphasis added). . . . What the panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the design of the measure itself. . . . The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau.[26]

The AB might have disposed of the appeal based entirely on these findings of error of law in the panel report. The result would have been a reversal of the conclusion by the panel that the United States could not justify its measure under Article XX. In other words, the United States would have "won" the case. It will

25. WTO Appellate Body Report on U.S. – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (April 29, 1996) [hereinafter *Reformulated Gasoline*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm.

26. *Shrimp/Turtle*, *supra* note 12, ¶¶ 115-16 (emphasis in original unless otherwise noted).

be recalled that the *Tuna/Dolphin* rulings had been based not on the chapeau of Art. XX, but on the notion of inherent territorial limits on the environmental exceptions in Articles XX(a) and XX(b). Thus, had the AB simply reversed the panel and stopped there, the validity of the *Tuna/Dolphin* approach to environmental trade measures would have remained a matter of uncertainty, to be decided presumably in future litigation.

Instead, the AB went on to find that the panel had made a third error of law, namely to assume that unilateral measures that conditioned market access on the policies of the exporting countries are, as a matter of general principle, not justifiable under Article XX. This was an assumption common to the panel ruling in *Shrimp/Turtle* and to the older *Tuna/Dolphin* rulings. In identifying this error of law, the typically cautious Appellate Body used emphatic language, suggesting disapproval of the basic approach taken in *Tuna/Dolphin* as well as by the panel below in *Shrimp/Turtle*. The language of paragraph 121 of the decision is worth quoting at some length:

> In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, 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, to 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. . . . It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Art. XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.[27]

With this holding, the AB rejected the traditional approach to environmental trade measures in the GATT/WTO system, without so much as a citation to the unadopted *Tuna/Dolphin* panel reports. Since the AB had already reversed the specific findings of the *Shrimp/Turtle* panel with respect to the chapeau of Art. XX, and given the radical shift of perspective implied in these words,

27. *Shrimp/Turtle*, *supra* note 12, ¶ 121.

some interpreted this paragraph as dicta, of uncertain legal significance in future cases. But when the AB ruled on Malaysia's challenge to the U.S. implementation of its original ruling, the AB went out of its way to make clear that paragraph 121 was not dicta, but rather a fundamental basis of the original holding of its first decision. The later ruling reaffirmed that paragraph 121 was intended to give legal guidance to future panels.[28]

Having already done more than it strictly needed to do to reverse the panel in its first *Shrimp/Turtle* ruling, the AB went on to complete the analysis, showing how Article XX ought to be applied to the facts of the case. The first stage in "completing" the analysis was to determine whether the United States' measure was covered by any of the specific heads of Article XX. The United States had invoked Article XX(g) ("in relation to conservation of exhaustible natural resources"), and in the alternative, Article XX (b), "necessary for the protection of . . . animal life." The U.S. preferred to make its case under XX(g) because its requirement of fit between measure and objective is less exacting than the one imposed by Article XX(b).

In previous GATT jurisprudence,[29] "necessary" had been interpreted as triggering a very high level of scrutiny: a measure could only pass muster if it used the least restrictive means to achieve its end.[30] The tendency of GATT panels had, however, also been to interpret "in relation to" in XX(g) as not significantly relaxing the level of scrutiny determined by the "necessary" language in XX(b). Breaking from this interpretive tradition, the AB in the *Re-*

28. *Shrimp/Turtle 21.5 Report*, *supra* note 13.

29. *Tuna/Dolphin*, *supra* note 7, ¶ X; GATT Dispute Panel Report, Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991).

30. In a recent decision, subsequent to its initial ruling in *Shrimp/Turtle*, the Appellate Body took an approach to the necessity test in Art. XX(b) that is more flexible and deferential to domestic policy choices than was the case with the older GATT jurisprudence. *See* WTO Appellate Body Report on European Communities – Measures Affecting Asbestos & Asbestos-Containing Products, WT/DS135/AB/R (March 12, 2001) [hereinafter *Asbestos*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm. Following another recent ruling, the AB noted that "necessity" did not always require that a measure be "indispensible" to attain the government's policy objective (least restrictive means), in some cases a more relaxed standard might be appropriate, especially if the measure seems well targeted or closely related to the objective in question. Report of the Appellate Body on Korea – Measures Affecting Import of Fresh, Chilled & Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, ¶ 161 (December 11, 2000) [hereinafter *Korea Beef*], *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm.

formulated Gasoline case held that the two phrases are not equivalent; there is a significant difference in the closeness of connection suggested by the ordinary meaning of "in relation to" as opposed to "necessary."[31] Based on *Reformulated Gasoline*, the United States understandably preferred that its measures be considered under XX (g), rather than XX(b).

Conversely, the complainants preferred XX(b), with its necessity test. In this connection, the complainants argued that the expression "exhaustible natural resources" applied only to resources incapable of biological reproduction—petroleum or coal reserves, for example. According to the complainants, this definition of "exhaustible natural resources" represented the understanding common at the time that the original GATT was drafted in 1947. But the incorporation of GATT into the WTO framework in 1994 created a new interpretive context that the AB was bound to follow. The Preamble to the WTO Agreement, which established this new framework, referred to sustainable development as an objective of the WTO system. The AB therefore chose to interpret the notion of "exhaustible natural resources" in light of evolving international legal instruments and policies to promote "sustainable development." These instruments and policies provided ample evidence that endangered species are considered "exhaustible," despite individual members of the species having reproductive capacities.

Inasmuch as they were threatened with extinction, the sea turtle species at issue were considered by the AB to be exhaustible natural resources within the meaning of Article XX(g). This finding is not necessarily incompatible with an "original intent" reading of the GATT. Merely because the framers of the GATT may have thought of exhaustible natural resources in terms of non-living mineral resources, it does not follow that XX(g) should be frozen by such an understanding. In other words, the framers might have thought that living resources are not exhaustible, and 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. On this interpretation of original intent, a finding that sea turtles are exhaustible based upon the evidence in 1998 would not be at odds with the framers' reading of Art. XX(g).

31. *Reformulated Gasoline*, *supra* note 24.

Moreover, a reading of "exhaustible" frozen in 1947 could easily lead to absurdity: hypothetically, a WTO Member might end up being able to justify otherwise GATT-inconsistent trade restrictions under XX(g), even where the best available scientific evidence suggested the resource was not in danger of running out- and just because it was thought to be running out more than a half-century earlier! The issue under Art. XX is surely whether a Member has a legitimate reason today for taking trade-restricting measures, not whether they would have had a legitimate reason in 1947.

Having established that the endangered species of sea turtles fell within the meaning of "exhaustible natural resources," the Appellate Body went on to examine whether the U.S. measures were "in relation to" the conservation of such exhaustible natural resources. Here, following its approach in *Reformulated Gasoline*, the Appellate Body applied a "rational connection" or reasonableness standard in assessing the fit between the U.S. measure and the goal of conserving exhaustible natural resources, and easily found that the measure met this standard.

There is some evidence in the language the AB used, however, to suggest that it was thinking not merely in terms of rational connection, but was also using an implicit conception of proportionality. Thus, the AB not only held that there was a "direct connection" between the main features of the U.S. scheme and the conservation of sea turtles, but also found that "Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species."[32] What the AB appears to mean here by proportionality in scope and reach, is whether *all* the trade restricting features of the scheme have some reasonable connection to turtle conservation.[33] It does *not* appear to be *balancing* in any way the environmental benefits against the costs to trade entailed in the U.S. measure. Thus, the AB does not engage in a *comparative* analysis of the environmental benefit of the measure versus its trade-restrictive effects. Indeed, it simply does not

32. *Shrimp/Turtle*, *supra* note 12, ¶ 141.

33. The AB notes in this connection, for example, that the scheme exempts countries where sea turtles are not endangered by shrimp fishing because of the fishing techniques used or specific environmental conditions. If the scheme *were* to apply to such countries, it might well be disproportionately wide in scope or breadth, since such application would not obviously have *any* benefit in terms of sea turtle conservation. *Id.* ¶ 138.

speculate on either benefits or costs, nor on their incidence or level. The AB looks only at proportionality in terms of how the *design* or *structure* of the measure fits with its goal.

One of the issues that the AB raised but did not decide was whether Article XX(g) requires a territorial nexus between the exhaustible resource and the WTO Member seeking to justify its measure. Merely noting that all of the endangered species of turtles could be observed at one time or another in U.S. waters, the AB stated that were a nexus required, it existed under these facts. 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.

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.

IV. POLICING UNILATERALISM THROUGH THE CONDITIONS IN THE CHAPEAU

The overall boldness with which the AB rejected the bright line

rule against unilateral environmental trade measures seems to suggest that the AB simply gives short shrift to concerns that such measures are susceptible to protectionist abuse or that they tend to impose on other countries policy solutions that are ill-adapted to the particular conditions in those countries.

But a careful reading of the AB's application of the chapeau undermines this interpretation. According to the AB, the chapeau's safeguards limit the damage that unilateralism can do to non-discriminatory, rules-based trade. As the AB emphasizes, the conditions in the chapeau control the abuse of rights and they regulate the overall balance of rights and obligations struck by Art. XX. However, interpreting the chapeau so as to vitiate the meaning of the rights contained in the operative paragraphs of Art. XX would be inappropriate. Just as a bright-line rule against unilateral environmental measures would make Article XX inutile, so too would an excessively strict interpretation of the chapeau's conditions. Such an interpretation would make it impossible, in practice, for unilateral measures to survive judicial scrutiny.

The AB has acknowledged the delicate nature of chapeau interpretation:

> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions (e.g. Art. XI) of the GATT 1994, *so that neither of the competing rights will cancel out the other* [.]" [34]

The AB found that the application of the U.S. scheme constituted "unjustifiable discrimination" within the meaning of the chapeau. One element of unjustified discrimination was that while the U.S. refused to negotiate seriously with the complainants, it did negotiate seriously over this issue with western hemisphere trading partners.[35] The failure of the State Department to negotiate seriously with the complainants, in the manner that the U.S. negotiated with western hemisphere countries, was a failure in application, since, as noted above in the discussion of the background of this case, Section 609 *itself* contained a requirement to negotiate with *all* relevant countries. Thus, this failure was ap-

34. *Id.* ¶ 159 (emphasis added).

35. The U.S. was actually able to conclude a multilateral environmental agreement. Inter-American Convention for the Protection and Conservation of Sea Turtles, opened for signature Dec. 1, 1996, 37 I.L.M. 1246.

propriately considered under the chapeau, which deals with the manner of application of a Member's scheme. The AB also found the application of the U.S. scheme unjustifiably discriminatory on the separate grounds that (1) they were a rigid, extraterritorial extension of U.S. law to other countries, and (2) they wholly disregarded the conditions prevailing in other countries. To be certified (and gain access to U.S. shrimp markets), all countries were required to have a TED program essentially identical to that of the U.S., regardless of conditions in those countries. This was certainly discriminatory in comparison to the agreement embodied in the Inter-American Convention for the Protection and Conservation of Sea Turtles, which allowed the specific circumstances of the exporting countries to be taken into account in determining the means they adopted to satisfy the U.S. conservation objective. It was unjustified because, as the AB suggests, other measures more acceptable to the exporting country might have achieved the legitimate conservation objective of the U.S. Indeed, as the AB notes, this was already implicit in the scheme itself, which allowed for the possibility of certification in the case of a turtle conservation program "comparable" (though not identical) to that of the U.S.

Furthermore, the scheme as applied barred imports of shrimp caught with TEDs merely because they were caught in waters of countries not certified by the U.S. Here the AB was *cumulating* the effect of country-based application with the effect of using a rigid, U.S.-derived standard as the standard of *country* certification. *Taken together*, these two features of the scheme's application lead to a conclusion of *unjustified* discrimination on the grounds that the scheme's paramount concern was influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers.[36] Thus, the ultimate problem is not with country-based application as such, but "when the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[37]

36. *Shrimp/Turtle*, *supra* note 12, ¶ 165.

37. Howard Chang is one of the few commentators on the decision to recognize that the AB did not suggest, inconsistent with its analysis of Art. XX as a whole, that country-based application is per se inconsistent with the chapeau. *See* Howard F. Chang, *Toward A Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31 (2000). The other outstanding commentary on the AB ruling is by Petros Mavroidis. *See*

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 U.S. 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 taking each of these propositions separately and carefully examining them in context, we can discern the extent to which the AB actually infers a duty to negotiate from the requirements of the chapeau, and the extent and nature of that duty.

Within GATT/WTO jurisprudence, offering different terms of market access to some Members and not others will almost always constitute "discrimination." Thus, it is hardly controversial that 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. However, the AB had to consider not only whether there was discrimination, but also whether that discrimination was unjustifiable. In other words, could it be justified in terms of the objective of the United States, the protection of endangered species of sea turtles? To answer this question, the AB examined international environmental law related to biodiversity.

Petros C. Mavroidis, *Trade and Environment after the* Shrimp-Turtles *Litigation*, 34 J. WORLD TRADE 73 (2000). There is also an illuminating discussion of the case by Gráinne de Búrca & Joanne Scott. *See* Gráinne de Búrca & Joanne Scott, *The Impact of the WTO on EU Decision-making*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES, 16-22 (de Búrca & Scott eds., 2001).

The AB had already used this body of international environmental law in defining the meaning of exhaustible natural resources in XX(g), and it had justified proceeding this way by pointing to the reference to sustainable development in the Preamble of the WTO Agreement.

Citing the Rio Declaration and other sources of international environmental law, the AB held that trans-boundary or global environmental problems should be dealt with to the *greatest* extent possible through cooperation and consensus, and unilateralism should be avoided to the *greatest* extent possible.[38] On this understanding of the appropriate approach to global environmental problems, it would indeed be very difficult to argue that the U.S. could be *justified* in not offering serious negotiations to all relevant countries. But here the AB was not *incorporating* into the chapeau a duty to negotiate from international environmental law. It was merely using a baseline from international environmental law to determine whether, in the circumstances, the discriminatory behavior of the U.S. was *also* unjustifiable.

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.

But since the AB was not reading a self-standing duty to negotiate into the chapeau, it did not need to expand on these complexities. The U.S. was required to negotiate seriously with the complainants exactly to the extent it had already negotiated with the western hemisphere countries, no more and no less. Given the confusion on this point, it bears repeating: The "unjustified dis-

38. *Shrimp/Turtle*, *supra* note 12, ¶¶ 168-69.

crimination" was not the failure to negotiate as such, but the failure to treat the complainants as well as the U.S. had treated the western hemisphere countries.[39]

The first AB ruling has been interpreted erroneously to stand for the proposition that failure to negotiate is a component of another element of unjustified discrimination: the rigid application of a unilateral scheme without regard for different conditions in different countries. The importance of negotiation to the operation of environmental trade measures is not discussed or even referred to in the AB's second ruling. This is apparently because the AB found, in its second ruling, that the U.S. was able to build into *unilateral* operation of its scheme sufficient flexibility, by certifying countries that had a program comparable in environmental effectiveness, even if it worked differently than the domestic U.S. regulation. In other words, the AB suggests that if a Member has adequately accounted for different conditions in different countries, then whether that country has engaged in negotiation may be irrelevant for purposes of the chapeau.[40]

In considering the question of flexibility, the AB's second *Shrimp/Turtle* ruling also made clear that a Member is *not* required to sacrifice the achievement of its environmental objective to any extent whatsoever in order to accommodate different conditions in different countries. Some interpretations of the original report, notably by Professor Joel Trachtman, had found the AB to be engaged in a balancing analysis in its application of the chapeau.[41] However, in the *Shrimp/Turtle 21.5 Report*, the AB stated unambiguously that, consistent with the chapeau, a Member imposing environmental trade measures may require a program *comparable* in effectiveness to that which exists in the Member's own domes-

39. Of all the commentary on the AB ruling, only that of Howard Chang seems to have clearly grasped this point. *See* Chang, *supra* note 36.

In the *Shrimp/Turtle 21.5 Report*, the AB clarified that the duty of negotiation under the chapeau simply amounted to a requirement to make a "comparable negotiating effort" with the complainants, i.e., comparable to what the U.S. had invested in the case of the western hemisphere countries. The implication is that, had the U.S. negotiated with *no-one*, it would not have run afoul of the chapeau. *Shrimp/Turtle* 21.5 Report, *supra* note 27, ¶¶ 122-23.

40. Of course, even if the application of a unilateral measure is sensitive to differing conditions, it is impermissible for a nation to negotiate seriously with some countries but not with others.

41. *See* Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998).

tic law.[42] A Member need not go further in accommodating affected Members – for example, it need not adjust the statutory or regulatory requirements to the particular circumstances of each country, as long as it provides a reasonable mechanism for assessing whether any country's program is comparable.[43]

An even more serious misreading of the AB's invocation of international environmental law with respect to the duty of cooperation is that the AB held that global environmental trade measures may only be taken, if at all, pursuant to an already negotiated multilateral framework. In other words, a Member not only has a duty to negotiate but to actually succeed in achieving a multilateral framework under which trade measures are permissible (or required), before taking such measures.[44] This reading simply ignores the exact wording of the international environmental instruments cited by the Appellate Body. These instruments require cooperation and the avoidance of unilateralism "as far as possible."[45] This wording clearly anticipates that there will be situations where it will not be possible to avoid unilateralism. If it were not the case, then the language "as far as possible" would be utterly inutile. One of the cornerstones of the AB's approach to WTO interpretation, established in the earlier *Japan Alcohol* and *Reformulated Gasoline* cases is that interpretations of treaty provisions should be avoided that render other treaty provisions useless or meaningless.

In the *Shrimp/Turtle 21.5 Report*, the AB puts to rest any misunderstanding concerning the need to conclude a multilateral environmental agreement:

> Requiring that a multilateral agreement be concluded by the United States in order to avoid 'arbitrary or 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,

42. *Shrimp/Turtle 21.5 Report*, *supra* note 27, ¶¶ 144.

43. *Id.* ¶ 149.

44. This is the interpretation of the ruling offered for example by Gary Sampson:

> [T]he absence of an MEA to deal with turtle protection proved critical. . . . On the facts of the case, it found that, among other things, the failure to have established an environmental agreement as an instrument of environmental protection policy had resulted in a unilateralism which was discriminatory and unjustifiable…."

Gary P. Sampson, *Effective Multilateral Environmental Agreements and Why the WTO Needs Them*, 24 WORLD ECONOMY 1109, 1126 (2001).

45. Rio Declaration on Environment and Development, prin. 12, U.N. doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874, 878 (1992).

> would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable.[46]

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). 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."

V. COUNTRY-BY-COUNTRY VS. SHIPMENT-BY-SHIPMENT CERTIFICATION

Malaysia's challenge to the United States' revised turtle-friendly trade measures focused in part on the proper interpretation of the chapeau's "flexibility" requirement. The 21.5 dispute resolution panel had found that certification of countries with programs of comparable effectiveness was *not* sufficient to satisfy the chapeau. It was essential as well, according to the panel, that the United States was now admitting certified turtle-friendly shipments from non-certified countries.[47] Thus, according to the panel, even if the U.S. altered the application of the scheme so as to provide other countries' governments with adequate flexibility to achieve the environmental objective through different types of policies, it would still also have to allow in shrimp from countries with turtle conservation policies that do not meet even these new flexible requirements, provided that the particular shipment of shrimp happens to have been fished in a turtle-friendly manner.

In its appellate submission, Malaysia argued that, although the United States' revised guidelines permitted shipment-by-shipment certification, there was litigation before the U.S. courts challenging this aspect of the revised guidelines as inconsistent with the requirements of the statute. Thus, the U.S. implementation, in as much as it required shipment-by-shipment certification,

46. *Shrimp/Turtle 21.5 Report*, *supra* note 27, ¶ 123.
47. *Id.* ¶ 106.

was legally insecure. The Appellate Body rejected this argument, noting that it could only assess conformity on the basis of existing legal facts, and could not speculate as to future decisions of the U.S. courts.[48]

The AB's ruling, however, does not answer the underlying question of whether shipment-by-shipment certification is a sine qua non for the operation of this kind of scheme consistent with the requirements of the chapeau of Art. XX. One should first of all note that shipment-by-shipment inspection was not presented as a separate requirement implicit in the chapeau by the AB in its original ruling. Rather, the AB had mentioned the absence of shipment-by-shipment inspection as evidence that the administrators of the U.S. law were treating the statutory scheme more in the manner of an extraterritorial extension of U.S. domestic law than as a global conservation measure.[49] In other words, the AB was pointing to a number of factors that suggested inadequate appreciation by the administrators of the character of the statutory scheme, and above all its focus on conservation of the global commons rather than on bringing foreign actors under the ambit of United States law. Such lack of appreciation could explain the various elements of inflexibility that, cumulatively, amounted to unjustified discrimination within the meaning of the chapeau.

The United States did not appeal the panel's interpretation that, absent shipment-by-shipment certification, the revised U.S. scheme would not conform with the chapeau's flexibility requirement. One reason for this decision may be that, in defending the shipment-by-shipment approach against domestic court challenges, the executive branch of the U.S. government would actually have found helpful a panel ruling that such an approach was actually required under Article XX to meet the U.S.'s WTO obligations.

Nevertheless, in its 21.5 ruling the Appellate Body notably does *not* include shipment-by-shipment certification as even one aspect of the flexibility required by the chapeau, let alone as a separate sine qua non requirement. Here it is important to reflect on the AB's re-emphasis of paragraph 121 in its original ruling. As discussed above, the AB suggests in that paragraph that there is

48. *Id.* ¶¶ 93-95. Recently, in fact, the court upheld the shipment-by-shipment interpretation of the statute.

49. *Shrimp/Turtle*, *supra* note 12, ¶ 165.

nothing in the overall structure of Article XX that would prevent a member from conditioning imports on whether Members comply with or adopt a policy or policies unilaterally prescribed by the importing Member. Indeed, in that paragraph the AB made the even stronger statement that if such policy-conditioned measures were excluded from the ambit of Article XX, this would render "most, if not all, of the specific exceptions of Article XX inutile…."

Malaysia had argued that this statement in paragraph 121 was mere dicta. In its 21.5 ruling, the AB held that, to the contrary, "[t]his statement expresses a principle that was central to our ruling in *United States-Shrimp*."[50] If the United States law were to be interpreted by the courts as excluding shipment-by-shipment certification, it would still be, in principle, justifiable under Article XX. According to the AB, Article XX contemplates measures that condition market access not only on the practices of foreign producers, *but on the adoption of certain policies* by the WTO Member state from whence the product originates.

To say that the chapeau *requires* shipment-by-shipment inspection in the application of the U.S. scheme would be to interpret the chapeau in a manner that is inconsistent with the AB's overall understanding of the structure and purpose of Article XX, as articulated in paragraph 121 of its original ruling, and reaffirmed with emphasis in paragraph 138 of its 21.5 ruling. Since the United States could conceivably have a law that explicitly excludes shipment-by-shipment inspection, conditioning all market access on the turtle conservation policies of the country of origin, it makes no sense that the chapeau would be a per se bar to application of the law in a manner that excludes shipment-by-shipment inspection. On the other hand, on the facts, where administrators are applying a statute in a manner that is more trade restrictive than its ordinary meaning as interpreted by the courts, then this extra, legally unmandated degree of trade restrictiveness *could* constitute evidence of unjustified discrimination (as the AB found in its original ruling).

One puzzle concerning paragraph 121 of the original AB report is why the AB regarded most of Article XX as *inutile*, unless it allowed for market access to be conditioned on the policies of exporting Members. To find that Article XX may contemplate in

50. *Shrimp/Turtle 21.5 Report*, *supra* note 27, ¶ 138.

some situations these kinds of measures is one thing, but to consider that Article XX is mostly about such measures is quite another. This puzzle can be approached by considering the counterfactual situation that the U.S. measure was concerned only with shipment-by-shipment certification and did not in any way predicate market access on the government *policies* of other WTO Members. How could Article XX be considered inutile in such a situation?

The only plausible explanation is that such process-but-not-policy-based measures do not violate any operative provision of the GATT in the first place. Therefore, Article XX is, by and large, not necessary to justify them. Thus, if the United States had a law that stated that all shrimp, whether they are caught in the U.S. or elsewhere in the world, must be caught in a turtle-friendly manner in order to enter the U.S., such a measure could be regarded as consistent with the National Treatment obligation in the GATT Art. III:4, because it provides "no less favorable treatment" to like imported products. Such a measure would arguably not be discriminatory, because it would deal only with a characteristic of the product, its method of production, and not distinguish between different countries and their turtle-conservation *policies*.

However, the conventional wisdom in traditional GATT/WTO circles is that regulations that treats products differently on the basis of their process of production (e.g. whether a given shrimp has been fished with a turtle-friendly or turtle-deadly method) are per se violations of the GATT, and they can only be justified under Article XX. I have challenged this product/process distinction in other scholarship;[51] the AB's remark that Article XX would be largely inutile unless it could be used to justify measures conditioned under other countries' policies suggests that the AB itself may not subscribe to the conventional wisdom of the product/process distinction. Rather, the AB may view Article XX as unnecessary for purposes of justifying measures that condition market access on how the imported product is produced, rather than on some kind of policy in the country of origin of the imported product.[52]

51. *See, e.g.*, Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining "Unilateralism" in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000).

52. *Id.* For a critique of Howse and Regan, *see* the article by Sanford Gaines in this symposium issue, 27 Colum. J. Envtl. L. 379 (2002).

Indeed, in its *Asbestos* ruling,[53] the AB appears to have left the door open for the possibility that non-discriminatory process-based measures are consistent with Article III:4. First of all, it held that in determining whether products are "like," the physical characteristics of different products, and their relevance to "likeness" must be assessed in a purposive manner, in light of the objectives of Art. III as a whole—above all the avoidance of protective discrimination against imports. For Article III:4 purposes, no particular physical characteristic is dispositive, in the abstract, of whether a product is "like" or unlike. Other factors, such as consumer preferences, must be considered in forming a judgment based on the criteria that the Appellate Body approved in *Japanese Alcohol* and subsequent cases for assessing likeness in the context of Art. III:2, which deals with National Treatment in taxation. Moreover, there may be additional criteria or factors that could be decisive, besides those already developed in the taxation cases.

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 Article 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.

Reflecting on the product/process distinction in light of the original AB ruling in *Shrimp/Turtle*, John Jackson predicted "the

53. Asbestos, *supra* note 29. The interpretation of this ruling that follows is elaborated at length in Robert Howse & Elizabeth Tuerk, *in The WTO Impact on Internal Regulations-A Case Study of the Canada-EC Asbestos Dispute*, THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES, *supra* note 36.

product-process distinction will probably not survive and perhaps *should* not survive."[54] However, Jackson also rightly notes that since there is no ruling where the AB has explicitly treated a process-based measure as consistent with National Treatment, the issue "remains open."[55] I believe that, in the respects discussed above, the *Asbestos* ruling strengthens Jackson's prediction.

VI. CRITICISMS OF THE AB RULINGS IN *SHRIMP/TURTLE*

Having swept away almost all the pillars of the GATT anti-environmentalist edifice, it is not surprising that the AB would be criticized for illegitimate judicial activism. A fairly representative criticism is that of Jagdish Baghwati of Columbia University:

> I have some sympathy for [the] view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters. I was astounded that the appellate court, in effect, reversed long-standing jurisprudence on process and production methods in the *Shrimp/Turtle* case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.[56]

The *only* "jurisprudence" clearly establishing the principles to which Bhagwati is referring consists in the two *unadopted Tuna/Dolphin* panel reports. Although unadopted, these reports embody a perspective almost universally held by the trade-insider network. Was it "activist" of the Appellate Body not to defer to that insider perspective, but instead to go back to the treaty texts themselves and to sources of interpretation authorized by the Vienna Convention on the Law of Treaties? As a matter of positive law, the Appellate Body had already established in early cases that while unadopted GATT reports may offer "guidance," there is no legal requirement to take them into account when deciding cases within the dispute settlement framework of the WTO.[57] In

54. John H. Jackson, *The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 222, 224 (2000).

55. *Id.*

56. Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 60-61 (Roger B. Porter et al. eds., 2001). *See also* CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION, at Ch. 4 (2001).

57. Appellate Body Report on European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5,

terms of the structure of dispute settlement and the mandate of the Appellate Body in the WTO system, a somewhat more elaborate answer is required.

According to the Dispute Settlement Understanding, the system:

> serves to preserve the rights and obligations of Members under the covered agreements, and to clarify existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the Dispute Settlement Board (DSB) cannot add to or diminish rights and obligations provided in the covered agreements.[58]

Based on this mandate, it was not within the power of the Appellate Body to defer to any kind of insider understanding of the limits on Article XX. The AB was required to go back to the provisions themselves and read them, not in light of the GATT tradition or practice as such, but rather "in accordance with customary rules of interpretation of public international law."[59]

It is hardly surprising that once it repaired to the text, the Appellate Body found no support for the kind of limit on the application of Article XX that was opined by the panel in *Tuna/Dolphin* and in a rather revised version at the panel level in *Shrimp/Turtle*. The textual foundation just isn't there. The limit in question was generally not argued in any case as a textual matter. Rather, arguments for such limitations were based on the need to prevent what John Jackson has referred to as a "slippery slope"[60] —the infinite possibilities for restricting trade that might arise if it were possible to restrict market access based upon value-based judgments of other countries' policies. One may take issue with this view of the structural requirements of the multilateral trading system, as I have in other work, but even if the Appellate Body agreed with that view, it was prevented from adding to the obligations or diminishing the rights to be found in the textual provi-

1998) [hereinafter *LAN* Equipment], *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; Appellate Body Report on Japan - Taxes on Alcoholic Beverages, WT/DS8/10/11/AB/R (November 8, 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

58. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, Marakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.C.M. 1125, 1127 (1994).

59. *Id.*

60. Jackson, *supra* note 53.

sions of Article XX. Given the mandate of the Appellate Body under the DSU, to have done otherwise than it did would have been illegitimate and indeed illegal judicial activism.

DSU 3.2 doesn't absolutely confine dispute settlement organs to the text itself. Rather, they cannot go beyond the text as interpreted using the customary rules of treaty interpretation in public international law. These rules, especially as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, place considerable emphasis on the ordinary meaning of the text, interpreted in light of context, object and purpose. The Vienna Convention Article 31 allows context, object, and purpose to be taken into account in interpreting the exact words of the treaty in their "ordinary meaning," but it does not contemplate that they can be used to fill gaps or to supplement the text itself with, as it were, unwritten law or unstated structural principles. In short, context, object or purpose cannot be a basis for reading into the text a diminution of a right or an increased obligation, unless the *words themselves* at least *point* to the application of such extrinsic interpretive materials. Thus, the two aspects of DSU 3.2 are to be read together, namely the obligation not to add to or diminish the rights and obligations in the treaty text, and the requirement to interpret the text according to the customary public international law rules of treaty interpretation, which are to a significant extent codified in the *Vienna Convention.*

Is there nevertheless a place within the *Vienna Convention* rules for bringing in the insider understanding that critics of the AB ruling in *Shrimp/Turtle* believe ought to have been decisive? Section 31(3) of the *Vienna Convention* does provide for the taking in account of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[61] Would the insider understanding qualify as such an agreement? The answer is clearly "no," because one of the parties, the United States, obviously had been taking a different view of Article XX. (This is true even though many American trade officials, at a personal level, may have shared the insider understanding.) Had the United States not invoked Article XX as applicable in both *Tuna/Dolphin* cases or had those rulings been adopted (i.e. accepted by the WTO Membership as legally binding settlements

61. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

of the dispute) then matters might have been different. But even in that case, there would still be an issue as to whether the evidence was strong enough to constitute "agreement" concerning interpretation.

The "judicial activism" critique of the AB's *Shrimp/Turtle* ruling has another dimension or alternative formulation. It has been argued that the law regarding "unilateral" global environmental trade measures was a matter of controversy at the time of the *Shrimp/Turtle* case, and that the Appellate Body over-reached in resolving a controversy that, given the sensitivities involved (including the delicate North-South issues), should properly have been settled through negotiation, not litigation. Now the Appellate Body was *required*[62] to decide the appeal, and however the appeal was decided, it is hard to imagine that the AB would not find itself on one side of the controversy or the other, merely by virtue of having to make a legal ruling. Moreover, in making one of the functions of the dispute settlement organs clarification of the law, DSU 3.2 supposes that the Appellate Body will not decline to rule in areas where the law is unclear. As Coase and his followers have impressed on us, bargaining always takes place in the shadow of the law, and whatever decision the AB made concerning the law would have some effect on future negotiations. In sum, the AB was not institutionally situated such as to be neutral or completely deferential to a political determination of the problem posed by the *Shrimp/Turtle* dispute.

Moreover, I believe that even if the AB's sole concern had been judicial in such a situation, it still would have acted just as it did. To understand why, we have to again consider some foundational principles of public international law. One of these, established in the *Lotus* case,[63] is that the 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

62. This is a point that is not well understood by non-lawyer critics of judicial activism such as Claude Barfield. There is no equivalent of a "political question" doctrine that would allow the Appellate Body to decline to address the claims put to it on appeal—the AB is bound by the DSU to address those claims, albeit not all the arguments the parties or third parties may make *about* the claims.

63. The Case of the S.S. "Lotus," Judgment 9, 1927, PCIJ, Series A, No. 10, p. 19.

in response to policies of another state.[64] 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.[65]

A third version of the judicial activism critique of the *Shrimp/Turtle* AB ruling focuses on the general notion that the AB somehow should have stepped aside, and allowed the controversy to be resolved politically. This third version of the critique gives a great deal of attention to the way in which the AB brought in materials from international environmental law and policy in resolving the meaning of the expression "exhaustible natural resources" in Art. XX(g). As discussed above, the AB explicitly rejected the view that the meaning of "exhaustible natural resources" was frozen at the time the GATT was negotiated and, invoking the preamble of the WTO Agreement and its reference to sustainable development, considered that the meaning of "exhaustible" had to be understood in evolutionary terms, in light of the development of international environmental law, science, and policy. The complainants in *Shrimp/Turtle* had argued that the meaning of "exhaustible" did not include living species, but only mineral resources and the like. Whether this was indeed a fixed and uncontroversial meaning of the expression in 1947 is not in itself obvious. And, as the AB pointed out, in two adopted GATT rulings, migratory fish species had already been deemed to be "exhaustible natural resources."

It is well established public international law that some provisions of treaties are to be interpreted in an evolutionary fashion. By reverting to the preamble of the WTO Agreement to establish that exhaustible natural resources is an evolutionary term, the Appellate Body merely followed *Vienna Convention* Article 31, which specifically mentions the "preamble" as part of the "context" which is fundamental to the interpretation of treaty text.

64. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.U. 14, 125-26.

65. *See* Report of the Appellate Body, E.C. Measures Concerning Meat and Meat Products, # 172, WT/DS28/AB/R, WT/DS46/AB/R (January 16, 1998) (invoking the principle of *in dubio mitius*), *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#Top.

However, the "preamble" in question was one that was written nearly 40 years after the original GATT text. The AB was implicitly accepting the notion that there is a new framework for the interpretation of GATT—that the creation of the WTO represented a foundational moment, one that in this case placed the relevant provisions of GATT within a broader universe of international law and policy relevant to environment and development, as well as general public international law.

Of course, the insider network, generally speaking, had boasted of the creation of the WTO as a new founding for the multilateral trading system, including the placement of the system on a more unambiguous, or unquestionable, foundation of international legality. They do not like to reap what they have sown.