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## MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THE WTO: IS THE SKY REALLY FALLING?

*Bradly Condon*<sup>†</sup>

### I. INTRODUCTION

From the “Battle in Seattle” at the World Trade Organization (WTO) meeting of 1999 to the violent protests against the Free Trade Agreement of the Americas at the Summit of the Americas in Quebec City in 2001, international meetings related to trade negotiations have been marred by protesters. A new term, “globophobics” has been coined to describe these protesters. While they consist of a loose coalition of anti-trade forces, ranging from organized labour to anarchists, environmental activists are usually prominent. While objections of environmentalists to trade agreements are not new, there is a new round of world trade negotiations being launched, and an ongoing trade policy debate in Washington, D.C. that involves the relationship between trade and environment.

In November 2001, the WTO Ministerial Conference in Doha, Qatar placed the issue of the relationship between WTO rules and multilateral environmental agreements (MEAs) on the negotiating agenda.<sup>1</sup> It is thus timely to check the progress being made in the relationship between the global trading system and global environmental protection agreements, and to consider whether the WTO needs to make changes to the current provisions relating to multilateral environmental protection agreements.

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1. See Ministerial Declaration, Ministerial Conference, WT/MIN(01)/DEC/1, para. 31 (Nov. 14, 2001), available at <http://docsonline.wto.org/GENviewerwindow.asp?D/DDF DOCUMENTS/T/WT/MIN01/DEC1.DOC.HTM>.

This article considers how conflicts between international trade agreements and multilateral environmental agreements (MEAs) should be resolved. The circumstances in which a nation may use trade restrictions to achieve environmental objectives *outside* its own jurisdiction are limited under the General Agreement on Tariffs and Trade (GATT),<sup>2</sup> under international law, and under Article 104 of the North American Free Trade Agreement (NAFTA).<sup>3</sup> NAFTA Article 104 uses a conflicts clause to resolve the issue more clearly than the GATT.<sup>4</sup> However, such a conflicts clause may not be appropriate for the GATT, or other WTO agreements, which focus overwhelmingly on non-environmental issues among an economically diverse and geographically dispersed 140 countries.<sup>5</sup> Moreover, existing WTO provisions already provide mechanisms to address conflicts between trade and multilateral environmental protection, notably Article XX, the WTO Preamble, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Article 3(2) and the Understanding on Trade and Environment. Thus, there may be no need to introduce substantive changes to the WTO, despite the extensive criticism of the existing trade law regime by environmental nongovernmental organizations (NGOs) and academic commentators and the numerous proposals that have been made for reforms. Indeed, the more carefully one analyses the existing regime, the more one appreciates the wisdom of those who created it.

Rather than attempt to alter or add to the existing WTO provisions, it would be more appropriate to use conflicts clauses in MEAs that contain specific obligations to use trade restrictions or give their signatories discretion to employ trade measures. While a conflicts clause such as

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2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter GATT].

3. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA].

4. For a comparison of approaches to trade and environment in the WTO, NAFTA and the European Union, see Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231 (1997); see also Bradly J. Condon, *Reconciling Trade and Environment: A Legal Analysis of European and North American Approaches*, 8 CARDOZO J. INT'L & COMP. L. 1 (2000).

5. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. While the Preamble recognizes sustainable development and environmental protection as concerns that should be taken into account in the pursuit of trade liberalization, these references apply to the interpretation of the WTO Agreements, rather than impose obligations to protect the environment.

NAFTA Article 104 may be appropriate for a regional trade agreement among countries that share a regional environment and have environmental cooperation systems in place,<sup>6</sup> such a clause would be impractical in a global trade agreement that contains far greater diversity of members with respect to environmental conditions, technological capacity, financial means, economic priorities, and legal systems. Most signatories to MEAs are likely to be members of the WTO, and it is not unreasonable to ask them to turn their minds to the issue of a conflicts clause for trade measures when drafting or amending MEAs.

To date, there have been no GATT or WTO cases challenging trade measures taken pursuant to an MEA. There have been three cases in which the issue of potential conflicts between WTO obligations and MEAs have been raised: *Tuna I*, *Tuna II* and *Shrimp*.<sup>7</sup> In all three cases, GATT/WTO panels have ruled against United States measures that were discriminatory, unilateral and extraterritorial. In each case, the United States used these measures in an effort to coerce mainly developing countries into adopting U.S. environmental policies. Moreover, the interpretative approach taken by WTO panels has evolved with the addition of interpretative provisions to the WTO Agreements that resulted from the Uruguay Round negotiations. In all three cases, the decisions reached were correct in law and just in their result. The application of the rules of international trade in these cases produced precisely the result they were designed to achieve, limiting the ability of an economically powerful state to abuse weaker countries.

This article begins with a review of the approach taken in the *Tuna* and *Shrimp* cases to the extraterritorial application of United States environmental policy using trade restrictions. This analysis will consider to what extent the GATT permits the use of trade measures to implement

6. See The North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Sept. 13, 1993, 32 I.L.M. 1480; see also Sarah Richardson, *Sovereignty Revisited: Sovereignty, Trade and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183 (1998); Bradley J. Condon, *NAFTA and the Environment: A Trade-Friendly Approach*, 14 NW. INT'L L. & BUS. 528 (1994).

7. GATT Secretariat, *United States—Restrictions on Imports of Tuna*, WT/DS21/R, Sept. 3, 1991, 30 I.L.M. 1594 (1991) [hereinafter *Tuna I*]. Also available from WTO, Centre William Rappard, Rue de Lausanne 154, 1211 Geneva 21, Switzerland (all references are to the page numbers of the WTO copy of the report). GATT Secretariat, *United States—Restrictions on Imports of Tuna*, WT/DS29/R, June 16, 1994, 33 I.L.M. 839 (1994) [hereinafter *Tuna II*]. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Oct. 12, 1998, available at <http://docsonline.wto.org/GENviewer/window.asp?D:DDFDOCUMENTS/T/WT/DS/58ABR.DOC.HTM> [hereinafter *Shrimp*].

international environmental obligations, and the distinction between measures taken pursuant to international agreements and measures taken unilaterally.<sup>8</sup> Next, this article considers the application of the least-trade-restrictive rule to trade measures taken to pursue international environmental goals as it has been applied under the GATT and in NAFTA Article 104. Finally, this article considers whether reforms to the WTO are really necessary to avoid conflicts between international trade law and international environmental protection.

## II. THE TUNA AND SHRIMP CASES

In the 1990s, GATT and WTO panels considered the GATT consistency of United States laws that used unilateral trade embargoes to protect marine mammals in three cases. The first two cases, banning tuna imports to protect dolphins, were considered under GATT 1947, and were never adopted by the GATT. The third case, banning shrimp imports to protect sea turtles, was considered under GATT 1994.<sup>9</sup> The panel decision

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8. The common law concept of *stare decisis* does not apply to WTO Dispute Settlement Body (DSB) rulings, which are not legally binding interpretations of the WTO Agreements in the way that decisions of common-law judges are binding with respect to legislation. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, Annex 2, vol. 31, 33 I.L.M. 1226 (1994), art. 3(2) [hereinafter DSU]. In practice, however, past rulings are taken into account by the DSB when interpreting WTO obligations. It is also important to note that GATT 1947, under which the Mexican Tuna case was decided, is legally distinct from GATT 1994, under which the Shrimp case was decided. See WTO Agreement, *supra* note 5, art. II(4). However, the wording of GATT 1947, Article XX was not changed in GATT 1994. What did change was the incorporation of environmental concerns in the WTO Agreement Preamble, which affects the interpretation of GATT Article XX. In addition, the DSU expressly incorporates the customary rules of interpretation of public international law, while the GATT 1947 did not. See DSU, *supra* art. 3(2). However, this should be viewed as a codification rather than a substantive change.

9. The two GATT agreements are essentially the same, but the Uruguay Round integrated the GATT into a new framework of several agreements under the administration of the World Trade Organization. While the relevant exceptions in Article XX of GATT 1947 and GATT 1994 are the same, the interpretation of the latter may differ due to the introduction of new references to environmental protection and sustainable development in the WTO Preamble, and the explicit reference to the customary rules of interpretation of customary international law in Article 3(2) of the new DSU. It was more difficult to have panel decisions adopted under the old GATT because the requirement for unanimous agreement essentially gave each contracting party a veto. The new DSU created an Appellate Body to hear appeals of panel decisions on issues of law and legal interpretations. See DSU, *supra* note 8, art. 17(1), (7). The DSU eliminated the veto by

was appealed to the Appellate Body and the modified decision was adopted by the WTO.

The analysis in this section focuses only on those aspects of the cases that are relevant to the issue of MEAs.

#### A. *Tuna I*

In 1991, the United States banned tuna imports from several countries, including Mexico, pursuant to its Marine Mammal Protection Act of 1972 (MMPA).<sup>10</sup> The stated purpose of the United States tuna embargo was to discourage fishing methods that kill dolphins in international waters.<sup>11</sup> However, the MMPA provisions gave no regard to

requiring the adoption of the AB decision unless there is unanimous agreement against adoption.

10. Pub. L. No. 92-522, 86 Stat. 1027 (1972), as amended by Pub. L. No. 100-711, 102 Stat. 4755 (1988), and Pub. L. No. 101-627, 104 Stat. 4467 (1990) (codified in part at 16 U.S.C. § 1361(ff)) cited in *Tuna I*, supra note 7, at 3 [hereinafter MMPA]. The Marine Mammal Protection Act of 1972 (MMPA), generally prohibits hunting, capturing, killing or importing marine mammals into the United States without authorization. Section 101(a)(2) authorizes limited incidental taking of marine mammals by U.S. commercial fishermen under permits issued by the National Marine Fisheries Service (NMFS). Under section 101(a)(2)(B) of the MMPA, the importation of yellow-fin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean (ETP) is prohibited unless the country in question proves through documentary evidence that its regulatory regime is comparable to that of the United States and its dolphin-kill rates are comparable. The regulatory regime must include the same prohibitions the United States applies to its own vessels and the average incidental dolphin kill must not exceed 1.25 times the average kill of United States vessels in the same period. Section 101(a)(2)(C) of the MMPA requires intermediary nations exporting yellow-fin tuna products to the United States to certify and prove that it prohibits imports of tuna from any nations directly embargoed by the United States. If they do not, they too are subject to the embargo. On October 10, 1990, the U.S., pursuant to court order, imposed an embargo on imports of tuna from Mexico. The embargo went into effect on February 22, 1991. See *Tuna I*, supra note 7, at 3-5; see also *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) (holding that the Secretaries of Commerce and the Treasury may not allow imports of yellow-fin tuna into the United States from any nation that does not conform with the 1988 MMPA amendments); Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Drifnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 495 n.130 (1991).

11. For the historical background of international conflicts over tuna fishing and the relationship between dolphins and tuna in the Eastern Tropical Pacific Ocean see R. Rosendahl, *The Development of Mexican Fisheries and its Effect on United States-Mexican Relations*, 3 UCLA PAC. BASIN L.J. 1 (1984); Kerry L. Holland, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267 (1991); T. Steiner, *The Senseless Slaughter of Marine Mammals*, 61 BUS. & SOC. REV. 18 (1987); E. Christensen & S. Geffin, *GATT Seis its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellow-fin Tuna*

whether the foreign fishing activity that resulted in the incidental taking of marine mammals was conducted wholly within the waters of another state and was consistent with that state's domestic and international law obligations.<sup>12</sup> In all of the cases in which import bans were imposed, the fishing activity of the foreign fishermen was consistent with that state's international legal rights pursuant to international treaty and customary international law.<sup>13</sup> While the dolphins being protected were listed as at risk of becoming endangered under the Convention on International Trade in Endangered Species (CITES),<sup>14</sup> CITES neither required nor authorised the ban on trade in tuna. Mexico challenged the embargo as a disguised trade barrier that was inconsistent with the United States' obligations under the GATT.

### B. *Tuna II*

In the second Tuna case,<sup>15</sup> the European Economic Community (EEC) and the Netherlands challenged the trade provisions of the MMPA, as amended by the International Dolphin Conservation Act of 1992.<sup>16</sup>

### C. *Shrimp*

In the *Shrimp* case, the United States banned shrimp imports from WTO members that did not comply with U.S. legal requirements regarding the protection of sea turtles from incidental death in the shrimp harvesting process. The United States negotiated and concluded a regional international agreement on sea turtle protection and conservation with some countries, but not others who were affected by the trade ban. Article

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*Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569, 572 n.9 (1991). Intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the ETP. See *Tuna I*, *supra* note 7, at 2. The MMPA prevents American fleets from using this method of tuna fishing. See *Divine Porpoise*, THE ECONOMIST, Oct. 5, 1991, at 31; McDorman, *supra* note 10; and *Tuna I*, *supra* note 7.

12. McDorman, *supra* note 10, at 492.

13. *Id.* at 495.

14. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

15. *Tuna II*, *supra* note 7. For a more detailed discussion of *Tuna II*, see *inter alia*, Joseph. J. Urgese, *Dolphin Protection and the Mammal Protection Act Have Met Their Match: The General Agreement on Tariffs and Trade*, 31 AKRON L. REV. 457 (1998).

16. See 138 CONG. REC. H9064-02 (1992) and Subchapter IV of the MMPA, 16 U.S.C. §§ 1411-1418 (1992). For a detailed discussion of the Tuna cases from a political economy perspective, see Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

XV of the Inter-American Convention included a conflicts clause that states:

1. In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organisation (WTO), as adopted at Marrakesh in 1994, including its annexes.
2. In particular, and with respect to the subject matter of this Convention, the Parties shall act in accordance with the provisions of the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as Article XI of the General Agreement on Tariffs and Trade of 1994.

The United States gave some countries three years to introduce “turtle exclusion devices” (TEDs), while others were given only four months. All species of turtles involved were listed as being under threat of extinction under CITES Appendix I, and occurred in U.S. territorial waters as part of their migratory route.<sup>17</sup>

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17. For a detailed review of the U.S. legislation, litigation to enforce the legislation, and the amendments and negotiations that occurred after the WTO case, see Eric L. Richards and Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295 (2000). For a variety of interpretations of the Shrimp decision, see Joseph R. Berger, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355 (1999) (taking the view that the Shrimp case represents a positive evolution in the treatment of conservation measures); Benjamin Simmons, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413 (1999) (arguing in favour of unilateral measures); Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 COLUM. J.L. & SOC. PROBS. 175 (1996) (arguing that the GATT needs to be changed to respond to environmental concerns); Jennifer A. Bernazani, *The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures*, 15 CONN. J. INT'L L. 207 (2000) (proposing the addition of an exception to Article XX specifically for MEAs); Axel Bree, *Article XX GATT—Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report*, 17 DICK. J. INT'L L. 99 (1998) (interpreting the decision of the Appellate Body as finding that the U.S. measure did not have extra jurisdictional effect); Terence P. Stewart & Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Co-existence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization*, 23 WM. & MARY ENVTL. L. & POL'Y. REV. 109 (1998); Matthew Brotmann, *The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp*, 16 PACE ENVTL. L. REV. 321 (1999); Ryan L. Winter, *Reconciling the GATT and WTO With Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 223 (2000) (arguing that a conflict between the WTO and MEAs is inevitable).



It bears repeating that, in each of these cases, the United States' measures were unilateral, discriminatory, extraterritorial, and not taken pursuant to MEAs.

### III. JURISDICTION: INTERNAL VERSUS EXTRATERRITORIAL ENVIRONMENTAL MATTERS

One issue before the *Tuna* and *Shrimp* panels was whether a state might employ trade restrictions to indirectly exercise jurisdiction over environmental issues arising outside its territory. The GATT is silent on the validity of measures directed toward the conservation of marine mammals outside the territories of individual contracting parties.

In *Tuna I*, the United States took the position that a government could *unilaterally* decide to prohibit imports of a product in order to protect the life of humans, plants or animals outside its jurisdiction.<sup>18</sup> The United States argued that the MMPA did not subordinate the legislation of other parties to its own, but simply specified the requirements for tuna imported into the United States. Moreover, nothing in Article XX supported the assertion that the United States legislation was applied extraterritorially, since trade measures by nature had effects outside a contracting party's territory.<sup>19</sup> It argued further that the GATT should not be interpreted to require a country to allow access to its market that served as an incentive to deplete the populations of species that are vital components of the ecosystem. Finally, the United States implied that, because CITES obliged a member party to prohibit imports in order to protect endangered species found only outside its own jurisdiction, international law permitted a state to use trade restrictions to pursue extraterritorial environmental policy objectives.<sup>20</sup>

Mexico argued that Article XX was confined to measures a party could adopt or apply within its own territory.<sup>21</sup> Nothing in Article XX entitled any contracting party to impose measures whose implementation would subordinate the legislation of one party to the legislation of another.

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18. *Tuna I*, *supra* note 7, at 16-22 (submissions of the U.S.).

19. *Id.*

20. *Id.* In this case, CITES did not include in its Appendix I list of species in danger of extinction any of the species of dolphins, which the U.S. was claiming to protect. The dolphins actually threatened with extinction were found only outside the ETP and were not protected by the U.S. legislation. U.S. and international data indicated that no dolphin populations in the ETP were threatened with extinction. *Id.* at 20. However, the three ETP species are listed in Appendix II of CITES, which includes species that may be threatened if trade is not restricted. See Christensen & Geffin, *supra* note 11, at 595 n.118.

21. *Tuna I*, *supra* note 7, at 16-17 (submissions of Mexico).

To accept that one party could impose trade restrictions to conserve resources in international areas or within the territories of other parties would introduce the concept of extraterritoriality into the GATT and be contrary to international law.<sup>22</sup>

In the *Tuna I* case, Canada stated the issue as being when and to what extent measures taken relating to unilaterally set conservation objectives can be extended to areas outside national jurisdictions. The United States would have to demonstrate that Mexico's incidental dolphin mortality in waters outside United States jurisdiction impinged on its conservation program to an extent that would allow justification of the embargo under Article XX(g).<sup>23</sup> Canada thus implied that a state should be permitted to exercise jurisdiction over extraterritorial environmental matters in so far as it was necessary to effectively manage a related internal environmental matter, even if it involved taking measures in the absence of any international agreement on the issue. However, the Canadian submission did not clarify the set of circumstances that might justify such actions in the context of Article XX(g).

The *Tuna I* panel noted that the GATT text in Article XX(b) did not clearly say whether it "covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure."<sup>24</sup> However, the drafting history of Article XX(b) indicated it did not.<sup>25</sup> The panel reasoned that:

[T]his paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable . . . . [I]f the broad interpretation suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.<sup>26</sup>

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22. *Id.*

23. *Id.* at 26 (submissions of Canada).

24. *Id.* at 45.

25. *Id.*

26. *Id.* at 40.

For the same reason, Article XX(g) only permitted measures aimed at resource conservation within the jurisdiction of the enacting country. Moreover, according to Article XX(g), those measures had to be taken “in conjunction with restrictions on domestic production or consumption.” A country can effectively control the production or consumption of a resource only to the extent that it falls under its jurisdiction.<sup>27</sup> Finally, the panel expressed the view that its interpretation restricting environmental measures to internal matters under Article XX “would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies.”<sup>28</sup>

While not mentioned by the *Tuna I* panel in its decision, academics have argued “that the Article XX exceptions are designed to allow a state to protect vital *internal* resources and to pursue vital *internal* policies,” not “to project its internal policies and goals onto other states.”<sup>29</sup> Owen Saunders comments:

While it is true that Article XX does not refer specifically to the health of citizens of the acting state, this is certainly what must be inferred; otherwise the GATT could be read as implicitly justifying far-reaching intrusions on the territorial sovereignty of other states, an interpretation

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27. *Tuna I*, *supra* note 7, at 41.

28. *Id.* at 45.

29. McDorman, *supra* note 10, at 520 (emphasis added). He cites in support of Jackson's comments regarding Article XX(b): “[a]lthough the language is not explicitly restricted to health and safety of the *importing* country, it can be argued that that is what Article XX means.” See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 209 (MIT Press, 1989). Jackson characterizes this as an issue of equalizing competition where foreign manufacturers are subject to less stringent environmental process standards. His opinion on this issue appears to have been accepted by the panel in this case. He states:

Whether an importing nation could use border restrictions or taxes to equalize the price of imported goods with domestic costs of health and safety regulation is as yet an unresolved issue for the world trading system. It is an issue fraught with dangerous potential. If this principle were extended to many types of government regulation—for example minimum wage or other labor regulations—it could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage. *Id.*

He notes further that the GATT focuses on the product, not the production process. If a production process in an exporting nation causes cross-border pollution in an importing nation, the parties may use a bilateral or multilateral treaty to deal with the problem. *See id.* at 208-10.

that is unsupported on a reading of the Agreement and on the basis of state practice.<sup>30</sup>

The *Tuna I* panel's ruling on this issue was thus consistent with academic opinion regarding the scope of the Article XX exceptions and the applicable principles of international law, namely those regarding state sovereignty and extraterritoriality. The *Tuna I* interpretation of the GATT does not permit a state to use trade restrictions to unilaterally assert jurisdiction over environmental matters outside its national territory.

The *Tuna II* panel employed a different analysis than *Tuna I*, but reached the same result. It applied a three-prong test to both Articles XX(b) and XX(g). The first prong considered whether the MMPA regulations qualified as measures to conserve "exhaustible natural resources" under Article XX(g) and "to protect human, animal or plant life or health" under Article XX(b). Despite arguments from the EEC and the Netherlands that such measures could not be applied extraterritorially, the panel held that neither article specifically limited the location of the resource or animal in question.<sup>31</sup> The panel reasoned that other provisions in Article XX did not exclude measures aimed at actions outside a contracting party's territorial jurisdiction and that international law permitted states to regulate the conduct of their nationals outside their territory.<sup>32</sup>

However, the U.S. measures failed to pass the second prong of the test under either Article XX(b) or XX(g). The intermediary embargo covered tuna imports from third countries—whether or not the tuna was harvested in a manner that was harmful to dolphins. The primary embargo permitted the applicable countries to harvest tuna in a manner that was harmful to dolphins as long as their practices and policies were comparable to U.S. standards. Thus, the U.S. trade measures could only accomplish their objective by forcing other countries to adopt U.S.-style laws. This could not be considered "necessary" under Article XX(b). Moreover, the trade measures were not be considered—measures made effective in conjunction with domestic measures as required under XX(g). Nor could

30. See J. OWEN SAUNDERS, *Legal Aspects of Trade and Sustainable Development*, in THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 370, 375 (1990). For a contrary view, see Christensen & Geffin, *supra* note 11, at 582, 590.

31. *Tuna II*, *supra* note 7, at 891-92.

32. *Id.* The panel gave the example of Article XX(e), allowing measures "relating to the products of prison labour," as one that clearly applied to extraterritorial subject matter. *Id.* at 892. It also noted that a "state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fisherman on these vessels, with respect to fish located in the high seas." *Id.*

the measures be saved under the Preamble to Article XX, the third prong of the test.

The *Shrimp* case added a new twist to the issue of jurisdiction. The *Shrimp* panel held there was a sufficient nexus between the endangered, migratory marine populations involved and the United States for the purposes of Article XX(g), because all of the species occur in waters over which the United States has jurisdiction, even though they migrate across national borders and international waters. In this regard, the *Shrimp* panel's reasoning resembles that of Canada's submission in the *Tuna I* case. At the same time, however, the *Shrimp* panel expressly declined to decide whether there is an implied jurisdictional limitation in Article XX(g) and, if so, the nature or extent of that limitation. As with the Canadian submission in the *Tuna I* case, the *Shrimp* panel recognised that a state has a legitimate interest in the protection of migratory species that occur within its territory. However, the more difficult issue of what limitations to impose on a state's trade measures in these circumstances remains unresolved.

As the *Tuna I* panel implied, international law regarding territorial limits effectively prevents a nation state from taking unilateral measures to conserve natural resources outside its territory. However, in the case of endangered migratory species such as the turtles, failure to act would threaten the ecosystem inside the nation's territory by permitting the destruction of the species when its migration took it outside the territory. The *Shrimp* panel appears to have solved this quandary by recognising that the United States has some form of jurisdiction over the species, if not over extraterritorial waters.

However, the *Shrimp* panel also implied that jurisdiction over the turtle was shared by other nations. While it recognised the U.S. policy goal as legitimate, it decided that the unilateral method of achieving that goal was not. In an effort to balance the need to conserve the species against the need to respect the legal rights of other nations, the panel ruled:

The parties to the Inter-American Convention together marked out the equilibrium line . . . and provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition.<sup>33</sup>

*Tuna II* and *Shrimp* opened the door for multilateral environmental measures dealing with shared species and resources to be justified as

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33. *Shrimp*, *supra* note 7, at 69-70.

exceptions under Article XX. The *Shrimp* decision suggests that nations may exercise *shared* jurisdiction over migratory species and the global environment, although the exact scope of that jurisdiction is yet to be defined. Because there is no express jurisdictional limit in Article XX, trade measures taken pursuant to an MEA to protect the global commons could be included in Article XX, even though the subject matter lies outside the territorial limits of the parties to the MEA in whole or in part.

#### IV. MEASURES TAKEN UNDER MULTILATERAL AGREEMENTS VERSUS MEASURES TAKEN UNILATERALLY

An important issue that was raised in the *Tuna* and *Shrimp* cases was whether any distinction should be made between trade measures taken pursuant to multilateral environmental and conservation agreements and those that are not. While unilateral measures may impinge upon state sovereignty, this principle is not violated where the affected states agree that trade restrictions may be employed under specific circumstances to pursue specific environmental objectives. Indeed, GATT Articles XX(b) and (g) are a good example of such an agreement. However, there is nothing in Article XX that explicitly distinguishes between measures applied as part of an international agreement and other measures.<sup>34</sup>

In *Tuna I*, Australia argued that where a contracting party takes a measure with extraterritorial application outside of any international framework of cooperation, it is appropriate for the GATT to scrutinise the measure against the party's obligations under the GATT. In particular, any measure involving conditional most-favoured-nation treatment "by way of country-specific import prohibitions should be examined strictly, especially in view of the history of disputes over tuna."<sup>35</sup> Australia thus implied that the existence of an international agreement dealing with the extraterritorial application of such measures would be relevant to the jurisdiction of the GATT to consider their validity under international law and relevant to their consistency with the GATT.<sup>36</sup>

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

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34. *Tuna I*, *supra* note 7, at 16-22 (submissions of the U.S.). The NAFTA does make such a distinction. See art. 104, which is discussed *infra* note 76.

35. *Tuna I*, *supra* note 7, at 26 (submissions of Australia).

36. *Shrimp*, *supra* note 7, at 17. This issue never arose in the *Shrimp* case, which only dealt with the U.S. measures as it was applied unilaterally outside the context of any international agreement with the affected countries.

a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own . . . if the Contracting Parties were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse.<sup>37</sup>

These statements infer that such measures would be inconsistent with the GATT regardless of whether they were taken unilaterally or pursuant to other multilateral agreements. However, the *Tuna I* panel also stated that the prohibition of extraterritoriality would not affect "the right of the Contracting Parties acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules."<sup>38</sup> It thus implied that under certain circumstances the distinction would be relevant to determining whether the use of such trade measures would be permitted notwithstanding their inconsistency with the GATT—those circumstances being a specific GATT amendment or waiver.<sup>39</sup> In other words, extraterritorial environmental considerations could not justify restrictive trade practices under GATT Articles XX(b) and (g), but trading partners could agree to subordinate their trade obligations in respect of each other by entering into environmental agreements that would prevail over the GATT. However, the panel did not specify whether such agreements would have to expressly override the GATT or whether they would merely need to do so implicitly.

Since the United States trade ban was not imposed pursuant to any international agreement, there was no clear ruling on what relevance of this distinction might have to the issue of extraterritoriality. The ruling clearly limits the ability of a state to unilaterally decide that restricting trade is the best way to protect the environment outside its own territory. However, it implies that such measures could be ruled consistent with the GATT if taken pursuant to a multilateral agreement whose provisions are intended to operate notwithstanding any inconsistency with the GATT.

The panel's ruling was criticised for requiring nations to negotiate international agreements and GATT waivers or amendments if they want to use trade restrictions to implement international environmental policies. But this is a reasonable position to take, given that such agreements may alter international legal obligations, while the panel itself may not. However, the ruling clearly requires that, if the rights and obligations of

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37. *Tuna I*, *supra* note 7, at 45.

38. *Id.*

39. *Id.*

the GATT contracting parties are to be modified, the contracting parties must modify them themselves—not dispute panels.<sup>40</sup>

The relevance of the distinction between measures taken under MEAs versus measures taken unilaterally was also raised in the *Shrimp* case. While the holding of the Appellate Body in the *Shrimp* case recognised the U.S. measure as legitimate under Article XX(g), it nevertheless struck down the measure because it was applied in a manner that constituted arbitrary and unjustifiable discrimination under the chapeau of Article XX.<sup>41</sup> The deciding factor was the unilateral nature of U.S. actions against WTO members who had not participated in the Inter-American Convention and the failure of the United States to give them the same opportunity to achieve a negotiated solution.

The Appellate Body stated a clear preference for measures taken under international agreements over measures taken unilaterally. This aspect of the decision is consistent with the decision of the *Tuna I* panel, and was backed up by the WTO Preamble and the Decision on Trade and Environment that were incorporated by the Uruguay Round agreements.

The Appellate Body interpreted the Article XX chapeau in light of the object and purpose of the WTO, which included, (1) seeking cooperative solutions to trade problems and (2) to prevent the risk that a multiplicity of conflicting trade requirements, justified under Article XX, could emerge. The standards of arbitrary or unjustifiable discrimination required three elements: (1) the application of the measure must result in discrimination;<sup>42</sup> (2) the discrimination must be arbitrary or unjustifiable in character; and (3) the discrimination must be between countries where the same conditions prevail. The purpose of the chapeau is to prevent the abuse of the Article XX exceptions, and to strike a balance between the

40. This is confirmed by the DSU, which states: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” DSU, *supra* note 8, art. 3(2).

41. GATT, *supra* note 2, art. XX. The Article XX 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. . . .” *Id.*

42. Here, the Appellate Body adopted the view expressed in the Appellate Body decision in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, May 20, 1996, 35 I.L.M. 274-75, 603 (1996), available at [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/2R.WPF.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/2R.WPF.HTM) [hereinafter *Gasoline*], that the nature of the discrimination between countries mentioned in the chapeau is different from the discrimination between products, which is prohibited in GATT Article III.



right of a member to invoke an exception and its duty to respect the treaty rights of other members.<sup>43</sup>

The Appellate Body ruled that the application of the U.S. measure constituted unjustifiable discrimination on two grounds. First, the intended and actual effect of the law was to coerce foreign governments to adopt essentially the same policy and enforcement program as the United States applied to its domestic shrimp trawlers, if they wished to exercise their GATT rights. Secondly, the United States failed to engage in serious negotiations to conclude bilateral or multilateral agreements before enforcing its import prohibition. The Appellate Body ruled further that discrimination results not only when countries in which the same conditions prevail are treated differently, but also when the application of the measure does not take into account the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

While the basis for this point in the text of Article XX is not clear, the Appellate Body makes an important point when it refers to the importance of assessing the conditions prevailing in a given country in determining what methods of multilateral environmental protection are appropriate. The enforcement of environmental laws requires the dedication of human and financial resources that some countries may not have, or that a country may prefer to dedicate to other matters that it deems more important to the welfare of its people. Differences in environmental conditions, technological capacity, financial means, economic priorities, and legal systems among the nations of the world make unilateral trade embargoes an inferior means of achieving global environmental protection. It is difficult to imagine the circumstances under which unilateral coercion would prove more effective than multilateral negotiations in achieving effective results.

The Appellate Body made it clear that when a WTO member chooses to protect migratory species by way of unilateral trade action rather than multilateral cooperation, such trade measures cannot be justified under the chapeau of Article XX. It noted that the protection and conservation of migratory species demands concerted and cooperative efforts on the part of many countries. It cited the references in the Decision on Trade and Environment to Principle 12 of the Rio Declaration on Environment and Development and Agenda 21 as proof that the WTO has recognised both

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43. Here, the Appellate Body invoked the principle of good faith, which includes the doctrine of *abus de droit*; the latter prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably." See *Shrimp*, *supra* note 7.

the need for such cooperative efforts and the inappropriateness of unilateral action in dealing with extraterritorial aspects of international environmental problems.<sup>44</sup> Finally, it found that the unilateral character of the application of Section 609 heightened the disruptive and discriminatory effect of the import prohibition and underscored its unjustifiability.

In addition to finding the application of the measure to be unjustifiable, the Appellate Body found its application to be arbitrary because there was no transparent, predictable certification process followed by U.S. officials. Nor was there any review or appeal process that could be followed in the event that an application for certification were denied. In this regard, the U.S. measure also failed to meet minimum standards of transparency and procedural fairness set out in GATT 1994 Article X:3.

Some kinds of unilateralism appear to be permitted by Article XX. For example, Article XX(e) permits trade restrictions relating to the products of prison labour and Article XX(f) permits trade restrictions imposed for the protection of national treasures of artistic, historic or archeological value. The former is likely to take the form of import restrictions while the latter is likely to take the form of export restrictions. Neither category appears to require the prior negotiation of a multilateral agreement. However, the Article XX preamble would prohibit the use of

44. Principle 12 of the Rio Declaration on Environment and Development states: "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus." *Rio Declaration on Environment and Development*, U.N. GAOR, 47th Sess., at 4, U.N. Doc. A/CONF. 151/5 (1992). The phrase, "as far as possible," appears to leave an opening for a country to take unilateral action where efforts at international negotiation fail, perhaps by invoking the doctrine of necessity. However, the doctrine of *abus de droit* may prevent a WTO member from invoking the defense of necessity to justify trade restrictions against another member. See *Shrimp*, *supra* note 7, at 50.

Agenda 21, para. 2.22(i) reads: "Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder global environmental problems should, as far as possible, be based on an international consensus." *U.N. Conference on Environment and Development, Agenda 21: Programme of Action for Sustainable Development*, U.N. Doc. ST/DPI/1344, U.N. Sales No. E. 93I.11 (1992), para. 2.22(i).

The Appellate Body also cited Article 5 of the Convention on Biological Diversity (requiring parties to cooperate in respect of areas beyond national jurisdiction for the conservation and sustainable use of biological diversity) and the Convention on the Conservation of Migratory Species of Wild Animals, which reads: "The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle."

these exceptions to justify arbitrary discrimination or disguised restrictions on trade. Thus, the United States could not ban the import of any product on the grounds that the exporting country employed prison labour—only the actual production of prison labourers could be banned. Similarly, Mexico could not ban imports from the United States on the grounds that the United States failed to ban the import of Mexican archeological artifacts. Mexico, however, would be free to ban the export of such items, as indeed it has.

The general conclusion that can be drawn from these interpretations of the provisions of the WTO Agreement, in particular the preamble, the Decision on Trade and Environment and GATT Article XX, is that trade measures taken pursuant to MEAs would be permissible if implemented in a non-discriminatory and transparent manner. However, unilateral trade measures aimed at changing the environmental policies of other nations are not.

#### V. CONFLICTS BETWEEN THE GATT AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

As stated at the beginning of this article, no case has yet arisen in which trade measures taken under an MEA have been challenged at the GATT or WTO. However, the issue was raised in both the *Tuna* and *Shrimp* cases.

The *Tuna I* panel failed to directly address the issue of what would happen should there arise a conflict between the GATT trade obligations and inconsistent trade obligations imposed under multilateral environmental agreements such as the Convention on International Trade in Endangered Species.<sup>45</sup>

The United States indirectly raised this issue in noting that a CITES party was obliged to prohibit imports in order to protect endangered species found outside its own jurisdiction.<sup>46</sup> Australia also raised this issue by taking the position that a GATT panel could not resolve conflicts between a contracting party's international trade obligations under the

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45. Such a case has not arisen to date, and is unlikely to be brought by a signatory to an MEA. If such an issue does come before a WTO panel, it would likely be in relation to non-parties to an MEA. See Richard G. Tarasofsky, *International Biodiversity Law and the International Trade Regime*, presented at Panel Session on Multilateral Environmental Agreements and Trade, IUCN/GETS Meeting, Geneva, Switzerland, Apr. 26, 1995 (on file with author).

46. *Tuna I*, *supra* note 7, at 16-22 (submissions of the U.S.).

GATT and its obligations under other multilateral agreements, although it acknowledged that no such conflict had arisen in the *Tuna I* case.<sup>47</sup>

The *Tuna I* panel suggested that the incidence of conflicting international trade obligations could be prevented, but it gave no indication as to whether a GATT panel should be seized of such matters. Moreover, the *Tuna I* panel implied that, in the absence of a GATT amendment or waiver, such conflicts might be resolved against such competing obligations in the absence of any clear intention on the part of the parties to the environmental agreement to have the latter prevail in the event of any inconsistency with their GATT obligations.<sup>48</sup>

The impact of the *Tuna I* decision was exaggerated by some of its critics, one of whom interpreted the ruling as follows: "The GATT Panel decision narrowly limits the use of trade sanctions to enforce international environmental agreements. This decision seriously undermines efforts to protect not only marine mammals, but also critical resources such as the ozone layer, endangered species, and tropical forests."<sup>49</sup>

However, in this case there was no international environmental agreement being enforced. The measure in question was not based on the listing of endangered species under CITES, nor any obligation thereunder.

In this conflict between trade and environment, there existed international trade obligations, but no competing international environmental or conservation obligations.<sup>50</sup> The issue regarding the relationship between GATT Articles XX(b) and (g) and international environmental agreements remained an open question after *Tuna I*. However, neither state sovereignty nor the prohibition of extraterritoriality is infringed where the affected states agree that trade restrictions may be employed to pursue specific environmental objectives.<sup>51</sup> Although international environmental considerations cannot justify restrictive trade practices under GATT Articles XX(b) and (g),<sup>52</sup> trading partners may agree to subordinate their trade obligations in respect of each other by entering into environmental agreements that demonstrate clear intention on the part of the parties to have the environmental

47. *Tuna I*, *supra* note 7, at 23 (submissions of Australia).

48. *Id.* at 45.

49. Christensen & Geffin, *supra* note 11, at 612.

50. See Ted L. McDorman, *The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts*, 17 N.C. J. INT'L. L. & COM. REG. 461, 478, and 483 (1992).

51. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 299-302 (2d ed. 1973).

52. See *Tuna I*, *supra* note 7, at 45.

agreement prevail in the event of any inconsistency with their GATT obligations.<sup>53</sup>

The *Shrimp* decision, however, appears to suggest that trade measures taken by a WTO member under a multilateral environmental agreement to protect migratory species that occur within its territorial limits, reasonably applied to other signatories of the same MEA, would meet the standards set out in Article XX(g) and the Article XX chapeau.<sup>54</sup> Application of the measures to non-signatories in the absence of an effort to reach a negotiated solution would clearly not. What remains unclear is whether Article XX would save measures taken after efforts at a negotiated solution have failed. The answer to this question would likely depend on the subject matter and degree of global acceptance of the MEA at issue,<sup>55</sup> in addition to the reasons the negotiations failed.

## VI. MEASURES APPLIED TO THIRD PARTIES

Two issues arise with respect to third parties: the application of trade sanctions to intermediary nations that act as trans-shipment points and MEA trade provisions to nations that are not parties to the MEA in question.<sup>56</sup>

Under the MMPA, the United States gave itself the right to interfere in trade between other parties, by providing for an embargo against "intermediary nations" simply because they continued to buy products which the United States had unilaterally decided should not be imported

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53. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 59, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

54. *Shrimp*, *supra* note 7, at 56.

55. See Article 38 of the Vienna Convention: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." For a description of the process by which a rule becomes a customary rule of international law, see Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 J. TRANSNAT'L L. & POL'Y 331 (2000). Commentators have suggested several criteria to determine whether MEAs should be exempted from GATT scrutiny under a GATT waiver or binding interpretation, including the number of parties to the agreement, the range of parties and interests represented (such as developed, developing, importing and exporting), the number of nations affected by the agreement who are parties, the distribution of benefits and harms, and the provision of technical, financial or other assistance. See Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841 (1996).

56. The Montreal Protocol on Substances That Deplete the Ozone Layer, done at Montreal, Sept. 16, 1987, as amended [hereinafter Montreal Protocol] for example, bans trade in controlled substances between parties and non-parties. However, it does not purport to impose a trade ban between non-parties.

by itself or by any other country. Such a case had never arisen before the GATT, was not provided for in the General Agreement, and, it was argued, would be contrary to international law.<sup>57</sup>

The European Community argued that the very concept of "intermediary nation" needed to be rejected because it would affect the right of each contracting party to determine autonomously its own trade policy. The EC refused to introduce trade measures against a state because of a third country's requirements, or on the basis of that country's unilaterally defined standards.<sup>58</sup>

Similarly, Japan argued that its trade relations with Mexico should not be subject to United States domestic law. The MMPA embargo was not "primarily aimed at the conservation of" dolphins within the meaning of Article XX(g) because an embargo on all yellow-fin tuna and tuna products was not a dolphin conservation measure but a sanctions mechanism to force other countries to adopt policies established unilaterally by the United States.<sup>59</sup>

The *Tuna* panels ruled that the prohibition of imports of Mexican tuna from intermediary nations was contrary to GATT Article XI:1 and not justified by Articles XX(b) or XX(g). However, *Tuna II* and *Shrimp* both found that the subject matter of measures aimed at protecting resources outside a nation's territorial limits could fall within the ambit of Article XX. While the measures in question were designed and implemented in a manner that failed to meet the standard set out in the Article XX preamble, the *Shrimp* decision in particular leaves the door open for well-designed measures taken pursuant to MEAs.

There is support for the view that "an international treaty, which explicitly states that it is modifying the GATT obligations, would do so for those countries party to the newer treaty."<sup>60</sup> However, no single state would have the authority to dictate the terms of trade between other nations under international law.

It has also been argued that in some situations conservation and environmental agreements can modify the GATT without an explicit modification statement, even with respect to non-parties to such agreements.<sup>61</sup> Thus, any expression of broad international support for the

57. *Tuna I*, *supra* note 7, 16-17 (submissions of Mexico).

58. *Tuna I*, *supra* note 7, at 31 (submissions of the EC).

59. *Tuna I*, *supra* note 7, at 33 (submissions of Japan).

60. See McDorman, *supra* note 50, at 483.

61. *Id.* at 484-85. McDorman argues that, with respect to CITES, GATT obligations must be modified even for countries not a party to CITES, given the completeness of the CITES regime, its obvious inconsistency with GATT, the narrowness of the exceptions to

modification of the GATT by environmental or conservation considerations could suffice to suspend the operation of the GATT rules.<sup>62</sup> However, it is difficult to accept that such fundamental principles as privity of contract and state sovereignty could be so easily overturned.<sup>63</sup>

GATT thereby created, and the overwhelming international support for CITES, which has more signatories than GATT.

62. *Id.* at 486. See also Vienna Convention, *supra* note 53, arts. 30, 34, 38, 59, and 64. Article 64 provides that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

Article 53 (*jus cogens*) provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

If the relevant CITES provisions regarding trade in endangered species were accorded the special status of *jus cogens*, like the prohibition of trade in slaves enjoys, those CITES provisions would undoubtedly prevail over the GATT in the event of an inconsistency. See BROWNLIE, *supra* note 51, 499-500. However, the proponent of a rule of *jus cogens* in relation to Vienna Convention, Article 53, will have a considerable burden of proof to meet. See *id.* at 501; see also T.O. ELIAS, *THE MODERN LAW OF TREATIES* 179-84 (A.W. Int'l Publishing Co. 1974).

63. The Latin maxim, *privatis pactionibus non dubium est non laedi jus caeterorum* (there is no doubt that the rights of others [third parties] cannot be prejudiced by private agreements) BLACK'S LAW DICTIONARY 1076 (5th ed. 1979), is reflected in the GATT amending formula. Article XXX:1 provides:

Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXX:1, 55 U.N.T.S. 194. The applicable rule of international law, which flows from the principle of state sovereignty, has been clearly and authoritatively stated as follows: "The rule that a treaty cannot impose obligations upon a 'third State' is well established." LORD MCNAIR, *THE LAW OF TREATIES* 310 (Clarendon Press 1961). "A treaty may not impose obligations upon a State which is not a party thereto." Article 18 of the Harvard Research Draft Convention on Treaties. *Id.* at 310.

"A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention, *supra* note 53, art. 48. There are few exceptions to this rule. The major

Moreover, the rights of the contracting parties can only be modified by agreement among the contracting parties themselves.<sup>64</sup> Nevertheless, the combined effect of the evolution of the customary rules of interpretation of public international law, the interpretive influence of the WTO Preamble and the broad language of Article XX give WTO panels considerable room to maneuver.

## VII. THE LEAST-TRADE-RESTRICTIVE PRINCIPLE AND MEAS

In *Tuna I*, Australia argued that, under Article XX(b), as previously interpreted,<sup>65</sup> the United States was required to demonstrate that country-specific import prohibitions on tuna were the only means reasonably available to it to ensure the protection of dolphins, and that such measures were the least GATT-inconsistent measures available.<sup>66</sup> Mexico argued that the best way to protect dolphins was by international cooperation among all concerned, not by way of unilateral trade measures.<sup>67</sup>

It was not necessary for the panel to decide whether the trade embargo was the least trade-restrictive means available to conserve dolphins. However, it implied that there were less trade-restrictive methods available to achieve that goal. It emphasised that the provisions of the GATT impose few constraints on a contracting party's implementation of *domestic* environmental policies, leaving each free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers, including those imposed for environmental purposes.<sup>68</sup> Moreover, it implicitly accepted Mexico's argument that multilateral negotiation would be the preferable and less trade-restrictive means of accomplishing international environmental goals.

The *Tuna II* panel also found that a measure cannot qualify as necessary under Article XX(b) where there are other GATT-consistent

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exception is set out in Article 38 of the Vienna Convention: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." *Id.* art. 38.

64. See *Tuna I*, *supra* note 40, at 45.

65. See Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, WT/DS10/R (Nov. 7, 1990), 30 I.L.M. 1122 (1991) [hereinafter *Thai Cigarettes*] (interpreting the meaning of the word "necessary" in the context of Article XX(b)).

66. *Tuna I*, *supra* note 7, at 26 (submissions of Australia).

67. *Tuna I*, *supra* note 7, at 16-17 (submissions of Mexico).

68. *Tuna I*, *supra* note 7, at 45.



alternatives available, which includes the negotiation of multilateral agreements. Moreover, measures designed to force other nations to change their environmental policies could neither be considered necessary under Article XX(b) nor primarily aimed at the conservation of natural resources under Article XX(g). The decision thus appeared to require the negotiation of multilateral agreements before a measure could be considered to be the least-trade-restrictive alternative available.<sup>69</sup>

The *Shrimp* decision concluded that where an alternative course of action is reasonably available, in this case multilateral negotiations, a measure cannot qualify under the Article XX chapeau (preamble). It thus appears that a measure cannot qualify under XX(g) where this less trade-restrictive alternative is available. The Appellate Body did not express this requirement in terms of the least-trade-restrictive test, but rather considered the multilateral course of action to be an alternative to the unilateral and non-consensual approach taken by the United States.

In its interpretation of Article XX(g) and the chapeau, the Appellate Body in the *Shrimp* case adopted the interpretation of the Appellate Body in the *Reformulated Gasoline* case.<sup>70</sup> One commentator has suggested that interpretation makes the requirements of the chapeau synonymous with the "necessary" test under Article XX(b).<sup>71</sup>

Regardless of how one interprets the WTO and GATT decisions with respect to the least-trade-restrictive test, it seems clear that if the negotiation alternative is not pursued before extraterritorial environmental trade measures are imposed, the trade measures will not qualify under Article XX(b) or XX(g).

The question that arises is whether a trade measure taken under a multilateral environmental agreement would have to pass the least-trade-restrictive test under Article XX(b) or XX(g). WTO jurisprudence suggest that it would have to in order to meet the requirement under Article XX(b) that the measure be "necessary."<sup>72</sup> However, the decision of the Appellate Body in the *Shrimp* case suggests that trade measures applied pursuant to a properly designed and well-implemented MEA would pass the test of both Article XX(g) and the chapeau.<sup>73</sup>

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69. See *Tuna II*, *supra* note 7. See also Wold, *supra* note 55. For another environmentally related WTO decision that applied the least-trade-restrictive requirement, see *Gasoline*, *supra* note 42.

70. See *Gasoline*, *supra* note 42.

71. See Wold, *supra* note 55.

72. See Dailey, *supra* note 55.

73. For a discussion of applying MEA measures to parties and non-parties, see *infra* Part VII.

Anderson and Fried state the least-trade-restrictive principle as follows: “[I]f one is pursuing environmental regulation, . . . one [must] do so in the least trade-restrictive way possible without compromising the environmental standard one has set for oneself.”<sup>74</sup>

It is reasonable to assume that this principle would apply to the manner in which a state implements trade measures under an MEA. Otherwise, the implementation process could be subject to abuse. The implementation would have to be non-discriminatory and transparent, and comply with the requirements for procedural fairness. However, it is unlikely that the least-trade-restrictive test would be applied to second-guess the substance of measures chosen by the parties to the MEA. The WTO would have to show deference in this regard to the parties to the MEA. Otherwise, the MEA would have to be renegotiated to comply with the opinion of a WTO panel, a result that would be impractical and exceed the jurisdiction of the panel.

Article 104 of the NAFTA provides a good example of how the least-trade-restrictive principle can be applied to MEAs.

#### VIII. NAFTA ARTICLE 104: APPLYING THE LEAST-TRADE-RESTRICTIVE RULE TO MEAS

The least-trade-restrictive principle applies to the use of MEA trade measures under NAFTA Article 104. Article 104 deems trade measures taken under listed international environmental agreements to be measures relating to legitimate environmental objectives and deems them to be necessary. However, Article 104 requires that “where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.” In order for a measure to be the least inconsistent with the other provisions of the NAFTA, it would have to be the least inconsistent with the free movement of goods and services between the Parties; that is, the least trade-restrictive.

Arguably, one of the implicit principles of the NAFTA, like the GATT, is a general rule prohibiting the use of unilateral trade measures to pursue extraterritorial environmental goals.<sup>75</sup> However, Article 104

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74. Jean Anderson & Jonathan Fried, *The Canada-U.S. Free Trade Agreement in Operation*, 17 CAN-U.S. L.J. 397, 403 (1991).

75. Extraterritoriality of laws means that the laws of a state are applied to persons, acts, or property that are beyond its borders. J.G. CASTEL ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS AND ECONOMIC RELATIONS* 442 (Edmond Montgomery 1986). NAFTA Article 102(2) explicitly incorporates “applicable rules of international law” in the NAFTA.

expressly permits the use of trade measures to pursue extraterritorial environmental goals where such measures have been authorised by an international environmental agreement and the NAFTA parties have agreed that the trade obligations of such an agreement are to prevail over inconsistent NAFTA obligations.<sup>76</sup>

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NAFTA, *supra* note 3, at 297. Under customary international law, “a state acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction.” See BROWNIE, *supra* note 51, 299-301. This rule, regarding extraterritorial enforcement of measures, is an aspect of jurisdictional competence. Jurisdiction flows from the general legal competence of states, often referred to as “sovereignty.” See *id.* at 291. This prohibition of extraterritoriality, which may also be described as an aspect of the principle of non-intervention, would qualify as a “customary rule of international law,” within the meaning of Article 38 of the Vienna Convention. Vienna Convention, *supra* note 53. See also BROWNIE, *supra* note 51, at 302. Both the GATT and the NAFTA would therefore have to be interpreted in a manner consistent with the prohibition of extraterritoriality. A contrary interpretation would render either treaty void under the *jus cogens* rule. See Vienna Convention, *supra* note 53, art. 53.

76. NAFTA Article 104 provides:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
  - (a) Convention on the International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973;
  - (b) The Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990;
  - (c) Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico and the United States; or
  - (d) The agreements set out in Annex 104.1, *such obligations shall prevail to the extent of the inconsistency*, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with this Agreement (emphasis added).
2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to the agreements listed in paragraph 1, and any other environmental or conservation agreement.

Annex 104.1 currently lists only two agreements:

Article 104 appears to represent a departure from the GATT, which contains no equivalent provision. However, a closer examination reveals that the legal regimes governing conflicts with environmental agreements under the GATT and the NAFTA are not as different as they first appear to be.

Neither the GATT nor any GATT panel decision has clearly set out whether Articles XX(b) or (g) prevail over international environmental agreements as between parties to both. The prevailing view of public international law is that the later law supersedes the earlier,<sup>77</sup> and that the specific supersedes the general.<sup>78</sup> Applying the latter principle, the more specific trade obligations in the agreements listed in Article 104 would supersede the GATT provisions under international law as between parties to both.<sup>79</sup> Moreover, GATT panels apply the same “least trade-restrictive” test as NAFTA Article 104(1) to the implementation of environmental policies. Article 104 thus represents a codification of what the likely outcome would be were any of the listed agreements challenged before a WTO panel.

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- (1) The Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986, and
  - (2) The Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.

NAFTA, *supra* note 3, at 297.

77. See BROWNLIE, *supra* note 51, at 603, where the author states, “it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject matter. . . .” See MCNAIR, *supra* note 63, at 219: “Where the parties to the two treaties said to be in conflict are the same, . . . [i]f the provisions of the earlier one are general and those of the later one are special and detailed, that fact is some indication that the parties intended the special one to prevail.” See also Vienna Convention, *supra*, note 53, art. 30, 59.

78. “[Where] one treaty contains general provisions and the other special provisions *in pari materia*, . . . the maxim *generalibus specialibus non derogant* comes into play—that is to say, ‘the specific prevails over the general.’” MCNAIR, *supra* note 63, at 219.

79. For example, it is unlikely that the GATT would be interpreted to “liberalize” trade in endangered species. Article VIII of CITES requires the parties to penalize trade in specimens in violation of the Convention. Such a specific provision would prevail over the GATT’s more general trade obligations under international law. The fact that CITES is given priority under NAFTA Article 104(1)(a) thus represents a codification rather than an innovation.

## XI. CONFLICTS BETWEEN NAFTA OBLIGATIONS AND NON-LISTED INTERNATIONAL ENVIRONMENTAL AGREEMENTS

The NAFTA provides no express permission or prohibition regarding the unilateral assertion of jurisdiction over extraterritorial environmental matters via the imposition of trade restrictions. However, Article 104 provides express permission to do so pursuant to specific international conservation and environmental agreements. Since the NAFTA provides no express permission to use trade restrictions to unilaterally assert jurisdiction over extraterritorial environmental matters, but expressly permits such measures to be taken pursuant to universally accepted<sup>80</sup> multilateral agreements, the implication is that the NAFTA, like the GATT, prohibits the unilateral use of trade restrictions to pursue extraterritorial environmental goals. Unlike the GATT, the NAFTA expressly permits a state to use trade restrictions to address environmental matters that occur outside its national territory, by international agreement. In this regard, the distinction between measures taken under international agreements and measures taken unilaterally is key to determining whether trade restrictions may be employed. Article 104 thus codifies the requirement implicit in the *Tuna* and *Shrimp* decisions that such measures must expressly or implicitly be intended to prevail over trade obligations, by agreement among the affected trading parties.

Article 104 implies that, where there is a conflict between trade obligations under NAFTA and environmental obligations under other agreements, the NAFTA obligations prevail unless the competing agreement is listed in Article 104 or Annex 104.1. The anticipated inclusion of further bilateral and multilateral environmental agreements in Article 104, via Annex 104.1, implies further that efforts to conclude such agreements between the NAFTA parties are to precede, and indeed replace, any resort to unilateral trade action. This would be consistent with the view, expressed in the *Tuna* and *Shrimp* cases, that such efforts to achieve negotiated resolutions must be pursued before trade restrictions could qualify under GATT Article XX. The NAFTA parties have agreed that trade restrictions may be used to implement the policy objectives of the agreements listed in Article 104, provided that the trade action in question is specifically authorised by one of the agreements listed in Article 104. Article 104 is therefore consistent with the *Tuna* and *Shrimp* interpretations of the GATT. Likewise, the Article 104(1) requirement to use the least trade-restrictive means of implementing international

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80. This term refers to universal acceptance by the NAFTA parties, evidenced by inclusion in Article 104 or Annex 104.1. See NAFTA, *supra* note 3, at 297.

environmental obligations duplicates the same test that is implicit in Articles XX(b) and (g), as interpreted by GATT and WTO panels.<sup>81</sup>

Under the NAFTA, trilateral negotiation is the rule, not unilateralism of the kind seen in the *Tuna* and *Shrimp* cases. For example, Article 906(1) requires the parties to “work jointly to enhance the level of . . . protection of . . . the environment” with respect to product standards.<sup>82</sup> With respect to the setting of domestic process standards, of which the rules regarding tuna fishing are an example, Article 1114 provides that consultations, not trade barriers, should be used to resolve disputes over the stringency of such standards in each country.<sup>83</sup> The NAFTA preamble also implies a policy that prefers political solutions to conflicts between trade and the environment over unilaterally legislated solutions.

The NAFTA thus confirms the approach taken to unilateral extraterritoriality in the *Tuna* and *Shrimp* cases, and is consistent with the view expressed by the GATT and WTO on this issue in its reports on trade and the environment.<sup>84</sup> The NAFTA adopts a consensual approach to international environmental protection that may be summed up as follows: International environmental considerations cannot justify restrictive trade practices, except where these are introduced in terms of specific provisions in a universally accepted environmental convention.<sup>85</sup>

81. This is implicit in the requirement in Article 104 that, “where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with this Agreement.” See NAFTA, *supra* note 3, at 297.

82. Article 906(1) provides a framework for the upward harmonization of standards, while Articles 906(2) and 906(3) provide a framework for compatibility of standards subject to the condition that it not result in downward harmonization. *Id.* at 397.

83. Article 1114(2) discourages parties from relaxing domestic environmental measures to attract or retain investment, and provides for consultations where one party believes this has occurred. Article 1114(1) confirms the right of each party to determine the measures it considers appropriate to ensure investment in its territory is undertaken in a manner sensitive to environmental concerns. NAFTA, *supra* note 3, at 642.

84. GATT Secretariat, *Report on Trade and Environment*, GATT B.I.S.D. (40th Supp.) at 78-79 (1992). The report states:

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 . . . if the goal is to influence environmental policies and practices in other countries, the option which is most consistent with orderly international relations is inter-governmental cooperation leading to a multilateral agreement. *Id.*

85. My description of the NAFTA approach to extraterritoriality is inspired by an Indian proposal that “[g]lobal environmental considerations cannot justify restrictive trade practices, except where these are introduced in terms of specific provisions in a globally

This principle encourages nations to resolve international environmental issues by persuasion and negotiation rather than by trade actions. However, once the necessary agreements have been reached and incorporated into the NAFTA, they may be enforced by way of trade restrictions, provided those trade restrictions are the least trade-restrictive means available to achieve the environmental goal.

#### X. DOES THE WTO NEED A CONFLICTS CLAUSE?

Behind much of the debate over trade and MEAs, particularly among advocates of unilateralism, lies the concern that trade rules may impede efforts to address serious global environmental problems, such as climate change and ozone depletion.<sup>86</sup> The starting point for the arguments of many commentators is the assumption that the WTO/GATT decisions have produced unsatisfactory results because they failed to see the justice in allowing the United States to unilaterally determine how to deal with multilateral environmental issues.<sup>87</sup>

It is clear that unilateral trade measures aimed at coercing other nations to adopt specific environmental policies in the absence of any multilateral agreement will not be GATT-consistent. One nation cannot

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accepted environmental convention.” McDorman, *supra*, note 10, at 479 n.112. This is essentially the approach taken in NAFTA Article 104.

86. See, e.g., Sean Fox, *Responding to Climate Change: The Case for Unilateral Trade Measures to Protect the Global Atmosphere*, 84 GEO. L.J. 2499 (1996) (expressing the view that “economic and legal arguments strongly support allowing states to use trade measures when necessary to promote their legitimate interests in protecting the global atmosphere”); see also Bernazani, *supra* note 17 (who proposes the addition of an exception to Article XX that would allow unilateral trade action where there is no MEA in place, there is a critical environmental situation, and negotiation efforts have failed to find a multilateral solution); Hudnall, *supra* note 17 (who notes that some kinds of unilateral measures are permitted in Article XX, subject to jurisdictional limitations). For example, Article XX(e) permits trade restrictions relating to the products of prison labour and Article XX(f) permits trade restrictions imposed for the protection of national treasures of artistic, historic or archeological value. The former is likely to take the form of import restrictions while the latter is likely to take the form of export restrictions.

87. For a discussion of this issue that takes into account the developing country perspective, see Rita M. Wisthoff-Ito, *The United States and Shrimp Import Prohibitions: Refusing to Surrender the American Goliath Role in Conservation*, 23 MD. J. INT'L L. & TRADE 247 (1999). It is worth noting that the U.S. has agreed to avoid the unilateral resolution of trade disputes under section 301 of the *Trade Act of 1974* in order to comply with its WTO obligations. See *United States—Sections 301-310 of the Trade Act of 1974* (Dec. 22, 1999) WT/DS152/R (Panel report adopted Jan. 27, 2000), available at [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:DDFDOCUMENTS/T/WT/DS/152.R.DOC.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDOCUMENTS/T/WT/DS/152.R.DOC.HTM).

unilaterally dictate what the environmental policies of other nations should be. Global environmental issues cannot be resolved unilaterally.

The work of the GATT and WTO on trade and environment has consistently expressed a preference for multilateral solutions over unilateral actions. The Group on Environmental Measures and International Trade<sup>88</sup> concluded that multilateral solutions to transboundary or global environmental problems would prove more effective and durable than unilateral measures.<sup>89</sup> More recently, the WTO Committee on Trade and Environment (CTE) reported that most member delegations considered that GATT Article XX did not permit a member to impose unilateral trade restrictions to protect the environment outside its jurisdiction.<sup>90</sup>

The *Shrimp* case indicates that trade measures taken pursuant to MEAs between parties to the MEA, if ever challenged before a WTO panel, will likely pass the test under Article XX(g) and the chapeau, provided that they are non-discriminatory and adhere to principles of transparency and procedural fairness.

The only outstanding issue is what would happen if such measures were applied to nations who have chosen not to agree to the MEA after a concerted effort to negotiate their inclusion. Put another way, what would happen if a "rogue" WTO member chose to threaten the global environment?

The Montreal Protocol provides a good example of an MEA that addresses an environmental issue of global concern in an effective way. The issue of ozone depletion is truly global—all nations need the protection of the ozone layer. Not surprisingly, the Protocol enjoys wide acceptance among the nations of the world. The Protocol not only bans trade in ozone-depleting substances and products between members, but requires parties to cease such trade with non-parties as well.<sup>91</sup> However,

88. This group was the first institutional framework created by the GATT to address trade and environmental issues. It was created in 1971, but did little work in this area until some twenty years later. See GATT Secretariat, *Trade and Environment in the GATT/WTO*, in TRADE AND ENVIRONMENT SPECIAL STUDIES 67 (Hakan Nordstrom & Scott Vaughan eds., 1999) [hereinafter Background Note].

89. Report by Ambassador H. Ukawa (Japan), *Chairman of the Group on Environmental Measures and International Trade, 49th Session of the Contracting Parties*, in TRADE AND ENVIRONMENT SPECIAL STUDIES 88 (Hakan Nordstrom & Scott Vaughan, eds., 1999) [hereinafter *Ukawa Report*].

90. Background Note, *supra* note 88, para. 55. Another delegation expressed the opinion that nothing in Article XX indicated that it only applied to environmental protection within the territory of the country invoking the exception. *Id.*

91. For a thorough discussion of the Montreal Protocol and other major MEAs that contain trade provisions, see Wold, *supra* note 55. For an inventory of MEAs that contain



the Protocol also contains provisions for developed countries to assist developing countries, requiring technology transfer and financial cooperation. A Multilateral Fund finances additional costs developing countries may incur when implementing ozone-friendly technology.

Many commentators have suggested that the WTO be amended to explicitly favour these kinds of MEA trade provisions. Few commentators have proposed that the MEAs are the appropriate place for such a conflicts provision. Wold argues that the principles of treaty interpretation, specifically *lex posterior* and *lex specialis*, are difficult to apply in practice to resolve conflicts between MEAs and the WTO.<sup>92</sup> Thus, conflicts clauses in MEAs would be "extremely useful" in his view.

Several WTO mechanisms already are in place to deal with MEA-WTO conflicts should they arise—a waiver of GATT obligations may be granted if approved by a three-fourths majority<sup>93</sup> or a simple majority may issue Decisions and Interpretations (XXV).<sup>94</sup> The *Shrimp* decision indicates the openness of the Appellate Body to considering MEAs in its interpretation of the GATT.<sup>95</sup> Indeed, it was the reference to such agreements in the Decision on Trade and Environment that seems to have encouraged the Appellate Body to consider the provisions of MEAs in reaching its decision.

Fletcher advocates the negotiation of an agreement on the interpretation of Article XX along the lines of a proposal made by the

trade measures and the WTO members who are parties and non-parties, see WTO, Committee on Trade and Environment, *Matrix on Trade Measures Pursuant to Selected MEAs*, WT/CTE/W/160, (Aug. 15, 2000). The majority of WTO members are parties to the major MEAs.

92. See Wold, *supra* note 55; see also *supra* notes 75-76. The GATT Group on Environmental Measures and International Trade discussed the possible hierarchy of international agreements under principles of international law, namely that if two agreements have the same membership on the same subject, the later and/or more specific one would take precedence. However, it chose not to pursue this approach, since it was beyond the mandate of the group and no challenge had been brought before the GATT against trade measures applied in the context of an MEA. See *Ukawa Report*, *supra* note 89, ¶ 15.

93. See WTO Agreement, *supra* note 5, art. IX(3), (4); see also GATT, *supra* note 2, art. XXV; Wold, *supra* note 55.

94. See GATT, *supra* note 2, art. XXV; Wold, *supra* note 55.

95. The Appellate Body reviewed provisions of the following MEAs to support its argument in favour of multilateral solutions to resolve transboundary environmental issues: Rio Declaration on Environment and Development, Agenda 21, Convention on Biological Diversity, Convention on the Conservation of Migratory Species of Wild Animals and the Inter-American Convention for the Protection and Conservation of Sea Turtles. See *Shrimp*, *supra* note 7, at 19, 37, and 49.

European Union.<sup>96</sup> The EU proposal included a provision that would explicitly resolve potential conflicts along the lines of NAFTA Article 104. However, both developed and developing country members of the WTO rejected the proposal. Some nations believed that the existing provisions were adequate to resolve any conflicts that might arise, while others feared that this would allow developed countries to use environmental measures to decrease market access.<sup>97</sup>

Dailey argues persuasively that the principle of sustainable development has become accepted as a rule of customary international law. As such, the principle obliges nations to exploit their resources in a matter that is sustainable.<sup>98</sup> She further notes the inclusion of the principle of sustainable development in the WTO Preamble. Dailey advocates the interpretation of Article 3(2) of the DSU to require panels to interpret the WTO agreements in accordance with customary rules of public international law, rather than simply the customary rules of *interpretation* of customary international law. She draws support for this view in the statement of the Appellate Body in *Reformulated Gasoline* that the GATT cannot be read "in clinical isolation from public international law." She also advocates an interpretation of the necessity test in Article XX(b) to require substantially equivalent environmental effectiveness of the less-trade-restrictive alternative.

However, the decision of the Appellate Body in the *Shrimp* case indicates that the WTO has already moved in the direction proposed by Dailey. The Appellate Body employed the new WTO preamble reference

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96. See Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 359 (1996). The EU proposal included the following elements: (1) "establishment of measures to ensure the effective implementation of measures to protect the environment, including the Basel Convention, the Montreal Protocol and CITES;" (2) "development of an interpretive document for GATT Article XX to set out clear criteria on the use of trade measures to enforce multilateral environmental agreements, including circumstances under which trade sanctions taken pursuant to a MEA, and applied to a GATT member which did not sign the MEA, can go against other GATT obligations;" and (3) "clarification of the circumstances under which the production process methods will qualify as GATT Article XX exceptions."

97. See Wold, *supra* note 55; see also *Report (1996) of the Committee on Trade and Environment*, in TRADE AND ENVIRONMENT SPECIAL STUDIES 98 (Hakan Nordstrom & Scott Vaughan, eds., 1999).

98. See Dailey, *supra* note 72. Dailey acknowledges that the scope of the principle remains controversial, and adopts the consensus view as to the four core principles of sustainable development: intergenerational equity (preserving resources for the benefit of present and future generations), sustainable use (exploitation of resources at sustainable levels), equitable use (which takes into account the needs of other states), and integration (integrating environmental concerns into economic and other decision-making processes).

to sustainable development, contrasting it with the old GATT preamble, in order to justify the U.S. measure as a legitimate natural resource conservation measure. It made reference to CITES as proof that the species of turtle in question were exhaustible. Most importantly, it displayed a willingness to include multilateral efforts to protect migratory species under the Article XX(g) exception. Since several panels have already indicated that multilateral efforts are the primary less-trade-restrictive alternative to unilateral trade embargoes, it is difficult to see why the least-trade-restrictive principle needs to be re-interpreted to deal effectively with MEA trade measures.

It seems neither necessary nor feasible to introduce an MEA conflicts clause in the WTO at the moment. While provisions such as NAFTA Article 104 may be useful in regional trade agreements, such a provision would be problematic in the WTO given the diversity of its membership. Moreover, both developed and developing country members of the WTO have rejected such a proposal. The more appropriate place to negotiate conflicts clauses is in the MEAs that employ trade measures to achieve environmental goals.

## XI. CONCLUSION

The general conclusion that can be drawn from the provisions of the WTO Agreement, in particular the preamble, the Decision on Trade and Environment and GATT Article XX, is that trade measures taken pursuant to MEAs are permissible. However, unilateral trade measures aimed at changing the environmental policies of other nations are not. In both legal and practical terms, this is most appropriate. Differences in environmental conditions, technological capacity, financial means, economic priorities, and legal systems among the nations of the world require a cooperative, multilateral approach to international environmental issues. The effective conservation of migratory species and the global commons requires the cooperation of all affected parties. The wide acceptance of MEAs such as the Montreal Protocol suggests that the nations of the world are indeed capable of finding creative, cooperative solutions to environmental challenges of global importance.

Much of the literature on this issue from U.S. legal scholars appears to take a common-law approach to analysing WTO jurisprudence. It is important to recall that the principle of *stare decisis* does not apply to decisions of WTO panels and that panel opinions on the potential GATT-consistency of measures taken under MEAs is thus far only *obiter dicta*. Nevertheless, decisions rendered in the *Tuna* and *Shrimp* cases will have persuasive value in future decisions of WTO panels and the Appellate Body. However, the primary focus of analysis must be on the provisions of

the agreements themselves, which were drafted in a way that allows their interpretation to evolve over time to deal with shifting global priorities and the growing diversity of the WTO membership.

Recent interpretations of existing WTO provisions have opened the door for multilateral environmental measures dealing with shared species and resources to be justified as exceptions under Article XX. The *Shrimp* decision suggests that nations may exercise *shared* jurisdiction over migratory species and the global environment, although the exact scope of that jurisdiction is yet to be defined. While it appears unlikely that trade measures taken pursuant to an MEA against parties to the MEA will be challenged before the WTO, should such a case arise the measure would probably meet the standards set out in Article XX. Should measures be taken against non-parties, the outcome of a WTO challenge is less certain. However, existing mechanisms are capable of dealing with such a situation, notably waivers, decisions and interpretations. In some cases a rule set forth in an MEA may become binding on non-parties as a customary rule of international law, as set out in Article 38 of the Vienna Convention. As such, it would influence the outcome were such a challenge to come before a WTO panel.

There appears to be no need to introduce immediate changes to the WTO regime in order to deal with hypothetical conflicts with MEAs. In particular, it does not appear to be either necessary or feasible to introduce an MEA conflicts clause in the WTO. While such provisions may be useful in regional trade agreements, they would be problematic in the WTO given the diversity of its membership. However, greater use of conflicts clauses in MEAs would be a step in the right direction.

