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Article XX GATT - QUO VADIS? The Environmental Exception After The Shrimp/Turtle Appellate Body Report

Axel Bree

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 308 [hereinafter GATT]; Article XX GATT reads in its relevant parts:

> General Exceptions
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> 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 or enforcement by any Member of measures: ***
>
> (b) necessary to protect human, animal or plant life and 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; ***

2. From the Latin phrase: *Domine, quo vadis?*, meaning "Master, where do you go?".

I. Introduction

Recently, a World Trade Organization (WTO) dispute panel ruled that Washington's import ban on shrimp caught in a manner that allows the bycatch of endangered sea turtles breaches free trade rules.[3] Last October, the Appellate Body[4] within the dispute settlement mechanism of the WTO rejected a United States attempt to overturn this ruling. This decision caused mixed reactions among United States representatives and environmental groups:[5] some see the report as furthering environmental concerns within the GATT jurisdiction,[6] but many complain that the decision merely reflects the WTO's difficulty with environmental issues.[7] This article critically analyzes the Appellate Body report, compares it to previous WTO dispute body decision and discusses the future implications of the Appellate Body's holdings.

Chapter II introduces the conflict between trade and environment and how this conflict is related to the provisions of the GATT. This leads to the description of the underlying facts of the *Shrimp/Turtle* case, that completes part two. Chapters three and four contain a detailed analysis of the Shrimp/Turtle Appellate Body Report. Chapter three focuses on the environmental exception in Article XX(g) GATT,[8] in particular the discussion about the meaning of "exhaustible" and "relating to," as well as the problem of "extrajurisdictionality". Part four then examines the report's holding concerning the introductory clause of Article XX,

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3. Appellate Body Report on United States – Import of Certain Shrimp and Shrimp Products, Report of the Appellate Body, October 12, 1998, 1998 WT/DS58/AB/R [hereinafter Shrimp/Turtle Appellate Body Report].

4. One achievement of the Uruguay Round is the new dispute-settlement understanding, which established an appellate procedure. The Appellate Body is a panel of three persons drawn from a permanent roster of seven persons; *see* Uruguay Round Final Act, Annex 2, Understanding of Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1226 [hereinafter DSU], Article 17.

5. Frances Williams & Guy de Jonquières, *US Appeal on Shrimp Import Ban Rejected*, FIN. TIMES, Oct. 13, 1998, at 10; Anne Swardson, *Turtle-Protection Law Overturned by WTO*, WASHINGTON POST, Oct. 13, 1998, at C2, cites Matthew Stillwell (CIEL): "It's better law, but it's still the same result."

6. Charlene Barshefsky: "The report does not suggest that we weaken our environmental laws in any respect", cited *in* Williams & de Jonquières, *supra* note 5; Phillipe Sands, Lecture at American University, WCL, Nov. 11, 1998.

7. Sierra Club: "the WTO is broken and must be fixed," cited *in* Williams & de Jonquières, *supra* note 5.

8. All Articles referred to in this article, are provisions of the GATT, unless otherwise stated.

the so-called chapeau.[9] The article ends in chapter five with a short conclusion, which is combined with an outlook to future disputes.

II. Survey of the Trade and Environment Conflict

A. The Conflict of Trade and the Environment: A Broad Perspective

An important issue concerning the completed and the ongoing negotiations and discussions about multilateral and regional trade agreements is whether and how unrestricted or "free" trade can be reconciled with environmental protection.[10] The WTO member countries' ministers expressed the opinion, "that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."[11] According to a more realistic point of view, however, there are numerous points of conflict. It has been argued that the free movement of goods and products between countries leads to environmental degradation. The given reasons include the unsustainable growth of production and consumption,[12] the lowering or non-enforcement of environmental standards ("race to

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9. This order is chosen in reference to the "fundamental structure and logic of Article XX," which contains "first a provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clause." Shrimp/Turtle Appellate Body Report, *supra* note 3, at 33, paras. 118-19.

10. *See*, inter alia, the articles Betsy Baker, *Protection, not Protectionism: Multilateral Environmental Agreements and the GATT*, 26 VAND. J. TRANSNAT'L L. 437 (1993); Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379; Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700 (1992); C. Foster Knight, *Effects of National Environmental Regulation on International Trade and Investment – Selected Issues*, 10 UCLA PAC. BASIN L.J. 212 (1991); Xavier Carlos Vasquez, *Symposium of the North American Free Trade Agreement: The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L. J. 357 (1993); Geoffrey W. Levin, Note, *The Environment and Trade – A Multilateral Imperative*, 1 MINN. J. GLOBAL TRADE 231 (1992).

11. Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Decision on Trade and Environment, 15 Apr. 1994, 33 I.L.M. 1125 (1994).

12. HERMAN DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (1996).

the bottom"),[13] or the branding of environmental regulations as unlawful trade measures.[14] However, free trade is regarded as an important instrument for global peace, development, and the efficient use of resources.[15]

B. The Conflict Under GATT in General

Based on the environmental harm of the production and process methods of a product or the use of a product, environmental regulations impose restrictions, such as import bans or taxes on the product. Given the objective of the WTO to promote free trade, it is not surprising that environmental measures cause disputes within its legal framework. The GATT and the WTO dispute settlement system[16] has been the most frequently used dispute settlement system to resolve environmental disputes between countries.[17]

Articles I, III, and XI place limits on the application of these regulations concerning imported products. If the burden placed on the imported goods is greater than for like domestic products,[18] a

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13. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1172-73 (1996).

14. DAVID A. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 52-54 (1994); C. Foster Knight, *supra* note 10, at 213-216; Mike Meier, *GATT, WTO, And the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing so Adversely Affects Trade?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 280-282 (1997); see next section of this article.

15. DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 81 (1817); HUNTER, *supra* note 13, at 1167-69.

16. As noted before, *supra* note 4, the WTO dispute settlement system was reformed during the Uruguay Round. The system is available for disputes concerning all agreements which are part under the WTO system (Article 1.1 DSU), though some agreements may apply additional rules (Article 1.2 DSU). After the failure of consultations (Article 4 DSU) between the conflicting countries the complainant can request a panel (Article 6 DSU). The panel consists of 3 (or 5, *see* Article 8.5 DSU) trade experts (Article 8.1 DSU). A remarkable change is that the final panel report will be adopted unless a consensus rejects it. Further, either side can appeal the panel's decision (Article 17 DSU). In the case that a trade violation is reported, the losing defendant has to bring its policy into the line with the recommendations or ruling (Article 21 DSU). If the country fails the complainant can ask for compensation (Article 22 DSU). As last resort the complainant can apply limited trade sanctions (Article 22.2).

17. Steve Charnowitz, *Environment and Health Under the WTO Dispute System*, 32 INT'L LAWYER 901, at 901 (1998).

18. The question concerning the likeness of products is one of the major issues in the trade and environment GATT debate, *see* United States - Taxes on Automobiles, Report of the Panel, Sept. 29, 1994, WT/DS31/R, para. 5.5–5.8. However, in the decision at stake this problem is not discussed, and, therefore, will

violation of at least one of the mentioned core principles of the GATT can be determined.[19] However, the GATT provides a number of exceptions which allow other justified objectives to precede over the advantages to be gained from free trade. This is where Article XX becomes relevant. Article XX(a)-(j) enumerates acceptable goals, such as the protection of public morals,[20] life and health monopolies,[21] patents, trademarks,[22] national treasures,[23] exhaustible natural resources,[24] or essential materials to a domestic processing industry,[25] and the exploitation of prison labor.[26] The question of whether a violation of a free trade principle that pursues one of these goals can be justified then requires a further examination and thorough evaluation of the conflicting interests. Besides the *General Exceptions* in Article XX, the GATT contains the *Security Exceptions* in Article XXI, exceptions for free trade areas in Article XXIV, and the instrument of an extraordinary waiver by a two-third majority vote in Article XXV:5.

Further violations of WTO agreements by such environmental regulations might arise under the General Agreement on Trade in Services[27] or the Agreement on Technical Barriers to Trade.[28]

C. The Conflict in the Shrimp/Turtle Case

The conflict underlying the Shrimp/Turtle case concerns a 1989 amendment to the United States Endangered Species Act of 1973[29] and the so-called Section 609[30] that generally prohibit the

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not be considered in this article.

19. See for a detailed analysis of the application of Article I, III and XI to environmental regulations Steve Charnowitz, *International Environmental Law Colloqium: Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 490-92 (1994); Charnowitz (1998), *supra* note 17, at 902-908; Foster, Mark Edwards, Note, *Trade and Environment: Making Room For Environmental Trade Measures Within the GATT*, 71 SOUTHERN CAL. L. REV. 393, 420-23 (1997-98).

20. Article XX(a).

21. Article XX(b).

22. Article XX(d).

23. Article XX(f).

24. Article XX(g).

25. Article XX(h).

26. Article XX(e).

27. *Part of* Uruguay Round Final Act, Dec. 15, 1993, Annex 1B, 33 I.L.M. 1130 (1994).

28. *Part of* Uruguay Round Final Act, Dec. 15, 1993, Annex 1A, 33 I.L.M. 1125 (1994); *see* Meier, *supra* note 14, at 277-280; KATHARINA KUMMER, TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AT THE INTERFACE OF ENVIRONMENT AND TRADE, 72 (1994).

29. Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531-1543.

import of shrimp and shrimp products where harvesting methods do not sufficiently protect sea turtles. Section 609 provides, inter alia, that the import ban will not apply to harvesting countries that are certified by the U.S. administration. According to regulatory guidelines, the certification shall be granted to either countries with a fishing environment that does not pose a threat of the incidental taking of sea turtles[31] or to harvesting nations that adopt a regulatory program that is comparable to and as effective as the regulatory program of the United States. The U.S. program requires the use of "turtle excluder devices" (TEDs), which in the actual application of the regulation became the standard requirement for granting the certification. In 1996, India, Malaysia, and Thailand filed a complaint with the WTO, alleging that the legislation has constituted unfair trade practices. In April of 1998 a WTO Panel found that the U.S. measure violated GATT's provision against quantitative restrictions (Article XI) and the most-favoured-nations principle (Article I:1).[32] The Panel also held that the import restriction could not qualify for either of GATT's environmental exceptions in Article XX.[33] The United States appealed the panel's decision, focussing only on the Panel's holding concerning Article XX.[34] The Appellate Body held that the findings of the Panel constituted error in legal interpretation and reversed them.[35] Though not requested by the United States, the Appellate Body completed the legal analysis[36] and found

30. Conservation of Sea Turtles; Importation of Shrimp, Pub.L. 101-162, Title VI, §609, Nov. 21 1989, 103 Stat. 1037.

31. Shrimp trawling has one of the highest rates of incidental takings (bycatch), and is, as of 1996, the biggest anthropogenic source of mortality of sea turtles; *see* A. CHARLOTTE DE FONTAUBERT, DAVID R. DOWNES & TUNDI S. AGARDY, BIODIVERSITY IN THE SEAS: IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN MARINE AND COASTAL HABITATS (1996), 20.

32. United States – Import Prohibition of Certain Shrimp and Shrimp Products, Final Report of the Panel, WT/DS58/R, at 268-271, paras. 7.11-7.23 [hereinafter Shrimp/Turtle Panel Report].

33. *Id.* at 285, para. 7.62.

34. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 26, para. 98. The violation of Article XI was a prerequisite for the Appellate Body and was not questioned in its report.

35. *Id.* at 34, para. 122.

36. The Appellate Body reasoned that procedure with its mandate under Article 17 DSU and Article 3.7 DSU, which emphasizes that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute." *Id.* at 34-35, paras. 123-124.

according to its own holding that the measure at stake could not qualify as a justification under Article XX.[37]

III. Article XX(g)

Initially, the Appellate Body established the sequence for carrying out an analysis under Article XX. In contrast to the Panel's report, the Appellate Body held that the structure and logic of Article XX requires an initial determination of whether the violating measure qualifies for one of the specific justifications in Article XX(a)-(j), and then application of the broad language of the "chapeau" to the specific provisional justification.[38] In the context of the Shrimp/Turtle case, U.S. measures must be found to "relat[e] to the conservation of exhaustible natural resources if such measures are made in conjunction with restrictions on domestic production or consumption."[39]

A. "Exhaustible Natural Resources"

The *Shrimp/Turtle* dispute was not the first case under the WTO/GATT dispute settlement system that involved conservation measures for animals. In the *Herring/Salmon* case[40] the panel needed to note only that the "United States agreed that salmon and herring were exhaustible natural resources."[41] The two *Tuna/Dolphin* panel reports did not spend a single word on that problem.[42] Therefore, the *Shrimp/Turtle* Appellate Body report

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37. *Id.* at 56, para. 187.

38. *Id.* at 32-33, paras. 117-120. The "chapeau" is the introductory clause of Article XX.

39. Article XX(g).

40. Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, L/6268 – 35S/98 [hereinafter Herring/Salmon]. In this dispute the United States challenged a Canadian regulation that prohibited the exportation of unprocessed salmon and herring. Canada argued that this measure was intended to conserve its fishing stocks within the meaning of Article XX(g).

41. *Id.* at 22, para. 3.29.

42. See the discussion of Article XX(g) in United States – Restrictions on Imports of Tuna, Report of the Panel, Sept. 3, 1991, DS21/R [hereinafter Tuna/Dolphin I], at 46-47, paras. 5.30-5.34; United States – Restrictions on Imports of Tuna, Report of the Panel, June 1994, DS29/R [hereinafter Tuna/Dolphin II], at 49-51, paras. 5.13-5.20. In these cases, which are similar in many respects to the Shrimp/Turtle case, Mexico, the EC and the Netherlands challenged U.S. restrictions on imports of yellowfin tuna. The Marine Mammal Protection Act banned the importation of fish caught with fishing technology that results in excessive incidental takings of marine mammals. Because the number of incidental deaths of dolphins during tuna fishing by Mexican boats was relatively high, the U.S. government imposed an embargo on Mexican tuna harvested with purse-seine

was the first to thoroughly address whether "living resources"[43] fall under the definition of "exhaustible natural resources." The *Shrimp/Turtle* panel report did not reach the question at stake, because of its "chapeau-down" approach.[44] Thus, the question appeared to be a settled issue,[45] but the parties to the *Shrimp/Turtle* dispute argued the issue extensively[46]. Indian, Pakistan, and Thailand found that only finite, non-living resources are "exhaustible", reasoning that the term "exhaustible" would become futile if all natural resources were considered to be "exhaustible",[47] and because the drafting history of Article XX(g) shows that the GATT drafters intended to protect minerals with this provision.[48] The Appellate Body rejected these arguments and held that endangered living resources were within the scope of Article XX(g).[49] Given that animals were considered in previous panel reports as "exhaustible natural resources", the result is less remarkable than how the court arrived at this conclusion.

Primarily, the Appellate Body referred to the textual interpretation and found that the term "exhaustible" does not exclude "renewable" resources.[50] The Appellate Body noted that the drafting of the legislation took place 50 years ago, and that the treaty must be read "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[51] The language of the treaty is not "static", but

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method. The United States attempted to justify the embargo, arguing that it served to protect the life and health of dolphins, even outside US jurisdiction, and to conserve an exhaustible natural resource. However, both panels rejected the U.S. arguments and found that the measures were unjustified GATT violations.

43. Resources are defined as any material which when extracted has economic value, *see* BLACK'S LAW DICTIONNARY, 6th ed. 1991, at 711. The term "living resources" refers to the ability to reproduce respectively propagate itself existing with animals respectively plants.

44. In contrast to the Appellate Body the Panel commenced its analysis of Article XX with the chapeau. As it determined that the import restrictions on shrimps are not consistent with the chapeau, the Panel did not find it necessary to examine Article XX(g), Shrimp/Turtle Panel Report, *supra* note 32, at 285, para. 7.63.

45. Charnowitz (1998), *supra* note 17, at 909, (adding that this interpretation is contrary to the technical meaning to the term "exhaustible").

46. Shrimp/Turtle Panel Report, *supra* note 32, at 3.237-3.240.

47. *Id.* at 3.237.

48. *Id.* at 3.238; referring to E/PC/T/C.II/QR/PV/5, 18 November 1946, at 79.

49. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 37, paras. 136-37; whether non-endangered species might fall under Article XX(g) was not decided by the Appellate Body.

50. *Id.* at 36, para. 128.

51. *Id.* at 36, para. 129.

"by definition, evolutionary."[52] Moreover, the Appellate Body acknowledged that the 1982 U.N. Convention on the Law of the Sea,[53] the 1992 Agenda 21,[54] the 1992 Biodiversity Convention,[55] and the Convention on the Conservation of Migratory Species of Wild Animals[56] include "living", "biological", or "natural" resources in their scope and points out the emerging international recognition of the importance of animal conservation.[57] The Appellate Body also referred to the principle of sustainable development,[58] which is embodied in the preamble of the 1994 WTO Agreement.[59] Worth mentioning in particular is

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52. *Id.* at 36, para. 130.

53. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

54. Agenda 21, UN Conference on Environment and Development (UNCED), Annex II, UN Doc. A/Conf. 151/26/Rev.1 (1992), reprinted in Agenda 21: Earth's Action Plan, Nicholas A. Robinson (ed.), 1993.

55. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993) [hereinafter Biodiversity Convention].

56. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 11 (1980) (entered into force Nov. 1, 1983).

57. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 36-37, paras. 130-31.

58. The principle of sustainable development is a synthesis of the human need for development and our responsibility for the environment. Development should be achieved in a way that is the least environmentally harmful. This idea can be traced back to the Stockholm Declaration in 1972 (11 I.L.M. 1416 (1972)), the Brundtland Report (WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE, 1987), which was named after the commission's chairman Gro Harlem Brundtland, and which brought the principle of sustainable development to international attention. In this report the principle is described as the way "to ensure that [development] meets the needs of the present without compromising the ability of future generations to meet their own needs." *Id.* at 8. At the 1992 United Nations Conference on Environment and Development in Rio de Janeiro it was consensus among the world's nations that sustainable development has to become the centre of the global economic system (Article 1 Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/26, 31 I.L.M. 874 (1992)). *See* (about sustainable development) HUNTER, *supra* note 13, at 99-104.

59. Agreement for Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994) (entered into force Jan. 1,1995) [hereinafter WTO Agreement], preamble:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, . . . and expanding 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 conserve the 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. . . (emphasis added).

footnote 107, in which the Appellate Body states that "this concept [of sustainable development] has been generally accepted. . . ."[60]

The *Tuna/Dolphin I* Report used the drafting history to decide that nothing had changed in the last decades,[61] but the Appellate Body explicitly acknowledged the need to broaden the scope of the environmental exception due to raising international concerns about the environment. The Appellate Body's approach shows a major change in the way environmental issues are perceived.[62] The report not only acknowledged the principle of sustainable development as "generally accepted" but also fundamentally based a part of its analysis on this principle. Previous reports may have noted this principle, but limited its effect by remarking that "the central focus of the agreement remains the promotion of economic development through trade."[63] Furthermore, the Appellate Body looked at a number of environmental treaties and even referred twice[64] to the Brundtland-Report,[65] a report that in 1987 determined the alarming environmental state of the earth and has since become a major source for environmental advocates. These arguments show clearly that the Appellate Body is willing to seriously consider developments, treaties, and statements that derive from outside the WTO, even if they might not support the objective of free trade.[66]

The Appellate Body's clarification of the applicability of Article XX(g) to endangered species is a positive event, especially because in doing so it opens its view towards aspects outside the trade spectrum. The discussed rationale indicates a significant strengthening of environmental positions within the GATT-environment debate.

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60. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 36, Fn. 107.

61. Tuna/Dolphin I Panel Report, *supra* note 42, at 45, para. 5.26, concerning the question whether the protection of extrajurisdictional living beings can be justified by Article XX(b).

62. *See* (concerning the development within the WTO dispute settlement system to better consider international law outside the WTO David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998)).

63. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 277, para. 7.42.

64. *Id.* at 36, Fn. 106, 107.

65. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 58.

66. This can also be seen as part of a development within the WTO legal system, to increasingly recognize sources of law outside the WTO and move away from the largely self-contained system. For a detailed analysis of this problem see David Palmeter & Petros C. Mavroidis, *supra* note 62, at 398-413.

B. Extrajurisdictionality

One of the most complex problems concerns trade measures that are intended to protect subjects outside a country's jurisdiction.[67] The *Tuna/Dolphin I* report referred to this problem as "extrajurisdictional" application of Article XX(b) and (g).[68] The *Tuna/Dolphin I* Panel rejected the extrajurisdictional application of Article XX(b) and (g) for numerous reasons. It noted that the legislative history indicates this interpretation for Article XX(b).[69] Further, it relied on the reasoning of the *Herring/Salmon* Report stating that a measure would qualify under Article XX(g) only if it were "primarily aimed at rendering effective these restrictions [on domestic production and consumption]."[70] The *Tuna/Dolphin I* Panel concluded that as a country can only control the production and consumption under its own jurisdiction, Article XX(g) was intended solely to permit trade measures that did not aim at extrajurisdictional production and consumption.[71] Some commentators[72] agreed with the panel's interpretation, but this perspective also generated criticism. Against these decisions it has been asserted that nothing in the semantics or in the systematic context provides for this limited application of Article XX(b) and (g).[73] Charnowitz has stated that the legislative history of Article XX(g)

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67. *See* discussion in Steve Charnowitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFFAIRES 203, 208-10 (1992); Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, COLUM. J.L. & SOC. PROBS. 175, 200-02 (1996); Foster, *supra* note 19, at 400-06.

68. Tuna /Dolphin I Panel Report, *supra* note 42, at 47, para. 5.32.

69. *Id.* at 45, para. 5.26. Article XX(b) was construed after the New York Draft of the International Trade Organization Charter which reads: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country." Later, Commission A of the Second Session of the Preparatory Committee in Geneva dropped the last part of the provision as unnecessary. EPCT/A/PV/30/7-15.

70. Herring/Salmon Panel Report, *supra* note 40, at 114, para. 4.6.

71. Tuna/Dolphin I Panel Report, *supra* note 42, at 47, para. 5.31.

72. Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 522 (1991); Steven Shrybman, *International Trade and the Environment*, 20 THE ECOLOGIST 30, 33 (1990); undecided John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1240-41 (1992).

73. Charnowitz (1994), *supra* note 19, at 328; SUSANNE RUBLACK, DER GRENZÜBERSCHREITENDE VERKEHR VON UMWELTRISIKEN IM VÖLKERRECHT [The transboundary movement of environmental risks in international law] 269 (1992).

does not support the panel's conclusion[74] and opined that there is no reason that Article XX(b) is intended to be less cosmopolitan than Article XX(g).[75] Moreover, it has been argued that environmental measures by their nature have extraterritorial effects.[76] Furthermore, trade measures are extraterritorial by definition, and therefore are acceptable within the GATT framework.[77] A restriction would inappropriately limit the pursuit of environmental goals and would only be justified under circumstances where protectionism is the objective.[78]

Although the Appellate Body explicitly stated that it did not address the question of whether there is a jurisdictional limitation in Article XX(g), it noted that "in the specific circumstances of the case before us, there is sufficient nexus between the migratory and endangered marine population involved and the United States for purposes of Article XX(g)."[79] This statement has to be interpreted to mean that the Appellate Body did not find the U.S. measure to have an extrajurisdictional effect. This conclusion can be drawn from the fact that the Appellate Body did not see the need to decide the question whether Article XX(g) is applicable to extrajurisdictional measures,[80] because the migratory turtles at issue reside in waters over which the United States has jurisdiction.[81] This rationale can be related to the "principle of common concern of humankind," based on the growing consensus that the world is ecologically interdependent and that humanity has a collective interest in certain activities or resources, no matter where they take place or where they are located.[82] Codified examples of this concept can be found in the Climate Change Convention[83] that, in its preamble, acknowledges that "change in the earth's climate and its adverse effects are a common concern of humankind" and the Biodiversity Convention[84] that affirms "that the conservation of biodiversity is a common concern of humankind."

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74. Charnowitz, *supra* note 19, at 328.
75. Rublack, *supra* note 74, at 210.
76. Foster, *supra* note 19, at 402; Foster uses the term "extraterritorial" in this context to be synonymous with "extrajurisdictional".
77. *Id.* at 405.
78. *Id.* at 428.
79. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 38, para. 133.
80. *Id.* at 39, para. 133.
81. *Id.* at 38, para. 133.
82. HUNTER, *supra* note 13, at 343.
83. United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849 (1992).
84. Biodiversity Convention, *supra* note 54.

The Appellate Body's holding was received as a great success for the environmental protection within the GATT, as it could mean that all environmentally related trade measures that somehow affect subjects within the jurisdiction of the acting state[85] could be justified by Article XX(b) or (g)[86] (which does not include the requirements contained in the chapeau). The general rule that might be derived from the Appellate Body report is that a sufficient nexus between the protected subject and a country exists when the natural resource is at least temporarily within the jurisdiction of the country that invokes the Article XX exception even though the damaging activity takes place outside its territory. However, it remains to be seen whether and to what extent future WTO reports will adopt the rationale of the Appellate Body.

C. The Meaning of the Term "Relating to"

Having determined that the sea turtles are exhaustible natural resources, the Appellate Body next addressed the question of whether their conservation "relat[es] to" the measures sought to be justified.[87] The meaning of this language was already analyzed in previous GATT reports. The panel in the *Herring/Salmon* case introduced the interpretation that the measure had to be "primarily aimed at", but not necessary or essential for the conservation of natural resources.[88] The Tuna/Dolphin panels referred to this wording, but did not stop at the semantic interpretation of Article XX(g), holding that the Article has to be read "in a manner that preserves the basic objectives and principles of the General Agreement."[89] The *Tuna/Dolphin I* report regarded a trade measure as not primarily aimed at the objectives of Article XX(g), because they were based on "unpredictable conditions."[90] The Tuna/Dolphin II panel added that Article XX(g) cannot be "interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction," because this would seriously impair "the

85. Ozone depletion, transboundary air and water pollution, climate change, loss of biodiversity, etc.

86. Phillipe Sands, Lecture at American University, WCL, November 11, 1998.

87. This analyzed part of Article XX(g), *supra* note 1, reads: "nothing . . . shall be construed to prevent the adoption or enforcement . . . of measures: (g) *relating to* the conservation of exhaustible natural resources . . ." (emphasis added).

88. Herring/Salmon Panel Report, *supra* note 40, at 38, para. 4.6.

89. Tuna/Dolphin II Panel Report, *supra* note 42, at 52, para. 5.26.

90. Tuna/Dolphin I Panel Report, *supra* note 42, at 47, para. 5.33.

balance of rights and obligations among contracting parties."[91] The rationale of this interpretation was clearly the result which the panels wanted to achieve. The panels found that it was not GATT-consistent to force other countries to adopt certain policies, and used the unclear term[92] "relating to" to introduce additional restrictions.

A later decision of the Appellate Body in the *Reformulated Gasoline*[93] dispute addressed the problem differently. It interpreted the "relating to" language as requiring a "substantial relationship" of the measure and the conservation of resources and did not overload it with the consideration of the objectives of the GATT.[94] In fact, the *Reformulated Gasoline* Appellate Body found the chapeau to be a more ambiguous part of Article XX, into which it could introduce its concerns regarding the abuse of the environmental exception.[95] This decision was regarded as a step towards a more environmental friendly reading of Article XX(g).[96]

The *Shrimp/Turtle* Panel Report was convinced by this latter approach, and did not bother with the analysis of Article XX(g) or (b).[97] Instead the report focused on the chapeau.[98] The appellate decision reversed this approach[99] and interpreted the "relating to" clause similarly to how it had in the *Reformulated Gasoline* dispute. To determine whether the U.S. measures and the objective of conserving sea turtles were substantially related, the Appellate Body stated that the U.S. legislation is "not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtles species" and that "[i]n principle the means are, in principle, reasonably related to the ends."[100] It concluded that the legislation that restricted the shrimp imports was indeed related to the conservation of an

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91. Tuna/Dolphin II Panel Report, *supra* note 42, at 52, para. 5.26.
92. *Id.* at 52, para. 5.25.
93. United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report, adopted May 20, 1996, WT/DS2/AB/R. In this dispute Venezuela (later joined by Brazil) brought a complaint before the WTO Panel against a United States regulation, which set out requirements for gasoline to control the pollution from gasoline combustion.
94. *Id.* at 19.
95. *Id.* at 22-29.
96. HUNTER, *supra* note 13, at 1196; Foster, *supra* note 19, at 430.
97. Shrimp/Turtle Panel Report, *supra* note 32, at 285, para. 7.63.
98. *Id.* at 273, para. 7.28.
99. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 33, para. 118.
100. *Id.* at 40, para. 141.

exhaustible natural resource within the meaning of Article XX(g).[101]

This reasoning makes it clear that the narrow, result-oriented interpretation of the words "relating to" by the *Tuna/Dolphin* panels is not applicable anymore. Though the concept of stare decisis does not exist in the WTO dispute settlement system, this decision effectively overruled the *Tuna/Dolphin* reports, in favor of the *Reformulated Gasoline* Appellate Body Report. This reasoning fulfills the self-imposed requirements of treaty interpretation, as it reflects the ordinary meaning of the words "relating to," read in their context, and in the light of the object and purpose of the GATT. The meaning of the disputed words as well as the context and the purpose of the GATT clearly does not require one to consider whether the measure is unpredictable or whether it coerces other countries to change their policies. The function of the words "relating to" in the context of Article XX is to ensure that a measure does not aim at other objectives, such as the protection of the domestic industry. It is not the purpose of that language to provide a balance between trade and environmental objectives and narrow down the scope of Article XX(g) but to rule out measures that do not focus on the conservation of natural resources. In conclusion, the Appellate Body report's holding on the language of "relating to" is appropriate and is welcomed as it definitely abolished the flawed interpretation of the *Tuna/Dolphin* panels.

D. The Meaning of the "Made Effective in Conjunction with" Clause

The last clause of Article XX(g) requires that the measures at issue "are made effective in conjunction with restrictions on domestic production and consumption."[102] In analyzing the clause, the Appellate Body again referred to and confirmed its previous holdings in the *Reformulated Gasoline* Report. In this report two different issues were discussed. The Appellate Body first addressed how the words "in conjunction with" were to be read and whether they were to be applied identically to domestic and imported products. In its analysis in the *Reformulated Gas*

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101. *Id.* at 40, para. 142.

102. As discussed above, this clause was used in the *Tuna/Dolphin I* report to support the holding that Article XX(g) is not applicable to extrajurisdictional natural resources. *Tuna/Dolphin I, supra* note 42, at 11.

case, the Appellate Body found that there was "no textual basis for requiring identical treatment,"[103] but that "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."[104] The measures concerned must impose restrictions, not just "in respect of" imported products but also "with respect to" domestic products.[105] The *Shrimp/Turtle* Appellate Body report adopted this analysis and noted that the disputed U.S. legislation imposed similar restrictions both on U.S. shrimp trawl vessels and shrimp importers. The Appellate Body concluded that it was "in principle, . . . an even-handed measure."[106]

The second issue addressed in the *Reformulated Gasoline* Appellate Body Report was the question whether the clause "if made *effective* in conjunction with restrictions on domestic production or consumption" (emphasis added) in Article XX(g) was intended to establish an empirical "effects test." The Appellate Body denied the applicability of such a test because it would be too difficult to determine the causation of such effects, and because measures which under any circumstances cannot have a possible effect on conservation goals would not have been "primarily aimed at" the conservation.[107] The recent Appellate Body Report did not address this issue, indicating the "effects test" is no longer relevant.

E. Interim Conclusion

The interpretation of Article XX(g) in the Appellate Body Report is objective, textually focussed and not overloaded with result-orientated, trade-protective thoughts. The interpretation of Article XX(g) has been consistent with the former Appellate Body Report in the *Reformulated Gasoline* case, but has incorporated new perspectives that are consistent with and can be related to principles of international environmental law. In conclusion, the Appellate Body's analysis of Article XX(g) is welcomed for both the legalistic methods it applied and the results it yielded. However, having fulfilled the requirements of Article XX(g) means

103. Reformulated Gasoline Appellate Body Report, *supra* note 93, at 21.
104. *Id.*
105. *Id.* at 20.
106. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 40, para. 144.
107. Reformulated Gasoline Appellate Body Report, *supra* note 93, at 21-22.

only a provisional justification;[108] the significant threshold for the disputed measure will be found in the chapeau.

IV. The Chapeau[109] of Article XX GATT

As mentioned above, the WTO dispute settlement body reports focused their legal analysis of environmentally induced trade restrictive measures on the introductory clause of Article XX (the "chapeau") and found therein the grounds for denying a justification under Article XX.[110]

The chapeau introduces two general requirements to the otherwise absolute provision that "nothing in this Agreement" shall prevent the adoption of measures to achieve the policy goals enumerated in Article XX(a)-(j). It requires that "measures are not applied in a manner which would constitute (1) a means of arbitrary or unjustifiable discrimination between two countries where the same conditions prevail, or (2) a disguised restriction on international trade."

In general, there is a broad agreement between the WTO dispute bodies,[111] the parties in the Shrimp/Turtle dispute,[112] and environmental groups[113] that the chapeau is designed to prevent abuse of the Article XX exceptions. Despite this superficial consensus, the exact meaning of the ambiguous language is heavily disputed. The debate in the *Shrimp/Turtle* case, in particular, dealt with the question of whether and under what

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108. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 41, para. 147.

109. The chapeau reads: "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 or enforcement by any Member of measures:"

110. Reformulated Gasoline Appellate Body Report, *supra* note 93, at 22-29; Shrimp/Turtle Panel Report, *supra* note 32, at 273-285, paras. 7.31–7.61.

111. Reformulated Gasoline Appellate Body Report, *supra* note 93, at 22; Shrimp/Turtle Appellate Body Report, *supra* note 3, at 45, para. 145. Both reports referred to the negotiating history, specifically 1946, when the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified.

112. Arguments of United States in *Shrimp/Turtle* dispute, reported in Shrimp/Turtle Appellate Body Report, *supra* note 3, at 6, para. 14; arguments of India, Pakistan, Thailand in Shrimp/Turtle dispute, reported in Shrimp/Turtle Appellate Body Report, *supra* note 3, at 11, para. 36.

113. CIEL et. al., Amicus Brief to the Appellate Body on United States – Import Prohibition of Certain Shrimp and Shrimp Products, July 23, 1998, at 41, para. 3.6.

conditions the invocation of the environmental exception for unilateral trade restricting measures would constitute such an abuse.

A. General Considerations

1. Previous WTO Dispute Settlement Reports—The *Reformulated Gasoline* report dealt with the interpretation of the chapeau in dicta. Concerning the general considerations it stated that

> [t]he 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.[114]

Referring to these statements, the *Shrimp/Turtle* Panel held that the chapeau "only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX."[115] Therefore, the panel must also consider "whether such type of measure, if it were to be adopted by other members, would threaten the security and predictability of the multilateral trading system."[116]

The *Shrimp/Turtle* panel based its decision on these general considerations and concluded that "requiring that other Members adopt policies comparable to the U.S. policy for their domestic markets and all other markets represents a threat to the WTO multilateral trading system."[117] This reasoning was criticized as a misunderstanding of the purpose of Article XX, which is not to provide guaranteed market access under all circumstances, but to

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114. Reformulated Gasoline Appellate Body Report, *supra* note 93, at 22; in the cited passage, it is remarkable that the Appellate Body referred to the *duties* of the party which invokes the exception and the *rights* of the other parties. A reasonable application, should take into account the *duties and rights* of both parties.

115. Shrimp/Turtle Panel Report, *supra* note 32, at 278, para. 7.44.

116. *Id.*

117. *Id.* at 280-81, para. 7.51.

disallow market access for certain limited reasons and to allow discrimination based on specific environmental policy goals.[118]

2. *The Shrimp/Turtle Appellate Body*—The Appellate Body did not agree with this interpretative analysis either and reversed it.[119] It complained that the panel interpreted the object and purpose of the whole of the GATT and the WTO Agreement in an overly broad manner rather than taking a precise look at the chapeau. The Appellate Body found that maintaining the multilateral trade system is neither a right nor an obligation nor an interpretative rule under Article XX. Furthermore the panel did not inquire into how the disputed measure "was being applied in a manner as to constitute abuse or misuse of a given kind of exception."[120]

In its dicta, the Appellate Body laid out its own general considerations. In determining a frame of principles and documents within which the chapeau the must be considered, the Appellate Body referred to the preamble of the new WTO Agreement. It noted that the preamble calls for "the optimal use of the world's resources in accordance with the objective of sustainable development," and added that this preambular language "must add colour, texture and shading to our interpretation of the . . . GATT 1994."[121] Further, it noted the establishment of a permanent Committee on Trade and Environment (CTE), with the agenda to solve trade and environment conflicts. It is also pointed out the ministerial decision establishing the CTE, which took note of the Rio Declaration on Environment and Development, in particular Principle 12[122] and Agenda 21.[123] Further, the Appellate Body stated that the chapeau embodies the need "to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . and the substantive rights of the other Members under the GATT 1994."[124] A line of equilibrium between the two positions, which

118. CIEL et al., *supra* note 113, at 44-45, note 209.
119. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 34, para. 122.
120. *Id.* at 32, para. 116.
121. *Id.* at 43, para. 153.
122. Rio Declaration on Environment and Development, *supra* note 58; Principle 12 calls for multilateral solutions and agreements concerning environment and development issues. This principle will be discussed *infra*, in respect to the problem of unilateralism.
123. Again, the Appellate Body referred to the principle of sustainable development and another hint for the increasing openness towards external sources of law.
124. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 44, para. 156.

moves as the interests at stake vary, has to be marked out.[125] The Appellate Body also added that the chapeau expresses the principle of good faith.[126]

3. Critique—By introducing a balancing test and a good faith principle, the Appellate Body has opened the door for arguments and requirements that do not necessarily need to have a textual basis. In contrast to the *Reformulated Gasoline* Appellate Body Report,[127] the Appellate Body in the *Shrimp/Turtle* report explicitly acknowledged that both sides of the dispute have rights and duties, between which a balance needs to be struck. However, it remains questionable whether this balance requirement can be derived from the accepted function of the preamble to prevent the abusive invocation of Article XX. It is without doubt that that the GATT imposes numerous duties on its members to reduce trade restrictions, and establishes the right of the other members to unrestricted market access. However, the (provisional) justification of a trade restriction under Article XX(a)-(j) conflicts with this, because it creates a right to impose the trade measure and rejects the rights of the other members deriving from Articles I, III or XI. This assumption can be supported by the language of the chapeau, which provides that aside from the enumerated reasons, "nothing in [the] agreement shall be construed to prevent the adoption and enforcement" of the exempted measures. Article XX itself does not establish an independent legal right for other members,[128] it only protects the other members from the abuse of rights. If the function of the chapeau is to prevent the abuse of these rights, the analysis of the chapeau should reflect this function. In other words, the starting point of the analysis should be the right of the member to invoke the exception and not a balance between rights and duties of all members based on the bona fide principle. Once a right has been established, it must be examined to see whether an abuse took place. For purposes of this examination it should be emphasized that an abuse is the exception rather than the rule. Moreover, the chapeau provides an ambiguous but explicit description for the existence of an abuse. Thus, there is neither a

125. *Id.* at 45, para. 159.
126. *Id.* at 45, para. 158.
127. *See* Taxes on Automobiles, *supra* at 18.
128. *See* Charnowitz (1998), *supra* note 17, at 911-12, who criticizes the Reformulated Gasoline Appellate Body Report "as being circular in suggesting that Article XX must be interpreted to preserve legal rights which themselves can only determined by article XX."

need nor a conceptual basis for this kind of balance analysis. However, the Appellate Body considered the balance principle only in a general way and moved on to analyze the language of the chapeau of Article XX.

B. Application of Measure Constitutes Unjustifiable Discrimination

The chapeau contains three different situations under which a trade restriction is considered abusive and cannot be ultimately justified. The Appellate Body first examined whether the measure was "applied in a manner which would constitute a means of unjustifiable discrimination between countries where the same conditions prevail."[129] The Appellate Body did not explicitly define the term "unjustifiable discrimination." Instead, the Appellate Body ruled out certain interpretations and laid out a set of characteristics that establish an "unjustifiable discrimination." As already held in the *Reformulated Gasoline* Report, the Appellate Body noted that the discrimination in Article XX is different in its nature and quality than the discrimination in the treatment of products in the meaning of Articles I, III, XI.[130] Otherwise, a violation of the free trade principles would automatically lead to the rejection of the exception in Article XX.

The Appellate Body then went on to reject an argument[131] that the policy goal of a measure can provide for its justification under the standard of the chapeau, because this "would be to disregard the standards of the chapeau."[132] In other words, the chapeau would no longer be able to safeguard against abuse if a policy goal which qualifies under Article XX(a)-(j) would also suffice to justify a discrimination under the chapeau. The chapeau addresses any "unjustifiable discrimination" that arises from the *application* of the measure at stake, whereas the other provisions in the GATT affect the measure itself.

In keeping with this provision, the Appellate Body looked at the actual application of the U.S. shrimp import ban and concluded

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129. The other two standards are: 1) application of a measure in a manner which would constitute a means of arbitrary discrimination between countries where the same conditions prevail; 2) application of a measure in a manner which would constitute a disguised restriction on international trade. The first of those standards is discussed *infra*, whereas the second standard was not at issue in the *Shrimp/Turtle* Appellate Body Report.

130. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 42, para. 142.

131. Argument of U.S. in Shrimp/Turtle dispute, reported in *id.* at 8, para. 22.

132. *Id.* at 41, para. 149.

that the "cumulative effect" of the differences in the means of application of Section 609 constituted an "unjustifiable discrimination."[133] The Appellate Body criticized the following features of the U.S. measure in its actual application: (1) it coerces other members to adopt essentially the same regulatory program; (2) the failure of the United States to engage in serious multilateral negotiations with the objective of concluding bi- or multilateral agreements for the protection of sea turtles; (2a) the United States concluded one regional agreement, but did not negotiate with other countries; (3) countries which desired certification under Section 609 were treated differently.

1. The Coercive Effect—Primarily, the Appellate Body complained about the coercive effect of the measure's application on the policy decisions made by foreign governments, because it requires "all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy" that is in effect in the United States.[134] Although the "statute appears to permit a degree of discretion and flexibility in how the standards for comparability might be applied," any flexibility has been eliminated in the actual "implementation of that policy through the 1996 Guidelines . . . and the practice of the administrators in making certification determinations."[135] Also, under the certification rule, individuals who catch shrimp with identical methods as required in the United States, but who fish in waters of uncertified countries are still not permitted to import their shrimp. This situation "is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles."[136] The court believes "that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of a measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[137]

This analysis of the Appellate Body does not differ in its outcome from holdings of previous panels. Both, the *Tuna/Dolphin*

133. *Id.* at 53, para. 176.
134. *Id.* at 46, para. 161.
135. *Id.*; the Appellate Body explained that under the guidelines at stake a certification "shall" only be granted, if the foreign state has adopted a regulation that mandates the use of effective TED's and if it has a "credible enforcement effort" in place, *id.* at 46, para. 162.
136. *Id.* at 47, para. 165.
137. *Id.*

II decision[138] as well as the *Shrimp/Turtle* Panel Report[139] based their findings on the fact that the regulation forced other parties to change their policies. The most obvious difference is that the Appellate Body did not categorically condemn the U.S. legislation, but tried to look in detail at the actual application of the measure and its flaws. Nevertheless, it remains questionable whether the underlying rationale of pushing other countries to adopt policies is permissible. It is suspicious that precisely the same rationale, which in one decision was used to deny that the measure was relating to the conservation of natural resources under Article XX(g), reappears to give reasons for the determination of an "unjustifiable discrimination."

Furthermore, every trade measure that is provisionally justified under Article XX(g) forces and is intended to force foreign states or at least foreign exporters to change their policies. Taking into account the rationale that the coercive measures at stake invade the sovereignty of other nations and dictate foreign conservation policies, it can be rebutted that otherwise the United States loses its sovereign power to regulate how its internal market is to be used and to correct what it reasonably perceives as market distortions.[140] This leads to the question of which country's rights are at stake in the chapeau of Article XX.[141]

Further, the import ban for shrimps that are fished with turtle excluder devices (TEDs) in uncertified waters is a discrimination that on the first view does not support the conservation goal of the U.S. legislation. However, this discrimination simply does not take place between countries. Moreover, the Appellate Body did not even address the question of whether this alleged discrimination, as well as the entire certification rule, may be justified by the fact that a reasonable alternative might not exist. Case by case decisions about the import of particular shrimps depending on the way how

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138. Tuna/Dolphin II Panel Report, *supra* note 42, at 52, para. 5.26: "If however Article XX were interpreted to permit contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets would be seriously impaired." It has to be noted that this analysis in *Tuna/Dolphin II* addressed Article XX(g). *Id.*

139. Shrimp/Turtle Panel Report, *supra* note 32, at 280, para. 7.51: "requiring that other Members adopt policies comparable to the US policy for their domestic markets and all other markets represents a threat to the WTO multilateral trading system." *Id.*

140. Stephen J. Porter, Note, *The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?*, 5 GEO. INT'L ENVTL. L. REV. 91, 103 (1992).

141. *See id.*

they are fished are not verifiable and enforceable, and thus would lead to the failure of the conservation objective and/or an increase in fraudulent labeling and a different kind of unfairness. Ultimately, the Appellate Body's rationale to show that the coercive effect of the application of Section 609 is an "unjustifiable discrimination" is not convincing.

2. Unilateralism—The second and maybe the most important aspect[142] of the debate is the unilateral character of the measure's application. The Appellate Body criticized the "failure of the United States to engage . . . other Members exporting shrimp to the United States, 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 against the shrimp exports of those other Members."[143] It is notable that the Appellate Body did not necessarily exclude unilateral measures, but that it required serious negotiations before taking unilateral actions as a last resort. Similar language was already included in the panel's report, which stated that its "findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate."[144]

Environmentalists argued that the United States nevertheless was justified in acting alone, because there is a broad international consensus for protecting endangered species.[145] In their *amicus brief*, environmental groups acknowledged that numerous international agreements require the protection of endangered, migratory marine resources.[146] They note that all five sea turtle species are listed as endangered under the Convention to Regulate Trade in Endangered Species of Flora and Fauna (CITES).[147] Further, the 1982 United Nations Convention on the Law of the Sea

142. John Jackson: "This case is really about unilateralism – one country imposing its view of what is appropriate for the environment, without adequate attempt to build multilateral mechanisms," *cited in* Julie Kosterlitz, *Shell Game*, 30 Nat'l J. 2102, 2105 (Sept. 12, 1998).

143. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 48, para. 166.

144. Shrimp/Turtle Panel Report, *supra* note 32, at 285, par. 7.61.

145. Kosterlitz, *supra* note 142, at 2105.

146. CIEL et al., *supra* note 113, at 26-30, para. 3.2.1.

147. Convention to Regulate International Trade in Endangered Species of Flora and Fauna, March 3, 1973, 12 I.L.M. 1085 (1973) (entered into force July 1, 1975) [hereinafter CITES].

(UNCLOS)[148] provisions on living marine resources require members to protect marine life.[149] Also the Food and Agriculture Organization Code of Conduct for Responsible Fisheries promotes remedies to the environmental consequences of the use of fishing equipment and techniques that create significant bycatch and resulting discard of non-target species.[150] The *Amicus Brief*,[151] further, mentions the Straddling Stocks Agreement,[152] the Biodiversity Convention,[153] and the Convention on the Conservation of Migratory Species of Wild Animals,[154] to show the international consensus concerning the protection of endangered species. The environmental groups claim that the complainants, which refuse to implement TED programs, violate their commitments and obligations under the enumerated agreements because TEDs are the only scientifically recognized effective means for turtle-safe shrimp fishing.[155] Moreover, the environmental groups[156] stated that

148. United Nations Convention on the Law of the Sea, *supra* note 53; signed by 125 countries. Bycatch is the harvesting of species other than those targeted.

149. UNCLOS, *supra* note 53, Article 192.

150. FAO Code of Conduct for Responsible Fisheries Article 6.2, 6.6:

> elective and environmentally safe fishing gear and practices should be further developed and applied, to the extent practicable, in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems. Where proper selective and environmentally safe fishing gear and practices exist, they should be recognized and accorded priority in establishing conservation and management measures for fisheries. States and users of aquatic ecosystems should minimize waste, catch of non-target species, both fish and non-fish, and impacts on associated or dependent species.

151. CIEL et al., *supra* note 113, at 28-29, para. 3.2.1.

152. Agreement for the Implementation of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August 4, 1995, UN Doc. A/Conf. 164/38 (not yet in force), Article 5: ". . . coastal States and States fishing on the high seas shall . . . (f) minimize . . . catch of non-target species, both fish and non-fish species . . . through measures, to the extent practical, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques."

153. Biodiversity Convention, *supra* note 55, Article 11 requires parties (the complainants are parties) to identify "processes and categories of activities which have or are likely to have significant impacts on the conservation and sustainable use of biological diversity;" Article 10(b) requires parties to "adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity."

154. Convention on the Conservation of Migratory Species of Wild Animals, *supra* note 56; the sea turtles at stake are covered by this Convention; Article III(4)(b) requires parties to take specific measures to prevent the adverse affects of activities that could prevent the migration of the species.

155. CIEL et al., *supra* note 113, at 29, para. 3.2.1.

156. *Id.*, at 30, para. 3.2.2.

Principle 8[157] of the Rio Declaration and Chapter 4 of Agenda 21[158] oblige the United States, the world's second largest consumer of shrimp, "to reduce and eliminate unsustainable patterns of consumption."[159] The Appellate Body did not directly reject these arguments. However, it referred to sections in the aforementioned agreements which declare multilateral actions to be the most effective conservation measures. It cited Principle 12 of the Rio Declaration which states that "[u]nilateral 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." The Appellate Body[160] also cited similar language found in paragraph 2.22(i) Agenda 21,[161] in Article 5 of the Convention on Biological Diversity, and in the Convention on the Conservation of Migratory Species of Wild Animals.[162] The Appellate Body concluded that the "unilateral character of the application of the [disputed regulation] heightens the disruptive and discriminatory influence of the [measure at stake] and underscores its unjustifiability."[163]

The reasoning of the Appellate Body is plausible and it shows again that the court is willing to consider international law outside the WTO system. However, the underlying rationale of the holding is that the unilateral measures are not permissible, because they are not the most effective possible solution. This rationale is based on the idea of effectiveness and proportionality. As discussed earlier,[164] the language and structure of the chapeau of Article XX does not leave any room for these considerations. Additionally, the argument could be made that multilateral negotiations are usually more time-consuming and for that reason might be less

157. Rio Declaration, *supra* note 122.
158. Agenda 21, *supra* note 54.
159. Principle 8 Rio Declaration, *supra* note 58.
160. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 49-50, para. 168.
161. Agenda 21, *supra* note 54, para. 2.22(i):
> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: . . . (i) 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.

162. Convention on the Conservation of Migratory Species of Wild Animals, *supra* note 56.
163. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 51, para. 172.
164. Article XX(b).

effective than unilateral measures which can be adopted immediately. Further, the unilateral measures can be seen as an interim solution until a multilateral agreement is concluded, or as incentive to convene multilateral negotiations.

3. The Inter-American Convention—A third point in the line of alleged flaws which leads to "unjustifiable discrimination" is closely related to the last issue. The Appellate Body criticized the fact that the United States negotiated and concluded the Inter-American Convention[165] for the protection and conservation of sea-turtles with only some of the affected countries. The Appellate Body found that this agreement "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."[166] The Appellate Body noted that a unilateral measure was not the only available solution. Furthermore, the Appellate Body held that the fact that the United States negotiated with some, but not with other WTO members, had an effect which was "plainly discriminatory and . . . unjustifiable."[167]

Here, the Appellate Body's interpretation of Article XX corresponds, for the first time, with the actual language of the chapeau. The criticized action does discriminate because it treats certain countries differently. Whether this discrimination is unjustifiable depends on the facts of the case. The United States would have to provide a plausible reason why it negotiated first with some countries and not with others.

4. Other Differential Treatment—Finally, the court detected that differential treatment was being given to various countries desiring certification. Under the 1991 and 1993 guidelines, fourteen countries in the Carribbean/western Atlantic region had a phase-in period of three years, whereas all other states had only four months to implement the requirement of compulsory use of TEDs.[168] The Appellate Body rejected the U.S. explanation that the longer implementation period was justified by the undeveloped character of TED technology in 1991 respectively 1993, while in 1996 improvements made a shorter period possible. It held that even in 1996 the implementation of the U.S. policy caused administrative

165. Inter-American Convention, Dec. 1, 1996, 37 I.L.M. 1246 (1998).
166. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 51, para. 171.
167. *Id.* at 51, para. 172.
168. *Id.* at 52, para. 173.

and financial costs and difficulties that could not be overcome in a short period of time.[169] Moreover, the Appellate Body observed that "[f]ar greater efforts to transfer [the required TED] technology successfully were made to certain exporting countries" – basically the fourteen wider Caribbean/western Atlantic countries cited earlier – than to other exporting countries, including the appellees.[170]

C. Arbitrary Discrimination

The analysis of whether the measure at stake is applied in a manner that arbitrarily discriminates between countries where the same conditions prevail is significantly briefer than the one concerning unjustifiable discrimination. The Appellate Body based its finding of arbitrary discrimination two points: (1) the rigidity and inflexibility of the certification process and (2) the lack of transparency,[171] predictability, and thus, due process and basic fairness in the certification process.[172]

The first point of critique, the inflexibility in the issuance of certifications, is grounded in the same observations as the complaint about the coercive effect of the measure, which is discussed below.[173]

Secondly, the Appellate Body criticizes the certification process, which requires an application and the visit of U.S. officials to the applicant country, but does not provide the opportunity for an applicant country to be heard in the procedure or to appeal from a denial of an application.[174] It contended that the procedure of certification was inconsistent with the standards of transparency and procedural fairness established in Article X:3. These alleged flaws in the application of the U.S. regulation are in fact worth the criticism for they are not consistent with international standards of due process. To the extent that violations of due process result in an arbitrary discrimination, the reasoning of the Appellate Body has to be supported. However, the concept of due

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169. *Id.* at 52, para. 174.

170. *Id.* at 53, para. 175.

171. It is noteworthy that the lack of transparency is one of the complaints concerning the WTO dispute settlement procedure; *see* HUNTER, *supra* note 13, at 1218-20; Foster, *supra* note 19, at 434-35; Kosterlitz, *supra* note 142, at 2105.

172. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 53-55, paras. 177-184.

173. *See id* at 23.

174. Shrimp/Turtle Appellate Body Report, *supra* note 3, at 53-54, paras. 178-181.

process relates to the way the public and the affected parties were given the possibility to participate in the process, whereas arbitrariness focuses on the reasoning behind one's conduct, and not upon any course of reasoning and exercise of judgment.[175] Thus, the court should have determined whether there was a plausible reasoning behind the certification decisions. The existence of procedural flaws exist does not automatically indicate arbitrariness. At a minimum, it places a burden on the United States to show the course of reasoning and exercise of judgement behind their non-transparent decisions.

D. Conclusion

The decision of the Appellate Body addresseded environmental concerns more than former reports and points out some serious flaws in the application of the regulation at stake. However, the interpretation of the chapeau in crucial points is still focused on certain concepts such as the balance principle, the rejection of unilateralism, or due process that are not necessarily reflected by the language of the chapeau. Furthermore, the process of determining whether an "unjustifiable discrimination" has occurred is ambiguous. On the one hand, it shows some flexibility in the court's perception of the measure at issue: In contrast to previous decisions the court does not categorically condemn measures that require the adoption of policies or that are applied unilaterally. It is an expression of the WTO dispute settlement system's increased openness that the system no longer considered free trade as the singular objective of the WTO and the international community. Because of this, the United States and the environmentalists have reason to expect that slight changes in the application of environmentally induced trade restrictions might make them consistent with the chapeau.

On the other hand, it is questionable whether the method of identifying unjustifiable discrimination is permissible under the chapeau. According to the Appellate Body's opinion, the chapeau does not require that the measure be proportional or balanced,[176] and its structure does not leave room for cumulative effects. A measure is either applied in an unjustifiable discriminatory manner or not; but it is not convincing to accumulate several minor discriminations in order to state "unjustifiable discrimination." For

175. BLACK'S LAW DICTIONNARY, *supra* note 39, at 69.
176. Shrimp/Turtle Appellate Body Report *supra* note 3, at 21.

this reason, the decision does not serve the predictability of future decisions, because it did not become clear which of the minor discriminations would be permitted, if the others were not existent.

V. Conclusion and Outlook

Even after a detailed analysis of the report it remains ambiguous, whether the decision is a success from the environmental point of view. The first obvious observation is that the analysis of section (g) in Article XX evaluates environmental concerns stronger than the chapeau discussion. Although the Appellate Body considered in detail environmental documents and agreements for its findings, it used these sources not only to support environmental interests but also to reject them. The importance of the world trade system and the WTO Dispute System require that the dispute settlement bodies have an open mind towards all kinds of global problems, and not view the problems from the trade perspective. The Shrimp/Turtle Appellate Body report is an important document which leads into this direction of openness.

The Appellate Body broke with some previously criticized holdings of WTO/GATT dispute settlement bodies, but not all. A policy and trade orientated interpretation of the chapeau still prevails over a textual and structural analysis of the introductory clause.

The value of the case for future decisions should not be overestimated. Although the WTO dispute settlement system does not abide by the principle of *stare decisis*, the report leaves open a number of questions related to the environment-trade conflict under GATT. In the first place are those concerning Article I, III, XI or XX(b) which are not covered by the report. Moreover, the findings concerning the chapeau leave room for speculation. Would a regulation that applies to the singular shrimp and not to the certification of a country be permissible? How much leverage must be left for the foreign country concerning its legislative power? Would a certification rule be an "unjustifiable discrimination," if the applying country seriously tried but failed to negotiate a multilateral agreement? Would the U.S. regulation have been chapeau consistent, if the United States had treated the countries,

which desired certification equally? Maybe Shrimp/Turtle II[177] will provide some answers.

177. Given the statement of the U.S. trade representative that "the report does not suggest that we weaken our environmental laws in any respect, and we do not intend to do so" (cited in Swardson, *supra* note 5, at C2) it could be possible that the case, similar to the Tuna/Dolphin case, will be a cause for another WTO dispute.

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