

# THE WTO'S ENVIRONMENTAL PROGRESS

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## ABSTRACT

The linkage between trade and the environment stands out as an important challenge in global economic governance. Over the past decade, the WTO devoted considerable attention to this issue and included it on the agenda of the Doha Round. In parallel, the jurisprudence on trade and the environment has experienced significant advances. This study provides an overview of the main institutional changes at the WTO and of the developments in the jurisprudence most relevant to the interaction between the environment and trade. Specifically, this study focuses on General Agreement on Tariffs and Trade (GATT) Article XX and takes note of many positive (and a few negative) features of the key Appellate Body decisions.

## INTRODUCTION

Over the past decade, an important period of reform has commenced in the interplay of trade and the environment. The debate began about 80 years ago and can be capsulized briefly. The initial debate occurred in the 1920s during the preparatory period for the first multilateral trade law instrument, the Convention for the Abolition of Import and Export Prohibitions and Restrictions. That Convention contained an exception for trade restrictions imposed for the protection of public health and the protection of animals and plants against diseases and against 'extinction'.<sup>1</sup> A generation later, the debate was rekindled in the drafting of the Charter of the International Trade Organization (ITO) and the General Agreement on Tariffs and Trade (GATT). The ITO Charter's Commercial provisions contain a general exception for multilateral environmental agreements (MEAs), in addition to the general exceptions that parallel those in the contemporary GATT Article XX (general exceptions). The MEA exception of 1948 applies to measures 'taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals', and which meets some

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<sup>1</sup> Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 League of Nation Treaty Series 391, Article 4, Ad Article 4, not in force.

additional conditions.<sup>2</sup> The debate on trade and the environment was revived in the early 1970s, and then became quiescent again. By the late 1980s, the GATT had developed an inward-looking personality, and began to be perceived as being unsympathetic to the challenges of protecting the environment. Emblematic of this environmental insensitivity was the GATT Secretariat Report of 1992 on 'Trade and the Environment' which proclaimed that 'In principle, it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting country'.<sup>3</sup> A new era in the trade-environment debate began in 1996–98. This era was fostered by enlightened Appellate Body jurisprudence and boosted by the attention given to the environment by trade negotiators in the waning days of the Uruguay Round.

This article calls the past decade a 'reform' period for the trading system not because of the birth of a new solicitude for the environment, but rather because the earlier green fundamentals of the trading system are now being respected. As will be seen subsequently, the Appellate Body gave little attention to the historic roots, preferring instead to formulate its environment-friendly holdings as an 'evolutionary' approach to interpretation. Nevertheless, in my view, the dramatic change in trade jurisprudence over the past decade is not evolutionary (and not revolutionary), but rather is reformist in orientation.

For this *Journal* to take note of 'trade and the environment' in this anniversary issue is appropriate indeed. Attention to the environment appeared in the first pages<sup>4</sup> of this *Journal*, and over the past ten years, the *Journal* has presented considerable cutting edge scholarship on this linkage.<sup>5</sup> The *Journal* has also run book reviews on this topic.<sup>6</sup>

<sup>2</sup> Havana Charter for an International Trade Organization (ITO Charter), 24 March 1948, [http://www.wto.org/english/docs\\_e/legal\\_e/prevto\\_legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm) (visited 10 June 2007), Article 45(1)(a)(x), not in force. The three additional conditions for such an international agreement are: (i) that it is not used to accomplish results inconsistent with the ITO Chapter on Intergovernmental Commodity Control Agreements, (ii) that it is not used to accomplish results inconsistent with the purposes of the ITO Charter, and (iii) that the agreement is given 'full publicity'. *Ibid.*, Articles 60(1)(e), 70(1)(d). Note that GATT Article XXIX:1 calls on parties to 'undertake to observe to the fullest extent of their executive authority the general principles... of the Havana Charter...'

<sup>3</sup> GATT Secretariat, *International Trade 90–91*, Vol. 1, 1992, 19–43 at 23.

<sup>4</sup> John H. Jackson, 'Global Economics and International Economic Law', 1 *Journal of International Economic Law* 1 (1998), at 3.

<sup>5</sup> For example, Daniel C. Esty, 'An Environmental Perspective on Seattle', 3 *Journal of International Economic Law* (2000) 176; David Vogel, 'Environmental Regulation and Economic Integration', 3 *Journal of International Economic Law* (2000) 265; Barbara Eggers and Ruth Mackenzie, 'The Cartagena Protocol on Biosafety', 3 *Journal of International Economic Law* (2000) 525; Andrew Green, 'Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?', 8 *Journal of International Economic Law* (2005) 143; Andrew Green and Tracey Epps, 'The WTO, Science and the Environment', 10 *Journal of International Economic Law* (2007) 285.

<sup>6</sup> For example, Kevin P. Gallagher, 'Review of Gary P. Sampson, *The WTO and Sustainable Development*', 9 *Journal of International Economic Law* (2006) 511.

The purpose of this article is to provide a brief survey of the past decade in the trade and environment debate. The article proceeds in three parts: Part I examines the most significant institutional developments at the WTO on trade and the environment. Part II examines developments in WTO jurisprudence, focusing on GATT Article XX. Part III concludes.

## I. INSTITUTIONAL DEVELOPMENTS

To fast forward to the conclusion, the environment has now become a mainstream trade issue. That transformation of the world trading system is to be commended. While it is still too early to declare victory on the visionary calls of fourteen years ago for 'greening the GATT',<sup>7</sup> the progress made since 1994 has surely been greater than expected by the governments and non-governmental organizations (NGOs) who, in the early 1990s, called for a more environment-friendly trading system.<sup>8</sup> Today, there is considerable recognition of the public order contributions of the WTO, not just for the world economy, but also for the global economy.

### A. WTO treaty provisions on the environment

In retrospect, some of the most important greening occurred in the new world trade constitution, that is, the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and its annexes. Let me briefly review those provisions. The Preamble to the WTO Agreement was based on the Preamble to the GATT, but a small change was made. Whereas the GATT's Preamble recognizes that trade relations should be conducted with a view to listed objectives including 'developing the full use of resources of the world...', the WTO's Preamble modifies this by recognizing among the listed objectives, 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development'. At the time this addition was made, few thought that such preambular

<sup>7</sup> This was the title of the leading scholarly analysis: Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (Washington: Institute for International Economics, 1994). An even earlier volume was Kym Anderson and Richard Blackhurst (eds), *The Greening of World Trade Issues* (Hertfordshire: Harvester Wheatsheaf, 1992).

<sup>8</sup> Among those actors: the European Free Trade Association (EFTA) countries, the Talloires Group, the Global Environment & Trade Study, the Foundation for International Environmental Law and Development (FIELD), and World Wildlife Fund (WWF).

language would have any future legal significance. Yet, surprisingly it did; in *US – Shrimp*, the Appellate Body relied upon the WTO Preamble to interpret the General Exceptions in GATT Article XX.<sup>9</sup> In subsequent years, this preambular language has often been referred to by governments, WTO adjudicators, and WTO officials as justification for a stronger environmental dimension to the WTO. For example, in *US – Shrimp*, the Appellate Body stated that the Preamble shows that WTO negotiators ‘decided to qualify the original objectives of the GATT 1947’, and demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development.<sup>10</sup> Moreover, the Appellate Body declared that states ‘should’ protect the environment ‘either within the WTO or in other international fora’.<sup>11</sup> In the follow-on *US – Shrimp* litigation in 2001, the compliance panel reached the conclusion that ‘sustainable development is one of the objectives of the WTO Agreement’.<sup>12</sup>

All agreements in the WTO system supervise trade-related environmental measures (TREMs),<sup>13</sup> but within these agreements, there are a number of provisions that specifically address the environment. Most of them were not part of the pre-WTO system. A brief catalogue follows: The Agreement on Agriculture provides that certain payments for government environment programs may have a qualified exemption from the Agreement’s required subsidy reduction commitments.<sup>14</sup> The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) includes ‘ecological and environmental conditions’ within its criteria for a risk assessment, and requires governments to consider ‘ecosystems’ as one factor in determining pest or disease free areas.<sup>15</sup> The Agreement on Technical Barriers to Trade (TBT

<sup>9</sup> See John H. Jackson, ‘Justice Feliciano and the WTO Environmental Cases: Laying the Foundations of a “Constitutional Jurisprudence” with Implications for Developing Countries’, in Steve Charnovitz, Debra P. Steger and Peter van den Bossche (eds), *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano* (Cambridge: Cambridge University Press, 2005) 29–43 at 40.

<sup>10</sup> WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras 152–53.

<sup>11</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 185.

<sup>12</sup> Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, para 5.54, adopted 21 November 2001, as upheld by Appellate Body Report, WT/DS58/AB/RW. In my view, a WTO commitment to sustainable development is a hollow victory for environmentalists because that term has been stretched in a way so as to make it acceptable to all and meaningful for no one. For a good discussion of ‘sustainable development’ today, see David G. Victor, ‘Recovering Sustainable Development’, *Foreign Affairs* 85 (2006), 91.

<sup>13</sup> For this analysis, I have adopted the TREM acronym invented in the early 1990s by Paul Demaret. As used here, a TREM is an environmental measure that affects trade (e.g. a tax).

<sup>14</sup> Agreement on Agriculture, Article 6.1, Annex II paras 2(a), 8(a), 12.

<sup>15</sup> SPS Agreement, Articles 5.2, 6.2.

Agreement) recognizes the protection of the environment as a legitimate objective.<sup>16</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains an environmental exception with regard to patents. Members may exclude an invention from patentability when the prevention of domestic commercial exploitation is necessary to protect human, animal, or plant life or health or to avoid serious prejudice to the environment.<sup>17</sup> The Agreement on Subsidies and Countervailing Measures (SCM Agreement) provided non-actionable status for financial assistance from government to industry to promote adaptation to new environmental requirements.<sup>18</sup> Unfortunately, this provision lapsed after five years, and the WTO failed to reinstitute this safe harbour. As a result, TREM subsidies are now potentially outlawed by the WTO, including those which may be called for in other WTO agreements.<sup>19</sup> The General Agreement on Trade in Services (GATS) contains an exception for measures 'necessary to protect human, animal or plant life, or health'.<sup>20</sup>

During the past decade, as the WTO system has matured, some of the environmental omissions in WTO law have become more evident. For example, the GATS, unlike the GATT, does not contain a policy exception for conservation measures.<sup>21</sup> The TBT Agreement lacks an environmental exception to its requirement that measures accord national treatment, accord most-favoured-nation treatment (MFN), and 'not be more trade restrictive than necessary to fulfil a legitimate objective'.<sup>22</sup> Another example is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which requires that panels adjudicating GATS disputes regarding 'prudential issues and other financial matters' have the necessary expertise to the specific financial service under dispute.<sup>23</sup> Yet, the DSU Article 1.2 and Appendix 2 lacks an analogous requirement for expertise in environmental disputes.

Experience within the WTO system has also pointed to new possibilities for using WTO rules to improve the environment. For example, the TBT Agreement requires the use of international standards as a basis for technical regulations except when such standards would be 'an ineffective or inappropriate means for the fulfillment of the legitimate objectives

<sup>16</sup> TBT Agreement, Article 2.2

<sup>17</sup> TRIPS Agreement, Article 27.2.

<sup>18</sup> SCM Agreement, Article 8.2(c).

<sup>19</sup> For example, Article 66.2 of the TRIPS Agreement directs developed country WTO Members to 'provide incentives to enterprises and institutions in their territories for the purpose of promoting technology transfer to least-developed country Members'.

<sup>20</sup> GATS Article XIV(b).

<sup>21</sup> See Uruguay Round Decision on Trade in Services and the Environment.

<sup>22</sup> TBT Agreement, Articles 2.1, 2.2.

<sup>23</sup> GATS Annex on Financial Services, para 4; DSU Article 1.2 and Appendix 2.

pursued . . .'.<sup>24</sup> In the *EC – Sardines* case, the WTO Appellate Body gave this rule a broad scope by holding that even voluntary, non-consensus standards qualified as 'international standards'.<sup>25</sup> The potentialities of this discipline for upward environmental and health harmonization have barely begun to be explored.<sup>26</sup> The next section in Part I looks at organizational improvements within the WTO.

## B. Organizational developments

The Uruguay Round negotiators called for a WTO Committee on Trade and Environment (CTE) which was set up in 1995. The CTE's achievements have been modest,<sup>27</sup> most notably being a symbol of the institutionalization of environment issues into WTO processes.<sup>28</sup> In particular, the Committee has served as a venue where national officials from trade and environment ministries can meet together, and where representatives from some MEAs and the UN Environment Programme can regularly meet with trade officials.<sup>29</sup> The value of such mutual socialization should not be underestimated.

In addition, the CTE has also commissioned from WTO staff a number of very useful background papers which eventually are made publicly available. These background papers have often been written by staff in the WTO Trade and Environment Division. Since the mid-1990s, this Division has

<sup>24</sup> TBT Agreement, Article 2.4.

<sup>25</sup> WTO Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paras 221–22. The term 'international standard' is not defined in TBT. The Appellate Body rejected the EC's contention that Article 2.4 of the TBT Agreement does not apply to non-consensus standards. The Appellate Body's explanation is illogical, in my view, because it seems based on the proposition that a 'standard' in the TBT Agreement can be a non-consensus document. That is obviously correct, but begs the question of what an *international* standard is. The Appellate Body's conclusion has rendered inutile the sentence in the TBT definitions that 'Standards prepared by the international standardization community are based on consensus'.

<sup>26</sup> Note, however, that the TBT Agreement proclaims that 'developing country Members should not be expected to use international standards as a basis for their technical regulations or standards . . . which are not appropriate to their development, financial and trade needs'. TBT Agreement, Article 12.4.

<sup>27</sup> One measure of its meagre output can be seen in the Annual Report of the CTE. In 2006, 2005, 2004, and 2003, the Report for each year ran less than two full pages. The 2002 Report ran three pages. Perhaps the best analysis of the CTE is Gregory C. Shaffer, 'The Nexus of Law and Politics: The WTO's Committee on Trade and Environment', in Richard H. Steinberg (ed.), *The Greening of Trade Law* (Lanham: Rowman and Littlefield Publishers, 2002) 81–114.

<sup>28</sup> The WTO Secretariat describes environment as a 'horizontal' issue. WTO Secretariat, 'Trade and Environment', [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_e.htm) (visited 6 June 2007).

<sup>29</sup> The CTE has not granted observer status to many international environmental organizations, for example, the Montreal Protocol Secretariat, the International Labour Organization, and the IUCN which is a hybrid international organization.

employed a number of talented staff who have made significant internal bureaucratic and external scholarly contributions. In 1999, the WTO Secretariat published a Report on Trade and Environment. That Report had some serious weaknesses,<sup>30</sup> but was warmly greeted and continues to be widely cited. The information disseminated on the WTO website about trade and environment has been useful, especially because it is available to anyone in the world with an internet connection. In some instances, however, the Secretariat continues to disseminate incorrect or at least questionable legal interpretations about TREMs, particularly process-related ones.<sup>31</sup>

From the early years of the WTO, on approximately an annual basis, the WTO Secretariat has sponsored a Public Forum where civil society and private sector participants are invited to attend, and gain an opportunity to interact with government officials and WTO bureaucrats. Environmental concerns have been an important focus of these Forums which have also devoted attention to developmental, trade, and sometimes social issues. Such Public Forums, however, have not significantly made up for the fact that even in its second decade, the WTO continues to resist making arrangements, consistent with those in other major international organizations, for consultation and cooperation with NGOs.

The WTO Secretariat is also responsible for writing reports for the Trade Policy Review (TPR) process. Many TPRs do take note of some ecological factors. For example, the 2005 TPR on Nigeria notes that Nigeria promotes environmentally friendly farming practices, an environmental shrimp fisheries project, and has transport infrastructure policies seeking environmental sustainability.<sup>32</sup> On the other hand, the TPR notes that gas production leads to environmental pollution.<sup>33</sup>

Although it is true that the multilateral trade negotiating process at the WTO has performed poorly since the mid-1990s, one brighter spot has been the 22 successful accession negotiations. So far, these negotiations have not addressed environmental concerns in any significant way. The accession negotiations routinely demand WTO-plus commitments from applicant

<sup>30</sup> Steve Charnovitz, 'World Trade and the Environment: A Review of the New WTO Report', 12 *Georgetown International Environmental Law Review* (2000) 523.

<sup>31</sup> For example, the Secretariat opines:

Under existing GATT rules and jurisprudence, 'product' taxes and charges can be adjusted at the border, but 'process' taxes and charges by and large cannot. For example, a domestic tax on fuel can be applied perfectly legitimately to imported fuel, but a tax on the energy consumed in producing a ton of steel cannot be applied to imported steel.

WTO Secretariat, 'Trade and Environment at the WTO', April 2004, at 21. In my view, no legal authority exists for this proposition, and the Secretariat certainly offers no analysis of GATT Articles II, III, or XX that would justify its conclusion.

<sup>32</sup> WTO, 'Trade Policy Review Nigeria', Report by the Secretariat, WT/TPR/S/xx147, 13 April 2005, at 55, 59, 80.

<sup>33</sup> *Ibid.*, at 66.

countries, but the WTO has not used its bargaining leverage to seek improvements in sustainable development.

The trade and environment debate has also had some broader impact. First, environmentalists have influenced the trading system by exporting into it norms in favour of organizational transparency. Although the trading system has always demanded transparency at the national level, the GATT had a blind spot about its own lack of transparency. In my view, criticism by environmentalists, other NGOs, and trade scholars was instrumental in the early 1990s in leading trade bureaucrats to begin to open up the trading system.<sup>34</sup> Today, the WTO website is among the best in international organizations in providing synopses of activities and downloads of documents. It was the environmental and consumer NGOs that first thought to send *amicus curiae* briefs to the WTO, and these once quixotic efforts eventually led the Appellate Body to open the door to amicus briefs. It was also environmentalists who first called for open trade panel hearings, and this was recently tested at the WTO.<sup>35</sup> Second, the trade and environment issue at the GATT/WTO has had some systemic implications for the environment regime. The most important has been an appreciation of the benefits to the trading system of the organizational strengthening that occurred in the 1990s. This led some environmentalists (and some within the WTO) to call for a World Environment Organization. The early 1990s debate on the trade-law status of environmental treaties also led to the use of the acronym MEAs and the greater community identity of those autonomous international entities. Today, MEAs are one issue being considered in the Doha Round.

### C. The environmental dimension of trade negotiations

The current round of multilateral trade negotiations, the Doha Development Agenda, was launched in 2001, and the negotiations are ongoing as of June 2007. The Doha Agenda contains several environmental elements which WTO Director-General Pascal Lamy has termed the 'environmental chapter'.<sup>36</sup> It seems very likely that if the Doha Round is successfully brought to conclusion, the results will include new environmental

<sup>34</sup> For example, see John H. Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?', 49 *Washington and Lee Law Review* (1992) 1227, at 1255 ('Nevertheless, the environmentalists...have several legitimate complaints about GATT dispute settlement procedures, among others. First, they note appropriately that the GATT lacks a certain amount of transparency.')

<sup>35</sup> See 'WTO Opens "Hormones" Panel Proceedings to Public', *WTO News*, 27 September 2006.

<sup>36</sup> 'Lamy Urges Support for Environmental Chapter of the Doha Round', *WTO News*, 5 February 2007.



provisions. Among them there may be needed disciplines for fishery subsidies.<sup>37</sup>

The Doha Declaration sets out a negotiating agenda and a forward work program for the WTO.<sup>38</sup> Because the negotiations are a work in progress, I will not cover them here. It should be noted, however, that the negotiating process is not being conducted with sufficient transparency, and therefore, the interested public is not always able to appreciate what is going on so that public opinion can be injected. For example, a recent paper by the Secretariat said to contain a reduced list of environmental goods is classified in the JOB series which is not available the public.<sup>39</sup>

#### D. Competition with preferential trade agreements

The WTO is in competition with other fora in the negotiation of new trade liberalization. In recent years, comparatively greater progress has been made in achieving liberalization in bilateral and regional free trade agreements, also known as preferential trade agreements (PTAs). All PTAs negotiated in the 2000s embrace numerous 'trade-and' issues beyond the rules now in the WTO. Investment is the most common WTO-plus issue in PTAs.

Many PTAs have provisions regarding the environment. For example, the China–Chile Free Trade Agreement states that the parties 'shall enhance their communication and cooperation on labor, social security and environment...'.<sup>40</sup> The Japan–Mexico Agreement devotes an article to Cooperation in the Field of Environment.<sup>41</sup> The PTAs negotiated by the United States all contain a chapter on environment that commits parties to enforce their own environmental laws and provides for dispute settlement should that not occur. These PTAs contain side agreements to effectuate environmental cooperation and capacity building. The most recent development in the United States is that after the 2006 elections, the new majority party (the Democrats) demanded stronger environmental provisions

<sup>37</sup> For example, see Roman Grynberg, 'WTO Fisheries Subsidies Negotiations: Implications for ACP Fisheries Access Arrangements and Sustainable Management', in Roman Grynberg (ed.), *WTO at the Margins* (Cambridge: Cambridge University Press, 2006) 607–32.

<sup>38</sup> These environmental objectives are reiterated in the Hong Kong Ministerial Declaration, WT/MIN(05)DEC, 22 December 2005, paras 30–2.

<sup>39</sup> See 'CTE Update', Bridges, May 2007, 8.

<sup>40</sup> Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile, 18 November 2005, Article 108, [http://www.sice.oas.org/tradee.asp#CHL\\_CHN](http://www.sice.oas.org/tradee.asp#CHL_CHN) (visited 6 June 2007).

<sup>41</sup> Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, 17 September 2004, Article 147, [http://www.sice.oas.org/Trade/JPN\\_MEXDraftEPA\\_e/JPN\\_MEXind\\_e.asp](http://www.sice.oas.org/Trade/JPN_MEXDraftEPA_e/JPN_MEXind_e.asp) (visited 6 June 2007).

in pending PTAs (e.g. Panama and Peru). The Bush Administration agreed to such a plan which is now being formalized.<sup>42</sup> Under this agreement, the pending PTAs will require both parties to implement seven listed MEAs; the list was carefully selected to only include MEAs that both parties had already ratified.

The utilization of PTAs was given considerable discussion in the 2005 Report of the Consultative Board to the WTO Director-General (Sutherland Commission).<sup>43</sup> The Report seems to criticize the ‘injection of particular “non-trade” objectives into [preferential] trade agreements’ such as ‘significant labour and environmental protection undertakings’.<sup>44</sup> The Report expresses a concern that such requirements may not only be ‘templates’ for future PTAs, but also ‘forerunners of new demands in the WTO’.<sup>45</sup> In my view, the Board was correct in laying down the marker that provisions used in PTAs are not necessarily appropriate for the WTO. The Board’s discussion on this point is a bit cryptic, but I doubt that the Board meant to suggest that environmental provisions should be left out of PTAs because their presence in PTAs could serve as a precedent for inclusion in the WTO. Such a position would be untenable, in my view, because a bilateral or regional level agreement might be an appropriate level for a mutual environmental commitment that would not make as much sense in a multilateral agreement. To be sure, the Board is correct in questioning whether a trade agreement is the optimal instrument for an environmental (or other non-trade) commitment in the first place.<sup>46</sup> Yet, even if a trade agreement is not optimal, there may well be domestic political or institutional reasons why trading partners may find it easier to gain parliamentary approval for trade agreements than for environmental agreements. For example, in the United States, the US Congress periodically makes available a fast track approval process for international agreements on trade that is not available for international agreements on the environment.

<sup>42</sup> Sarah Lueck, John D. McKinnon and Greg Hitt, ‘Bush, Congress Agree On Trade Standards’, *Wall Street Journal*, 11 May 2007, A2.

<sup>43</sup> See ‘Mini-Symposium on the Consultative Board’s Report on the Future of the WTO’, 8 *Journal of International Economic Law* (2005) 287.

<sup>44</sup> ‘The Future of the WTO, Addressing Institutional Challenges in the New Millennium,’ Report by the Consultative Board to the Director-General Supachai Panitchpakdi, January 2005, para 87, [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf) (visited 6 June 2007).

<sup>45</sup> *Ibid.*, para 87.

<sup>46</sup> *Ibid.*, para 33.

## II. DEVELOPMENTS IN DISPUTE SETTLEMENT UNDER GATT ARTICLE XX

Only three environmental disputes have been fully adjudicated at the WTO: *US–Gasoline*, *US–Shrimp*, and *EC–Asbestos*.<sup>47</sup> This caseload is less than what might have been expected given the high-profile concerns of the early 1990s about environmental trade barriers. In the first two of these cases, the challenged measure was found to be a WTO violation. In *Gasoline*, the US regulation found to be a GATT violation was corrected. In *Shrimp*, the US import ban found to be a GATT violation was corrected and then found to be in compliance by the DSU Article 21.5 panel and the Appellate Body. In *Asbestos*, the French regulation was found to be consistent with WTO law. A fourth case, *Brazil – Tyres*, was released as this article was finalized, and so will not be discussed here.<sup>48</sup>

All of these cases pivoted to a large extent on GATT Article XX (general exceptions), and the adjudications turned around the reputation of world trade law as being insensitive to the environment.<sup>49</sup> Despite the fact that violations were found in two of the three cases, the generally well-thought-out Appellate Body decisions inspired confidence in the adjudication process, and convinced many environmentalists that legitimate environmental measures would be permitted by the WTO. In all three original environmental cases, the decisions of the panels were flawed and the Appellate Body had to reverse some of the central holdings. Although space considerations prevent a comprehensive review of the Article XX caselaw, I will highlight the key holdings and related jurisprudence.

An important development for Article XX was that the Appellate Body cast aside some of the GATT and early WTO panel holdings that threatened to render the environmental exceptions unusable. With the ostensible intention of saving the trading system,<sup>50</sup> a series of panels had

<sup>47</sup> In addition, there have been five disputes involving the SPS Agreement. Any SPS case is concerned with threats to human, animal or plant life, and health. If the SPS cases are counted as environmental cases, then the environmental case load is considerably higher and the win/loss ratio much lower. In all five of the SPS cases, the challenged measure was found to be a violation. Two of those five cases had a DSU Article 21.5 panel that found continuing violations. For reasons of space, this article will not discuss the SPS cases comprehensively, but will offer comments on aspects of them.

<sup>48</sup> Daniel Pruzin, 'WTO Panel Backs EU in Ruling Against Brazil's Import Ban on Retreaded Tires', *BNA Daily Report for Executives*, 13 June 2007, A-1. The panel ruled against Brazil's claim for an Article XX(b) exception.

<sup>49</sup> See Carrie Wofford, 'A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT', 24 *Harvard Environmental Law Review* (2000) 563; Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate', 27 *Columbia Journal of Environmental Law* (2002) 491.

<sup>50</sup> See, e.g. GATT Panel Report, *US – Restrictions on Imports of Tuna*, 39S/155, 1991, unadopted, paras 5.25, 5.27, 5.32; GATT Panel Report, *US – Restrictions on Imports of Tuna*, DS29/R, 1994, unadopted, paras 5.26 ('Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties'), 5.38;

fabricated illogical reasons as to why Article XX could not be used.<sup>51</sup> Far from saving the GATT/WTO, these holdings threatened the trading system by triggering worries as to its hostile attitude toward the broader public interest. By reversing the *US – Gasoline*, *US – Shrimp*, and *EC – Asbestos* panels, the Appellate Body not only corrected errant holdings,<sup>52</sup> but also sent a signal to the public that the era of runaway panels on environmental matters was over.<sup>53</sup> In *EC – Asbestos*, the Appellate Body upheld the panel on Article XX, but reversed the panel's holding regarding the structural relationship between GATT Articles III and XX. The jurisprudence is now clearer that Article III and XX 'are distinct and independent provisions of the GATT 1994 each to be interpreted on its own'.<sup>54</sup> One hopes that this holding lays to rest the Appellate Body's puzzling statement in *US – Gasoline* that Article XX(g) 'may not be read so expansively as seriously to subvert the purpose and object of Article III:4'.<sup>55</sup>

In place of the convoluted Article XX jurisprudence of the past, the Appellate Body resuscitated Article XX<sup>56</sup> by establishing a multistep framework for panels to evaluate Article XX claims. For an Article XX(b) claim, a panel should begin the sequence of analysis by considering whether the challenged measure fits within the scope of a particular paragraph in Article XX, and whether the purported state interest in preventing a risk is genuine.<sup>57</sup> Then, the panel looks for the required 'degree of connection' specified in the paragraph (e.g. 'necessary').<sup>58</sup>

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Panel Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted 6 November 1998 as modified by the Appellate Body Report, paras 7.44 (holding that Article XX allows governments to derogate from GATT provisions so long as 'they do not undermine the WTO multilateral trading system'), 7.60, 7.61. Perhaps in its most brazen misleading statement, the *Shrimp* panel claims to be basing its holding not only on WTO rules, but also on 'international law', and in that regard, the panel refers to general international law and international environmental law. *Ibid.*, para 7.61.

<sup>51</sup> See Steve Charnovitz, 'GATT and the Environment: Examining the Issues', 4 *International Environmental Affairs* (1992) 203, at 211 (pointing out that 'increasingly stringent tests are being created by panels on an ad hoc basis').

<sup>52</sup> See, e.g. Appellate Body Report, *US – Shrimp*, above n 10, para 121 (criticizing the panel for an interpretation that would render Article XX exception 'inutile').

<sup>53</sup> The Presiding Member of the Appellate Body division in each of these three cases was Florentino Feliciano, a point well appreciated by Professor Jackson in his contribution to the Feliciano *Festschrift*, above n 9.

<sup>54</sup> See WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para 115.

<sup>55</sup> See WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 18.

<sup>56</sup> The Appellate Body noted that Article XX contains provisions to permit important state interests 'to find expression'. Appellate Body Report, *US – Gasoline*, above n 55, at 29–30.

<sup>57</sup> See Appellate Body Report, *EC – Asbestos*, above n 54, paras 157, 162.

<sup>58</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 18.

The next step is to further appraise the measure under the chapeau of Article XX, taking into account the particular paragraph that provides a provisional justification. The Appellate Body grasped the internal logic of Article XX that had eluded several panels of putting the chapeau to work to catch illegitimate attempts to misuse an environmental exception.<sup>59</sup>

### A. Paragraph (b) of Article XX

The challenge in adjudicating Article XX(b) has not been in identifying measures that actually fit within that paragraph; rather, the challenge has been to show that a contested measure is 'necessary'. As the Appellate Body explained in *US – Gambling*, this test is objective.<sup>60</sup> (The Appellate Body made this statement with reference to the GATS General Exceptions, but in doing so, made clear that it was relying on its GATT Article XX doctrine.<sup>61</sup>) In *EC – Asbestos*, the Appellate Body said that 'it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'.<sup>62</sup> Some scholars have read this statement to mean that the Appellate Body 'rejected categorically the notion that a member's right to determine its level of protection should be subject to considerations of proportionality'.<sup>63</sup>

The method to be used in determining whether the challenged measure is 'necessary' (to achieve its intended purpose) is difficult to outline succinctly because the jurisprudence is confusing. A 'necessary' measure is significantly closer to the pole of being indispensable than to the opposite pole of merely making a contribution to the policy goal. For measures that are *not* indispensable to achieve the Article XX(b) objective,<sup>64</sup> the 'necessary'

<sup>59</sup> See Charnovitz (1992), above n 51, at 218 (noting that the Article XX chapeau had atrophied from inattention and calling on panels to use the Article XX chapeau in environmental cases); Donald M. McRae, 'GATT Article XX and the WTO Appellate Body', in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law. Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) 228–36, at 227 (noting that GATT panels 'had paid little attention to the *chapeau*' and that under the WTO, 'new life has been breathed into the *chapeau*').

<sup>60</sup> See WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 304.

<sup>61</sup> Appellate Body Report, *US – Gambling*, *ibid*, paras 291–92, 305. Given this symmetry, this study will draw on *Gambling* because it provides the most elaborate exposition by the Appellate Body of the General Exceptions.

<sup>62</sup> WTO Appellate Body Report, above n 54, para 168. Relatedly, see WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 177 (taking cognizance of a right and 'duty' of WTO Members to protect the life and health of their people).

<sup>63</sup> For example, see Robert Howse and Elisabeth Türk, 'The WTO Impact on Internal Regulations', in George A. Bermann and Petros C. Mavroidis (eds), *Trade and Human Health and Safety* (Cambridge: Cambridge University Press, 2006) 77–117 at 113.

<sup>64</sup> When a measure is indispensable to achieve the Article XX(b) goal, then presumably that measure is deemed necessary. See Howse and Türk, *ibid*, at 114–15. Yet, in their most recent

standard is to be judged in every case through a process of weighing and balancing a series of factors.<sup>65</sup> The factors are open-ended, but should include: (i) the relative importance of the common interests or value pursued by the measure, (ii) the contribution made by the measure to the realization of the ends pursued by it, and (iii) the restrictive impact of the measure on international commerce.<sup>66</sup> The defending government bears the burden of putting forward evidence and arguments that enable a panel to assess the measure in light of the relevant factors to be weighed and balanced in a given case.<sup>67</sup> The defending government does not have to show that its measure is better than all alternatives, in order to establish that its measure is necessary.<sup>68</sup> If the complaining government points to an alternative measure that, in its view, the defendant government could have taken,<sup>69</sup> then the defendant bears an additional burden of showing that the measure it actually used remains necessary even in light of that alternative, or in other words, why the proposed alternative is not, in fact, ‘reasonably available.’<sup>70</sup> The determination of whether the proposed alternative is reasonably available is also accomplished through a balancing test by looking at the extent to which the alternative contributes to

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judgment on Article XX(d), in *Mexico – Taxes on Soft Drinks*, the Appellate Body said nothing about a special category of indispensable measures. WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, paras 66, 80.

<sup>65</sup> WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para 164. This test was applied to Article XX(b) in Appellate Body Report, *EC – Asbestos*, para 172. The importation of the Article XX(d) test to Article XX(b) has been criticized by some scholars. For example, see Anupam Goyal, *The WTO and International Environmental Law* (Oxford: Oxford University Press, 2006) 139–140.

<sup>66</sup> Appellate Body Report, *US – Gambling*, above n 60, para 306.

<sup>67</sup> Appellate Body Report, *US – Gambling*, *ibid.*, paras 309, 310, 323. No case has yet occurred where a measure itself has been judged on its own to fail this balancing test. One reading of the jurisprudence is that the Appellate Body’s term ‘weighing and balancing’ is a misnomer, and what is going on instead is that the measure in place is only weighed against a reasonable alternative measure. This is the interpretation put forward by Don Regan, as I understand it, and he may well be correct that the Appellate Body has not called for weighing adverse trade effects against other values. In other words, in a hypothetical case, the Appellate Body would not demand that an existing measure with 80% effectiveness and significant trade impact be replaced by a reasonable alternative measure with 70% effectiveness and no trade impact. See Michael Trebilcock and Michael Fishbein, ‘International Trade: Barriers to Trade’, in Andrew T. Guzman and Alan O. Sykes (eds), *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007) 1–61 at 45 (making a similar point).

<sup>68</sup> Appellate Body Report, *US – Gambling*, above n 60, paras 309, 310, 320.

<sup>69</sup> The alternative measure has to enable to defendant government to achieve its desired level of protection with respect to the objective pursued. Appellate Body Report, *US – Gambling*, *ibid.*, para 308.

<sup>70</sup> Appellate Body Report, *US – Gambling*, *ibid.*, para 311.

the realization of the end pursued.<sup>71</sup> If there is an alternative measure that achieves the same life or health end and is 'less restrictive of trade', then the panel could find that the measure being used is not necessary.<sup>72</sup> In justifying its measure, a government may 'rely in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion'.<sup>73</sup> In that regard, one might note the Appellate Body's statement (given in the context of the SPS Agreement) that a panel determining whether sufficient scientific evidence exists should 'bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned'.<sup>74</sup>

## B. Paragraph (g) of Article XX

For Article XX(g), three issues have to be addressed: first, is the measure concerned with the conservation of exhaustible natural resources? Second, is the measure one 'relating' to the conservation? And third, is the measure made effective in conjunction with restrictions on domestic production or consumption?

<sup>71</sup> Appellate Body Report, *EC – Asbestos*, above n 54, para 172. An alternative measure is not reasonably available if it is merely theoretical in nature, imposes an undue burden on the regulating government, or the regulating government is not capable of taking it. Appellate Body Report, *US – Gambling*, above n 60, para 311.

<sup>72</sup> See Appellate Body Report, *EC – Asbestos*, above n 54, para 172 (last sentence). The Appellate Body's consideration of a trade restrictiveness factor in connection to a health measure was noteworthy because (despite fifteen years of scholarly commentary to the contrary) this was the first GATT/WTO holding for Article XX(b) to do so. See GATT Panel Report, *Thailand – Restrictions on Importation of Internal Taxes on Cigarettes*, 37S/200, para 75 (no mention of a less trade restrictive test). The *Thai Cigarette* panel explained that Article XX(b) would 'allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable'. *Ibid.*, para 74. The panel further noted that Article XX(b) 'clearly allowed contracting parties to give priority to health over trade liberalization'. *Ibid.*, para 73. In my view, it was unfortunate that the Appellate Body abandoned these principles and replaced them with a balancing test in which trade can trump health. The Appellate Body does not explain why it did so, but the reason is probably that a trade-restrictiveness test had been incorporated into the SPS Agreement (Article 5.6) and the TBT Agreement (Articles 2.2, 2.3), and it is inevitable (and probably intended by trade negotiators) that such norms would eventually be imported in GATT Article XX. For example, in the first SPS case, the Appellate Body had declared that there is a 'delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings'. Appellate Body Report, *EC – Hormones*, above n 56, para 177.

<sup>73</sup> Appellate Body Report, *EC – Asbestos*, above n 54, para 178.

<sup>74</sup> Appellate Body Report, *EC – Hormones*, above n 62, para 124. See William J. Davey, 'Reflections on the Appellate Body Decision in the *Hormones* Case and the Meaning of the SPS Agreement', in George A. Bermann and Petros C. Mavroidis (eds), *Trade and Human Health and Safety* (Cambridge: Cambridge University Press, 2006) 118–132 at 122–23 (discussing the precautionary principle).

In *US – Shrimp*, the measure to safeguard sea turtles was challenged on the grounds that turtles are not an exhaustible natural resource. Although the Appellate Body could easily have decided this issue based on GATT precedent where fish had been found to fit within Article XX,<sup>75</sup> the Appellate Body instead utilized a teleological approach. Noting that the term ‘exhaustible natural resources’ in Article XX(g) had been written over fifty years earlier, the Appellate Body proclaimed that these words ‘must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment’, and, furthermore, that the term

natural resources is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.<sup>76</sup>

The Appellate Body then pointed to a number of sources, including the mention of sustainable development and the environment in the WTO’s Preamble, the UN Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21, and the Resolution of Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.<sup>77</sup> Whether these are cited as sources of law, or facts taken note of (or introduced by) by the Appellate Body, is unclear. Based on this analysis, the Appellate Body concluded that ‘it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources’.<sup>78</sup> This was an important Appellate Body decision both for the result reached and the jurisprudential technique followed.

The Appellate Body did not reach the question of whether the natural resource to be conserved has to be within the physical territory or legal jurisdiction of the country whose government is imposing a challenged import ban. Reaching this issue was not necessary because in *US – Shrimp*, the endangered turtles were highly migratory. Therefore, the Appellate Body saw a ‘sufficient nexus’ to the United States.<sup>79</sup>

<sup>75</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 131.

<sup>76</sup> *Ibid*, paras 129–30 (internal footnote omitted).

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid*, para 131 (internal footnote omitted). The footnote states that the ‘drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude “living” natural resources from the scope of application of Article XX(g)’. See para 131, n 114. My own research many years ago of the negotiating history led me to include that the conservation of living resources was not the central purpose of the Article XX(g) exception, but that the drafters had agreed, in a different context, that fisheries and wildlife could be exhaustible natural resources. See Steve Charnovitz, ‘Exploring the Environmental Exceptions in GATT Article XX’, 25 *Journal of World Trade* (October 1991) 37, at 45–47.

<sup>79</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 133.



Whether in a future dispute involving land-based biodiversity the Appellate Body would see a sufficient nexus to the country concerned about protecting planetary biodiversity remains to be seen. Textually, Article XX(g) does not contain any language suggesting that its coverage is geographically limited. While it is true that the first tuna-dolphin panel held that Article XX(b) and (g) were not extra-jurisdictional,<sup>80</sup> that report was not adopted. In my view, it was unfortunate that the Appellate Body in *US – Gasoline* chose to take cognizance of this discredited panel report and, even worse, to bring it into WTO jurisprudence.<sup>81</sup> Still, I would be surprised to see a holding that a WTO Member claiming a GATT Article XX(g) exception is compelled to permit imports of products made from a foreign endangered species even when such commerce gives incentives for killing the species. Perhaps, the principle of *in dubio mitius*<sup>82</sup> would be helpful to the adjudicator on the grounds that the governments drafting Article XX did not impose on themselves more onerous requirements than those specifically mentioned in Article XX.

On the 'relating to' prong of the Article XX(g), the Appellate Body in *US – Gasoline* seemed to distance itself from the GATT jurisprudence which had given that term a strict meaning of 'primarily aimed at'.<sup>83</sup> A more nuanced approach was further articulated in *US – Shrimp*, where the Appellate Body examined the relationship between the general structure/design of the measure and the conservation policy goal it purports to serve.<sup>84</sup> Regarding the US import ban on shrimp, the Appellate Body held that the means were 'reasonably related' to the ends.<sup>85</sup>

The last issue to be considered in adjudicating Article XX(g) is whether the measure is made effective in conjunction with restrictions on domestic production or consumption. Here, the Appellate Body made two important holdings: one, this prong requires evenhandedness between regulation of imports and domestic activity.<sup>86</sup> Two, while term 'effective' does not establish

<sup>80</sup> GATT Panel Report, *US – Tuna*, 1991 (unadopted), above n 50, paras 5.26, 5.27, 5.32.

<sup>81</sup> See Appellate Body Report, *US – Gasoline*, above n 55, at footnotes 37 and 38; Aaditya Mattoo and Petros C. Mavroidis, 'Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of the GATT', in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997) 327–43 at 327–32 (criticizing the GATT report in the first tuna-dolphin case).

<sup>82</sup> See Appellate Body Report, *US – Hormones*, above n 62, para 165 and n 154 (explicating the principle).

<sup>83</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 18–19.

<sup>84</sup> Appellate Body Report, *US – Shrimp*, above n 10, paras 136–37.

<sup>85</sup> *Ibid.*, para 141.

<sup>86</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 20–21; Appellate Body Report, *US – Shrimp*, above n 10, para 144.

an empirical effects test, this does not mean that a consideration of ‘the predictable effects of a measure is never relevant’.<sup>87</sup> No further exposition of this point has occurred because there have not been any Article XX(g) cases since *US – Shrimp*. In a thoughtful analysis of the *US – Shrimp* compliance Report, Robert Howse and Damien J. Neven suggest that ‘in future cases, in considering the fit between a Member’s measure and its environmental objective, the adjudicator should take into account the relative efficiency of the various policy instruments that a Member may choose to impose on another Member as a condition of access for its imports’.<sup>88</sup>

### C. The chapeau of Article XX

The chapeau of Article XX exists as a further condition for recourse to the General Exceptions. The focus of appraisal by an adjudicator under the standards of the chapeau is how the measure is applied, rather than how the measure is designed.<sup>89</sup> The evaluation is conducted in the context of a provisional justification under a specific paragraph in Article XX.<sup>90</sup> In the first holding on this matter, the Appellate Body assigned to the culprit government the burden of proof for the chapeau.<sup>91</sup> To explicate Article XX’s chapeau, the Appellate Body, once again, sought guidance from the Preamble to the WTO Agreement, and also considered the Uruguay Round Decision on Trade and Environment.<sup>92</sup> Even more remarkably, the Appellate Body declared that the chapeau, it could seek ‘additional interpretive guidance, as appropriate, from the general principles of international law’.<sup>93</sup> In addition, Body explained that under general principles of law and international law, recourse to Article XX must be exercised ‘reasonably’.<sup>94</sup> As WTO law commentators, such as Joost Pauwelyn, have pointed out, the Appellate Body arrogates to itself considerable discretion and adjudicative authority.

<sup>87</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 21.

<sup>88</sup> Robert Howse and Damien J. Neven, ‘US – Shrimp. United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia’, in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge: Cambridge University Press, 2003) 41–71 at 66.

<sup>89</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 22.

<sup>90</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 120; But see para 146 regarding the necessity of considering XX(b).

<sup>91</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 22–23.

<sup>92</sup> Appellate Body Report, *US – Shrimp*, above n 10, paras 152–55.

<sup>93</sup> *Ibid.*, para 158 (internal footnote omitted that cites to Article 31(c)(3) of the Vienna Convention on the Law of Treaties).

<sup>94</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 158 (internal footnote omitted that cites to two treatises and three cases of the International Court of Justice); see also Appellate Body Report, *US – Gasoline*, above n 55, at 22 (‘reasonably’).

A puzzling, and I believe unfortunate, feature of the Appellate Body's holdings on the chapeau is the notion that WTO Members have a legal 'right' in WTO law to have their exports accepted by other WTO Members. Given the WTO's indulgences for antidumping measures, its policy space for protectionist tariffs and tariff-rate quotas, and the availability in the DSU of suspension of concessions or other obligations (SCOO) against innocent exporters in the event of governmental non-compliance, surely no practical right to trade exists under WTO law. Yet, for the most sensitive national policy areas, those covered by Article XX exceptions, the Appellate Body in *US – Gasoline* held that Article XX must be applied reasonably with due regard both to the legal duties of the regulating government 'and the legal rights of the other parties concerned'.<sup>95</sup> But other than procedural rights, what right does the exporting government have that can be counterpoised to invocation of an exception? In *US – Shrimp*, the Appellate Body elaborated on this doctrine of WTO rights. For example, the Appellate Body states that an invocation of an Article XX(g) exception, if abused, will 'render naught the substantive treaty rights in, for example, Article XI:1 of other Members'.<sup>96</sup> Still, it is one thing to say that an abusive invocation of Article XX is disallowed, and quite another to say that the Article XI obligation confers an independent right. Given the myriad trade barriers tolerated WTO law, I would have thought that it is too late in the day for the Appellate Body to suppose that US trading partners have a legal right<sup>97</sup> to export shrimp to the US economy.

In any event, the Article XX chapeau forbids 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. In *US – Gasoline*, the Appellate Body held that the impugned measure constituted both unjustifiable discrimination and a disguised restriction. The main problems were that the US regulator had not pursued the possibility of entering into cooperative arrangements with the plaintiff countries to mitigate administrative problems, and had not taken into account foreign costs of compliance.<sup>98</sup>

<sup>95</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 22.

<sup>96</sup> Appellate Body Report, *US – Shrimp*, above n 10, para 156. The point is repeated in para 159.

<sup>97</sup> *Ibid*, paras 181 ('negation of rights of Members'), 182 ('suspension *pro hac vice* of the treaty rights of other Members'), 186 ('rights of other Members'), 163 ('a right to export shrimp'). At least in its early years, the Appellate Body seemed to have a statist perception of international trade as being 'trade between territorial sovereigns'. Appellate Body Report, *US – Gasoline*, above n 55, at 27.

<sup>98</sup> Appellate Body Report, *US – Gasoline*, above n 55, at 27–28. In a broader Article XX context in a later case, the Appellate Body criticized the regulating government for shifting the costs of enforcement to imported goods instead of evenly distributing such costs between domestic and imported products. Appellate Body Report, *Korea – Beef*, above n 65, para 181.

Arbitrary discrimination has been further elaborated. In *US – Shrimp*, the Appellate Body explained that arbitrary discrimination can occur when a defendant government requires certification of an exporting country, and yet does not give that country a formal opportunity to be heard, to respond to arguments made against it, and to receive a formal, written, reasoned decision, and to have a procedure for appeal. Such a program violates the chapeau because it allows arbitrary discrimination between certified and uncertified countries. An import ban can constitute arbitrary discrimination when it applies ‘a rigid and unbending standard’ that does not take into consideration ‘different conditions’ in exporting countries.<sup>99</sup> In the follow-on case, the Appellate Body upheld a revised US shrimp regulation that conditioned importation on whether the foreign regulatory program was comparable in effectiveness to the US program.<sup>100</sup>

Unjustifiable discrimination has been elaborated in three ways by the Appellate Body in *US – Shrimp*. First, the Appellate Body saw such discrimination in the way that the US government had given one group of countries three years (from 1991 to 1994) to adjust to US turtle safety measures, while giving the complaining countries less than four months to adjust in 1995–96.<sup>101</sup> Oddly though, the Appellate Body did not explain why a phase-in period in 1995 had to be as long as one in 1991. Nor did the Appellate Body attempt to reconcile its objection with the post-1997 subsequent practice of WTO Members of not automatically granting countries that join the WTO (through accession) the benefit of the phase-ins prescribed in the WTO Agreement. The second instance of unjustifiable discrimination occurred when US regulators negotiated cooperative agreements on sea turtle conservation with some countries, but did not attempt to do so with the complaining countries.<sup>102</sup> The Appellate Body postulated that the need for such environmental cooperation was recognized internally in the WTO in the Uruguay Round Decision on Trade and Environment and the 1996 Report of the CTE, and in addition was also recognized in Agenda 21, the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals. The Appellate Body did not explain exactly the relevance under the Vienna Convention on the Law of Treaties of these two environmental Conventions, particularly in light of the fact that the defendant United States is not a party to

<sup>99</sup> Appellate Body Report, *US – Shrimp*, above n 10, paras 163–64, 177. Such a situation can also be unjustifiable discrimination. *Ibid*, paras 165, 176.

<sup>100</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, above n 12, paras 144, 149.

<sup>101</sup> Appellate Body Report, *US – Shrimp*, above n 10, paras 173–74.

<sup>102</sup> *Ibid*, paras 167, 171, 172. See also Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, above n 12, para 124 (explaining that the United States is not required to conclude an international agreement).

either of them.<sup>103</sup> The third instance of discrimination occurred when US regulators devoted less efforts to technology transfer to the complaining countries than to some other countries.<sup>104</sup> This holding is the only one I am aware of in WTO jurisprudence that applies an MFN-like requirement to subsidies.

The Appellate Body did not appear to consider whether the complaining governments in the shrimp–turtle dispute had made any significant efforts to safeguard sea turtles (or to negotiate with the United States). Contrary to what the Appellate Body suggested in calling the US law a ‘weapon’,<sup>105</sup> one might instead perceive the US import ban as a shield and the practices in the complaining countries that killed endangered sea turtles as the weapon. Although the WTO law appears to lack principles of estoppel, the Appellate Body has suggested that sovereign states ‘should’ act together within the WTO ‘or in other international fora, to protect endangered species or to otherwise protect the environment’.<sup>106</sup> Whether the Appellate Body will someday insist that a complainant government do so remains to be seen.

### III. CONCLUSION

An appropriate closing for a contribution to a first-decade anniversary symposium is to make predictions about the next decade. I believe that a new cycle has begun in international governance that will be characterized by greater attention to the environment. These concerns will continue to influence the development of international economic law, and the advances on environment in the WTO wrought by the Appellate Body will not be reversed. The Doha Development Round will eventually be completed in some form, and the new package of WTO amendments will include some

<sup>103</sup> See Joost Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO “Missing the Boat”?’, in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Portland: Hart Publishing, 2006) 199–227 at 215 (noting that the Appellate Body’s reference to treaties raises questions of legitimacy and state consent). In *EC – Approval and Marketing of Biotech Products*, the panel stated that following Article 31(c)(3) of the Vienna Convention on the Law of Treaties did not require the panel to consider as a rule of international law, treaties that are not applicable between all the parties to the dispute. Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, paras 7.70–7.95. The panel used that holding to justify not making use of the Convention on Biological Diversity and its Biosafety Protocol. This holding has implications for the longtime debate on MEAs as to what would happen if a defendant government cited an MEA for justification that had not been ratified by the complaining government.

<sup>104</sup> See Appellate Body Report, *US – Shrimp*, above n 10, para 175.

<sup>105</sup> *Ibid*, para 171.

<sup>106</sup> *Ibid*, para 185. The Appellate Body has also suggested that the good faith notion applies to all Members, not just a plaintiff. Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, above n 12, para 134, n 97.

significant environmental provisions. The next decade may also bring more trade disputes regarding the environment on knotty issues such as government-created marketable rights to address climate change, biofuels production on deforested land, and genetically modified agriculture. One hopes that the WTO will be up to these challenges, and that it will get better at working with other international institutions to achieve more effective global governance.