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## **The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation**

**Lakshman Guruswamy**

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[30 ELR 10261]

In the case of United States-Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp),<sup>1</sup> the Appellate Body of the General Agreement on Tariffs and Trade's (GATT's) World Trade Organization (WTO)<sup>2</sup> declared that actions taken by the United States to protect endangered sea turtles were GATT-illegal. Despite the official U.S. welcome extended to this decision,<sup>3</sup> the conclusions of the Appellate Body challenge the freedom of the United States to make significant foreign and domestic policy decisions. By ignoring and effectively overruling decisions made by the U.S. judiciary, on the very same issues of U.S. constitutional and administrative law that the Appellate Body chose to decide, the US-Shrimp case has made unprecedented inroads into the sovereignty of the United States, and the protection of the environment. Not surprisingly, a growing surge of criticism leveled at the outcome of this case contributed to the outrage vividly demonstrated in Seattle in December 1999.

One result of the Seattle meeting is that the question of how the GATT/WTO may be reformed to incorporate environmental, human rights, and other goals is back on the agenda.<sup>4</sup> The twisted tale of the US-Shrimp case demonstrates that the GATT/WTO is in urgent need of reform. Unfortunately, the Sisyphian task of reforming the GATT/WTO is a long and arduous undertaking in which the odds are heavily stacked against the reformers. While interstitial changes are tortuously negotiated in protracted sessions, the environment will continue to suffer at the hands of the GATT/WTO. In order to prevent this, it makes eminent sense for trade and environmental cases to be moved out of the GATT/WTO legal regime into more fair, open, and just tribunals.

Part I of this Article reviews the facts of the US-Shrimp case and addresses a bizarre twist in this tale. The US-Shrimp case is not a simple play with a single plot, in which a miscreant WTO thwarts the efforts of a virtuous United States to protect internationally endangered sea turtles. On the contrary, there is more than a whiff of suspicion that the United States equivocated over its decision to protect endangered sea turtles, and that it did not play the ethical role that it portrayed. Startlingly, the Appellate Body relied on an admission made by the United States in arriving at one of their reasons for holding against the United States on the crucial grounds of "arbitrary discrimination." During oral hearings the United States made damaging and incorrect admissions about the alleged absence of appeal and review procedures in the certification process of the U.S. statute in controversy, along with other statements that were relied upon by the Appellate Body in arriving at their finding of an absence of due process. Why the United States made these incorrect misstatements, and or

dubious admissions, and thereby jeopardized its case eludes an easy answer. One possible explanation, although conjectural, is that the Clinton Administration abandoned sea turtles in order to further its broader international economic agenda.

Such conduct would be consistent with the fact that the laws and policies of almost all national civil societies, and particularly the United States, reflect some form of interest in group politics.<sup>5</sup> Lawmakers commit their countries to a variety of different and sometimes conflicting goals, objectives and programs that deal, for example, with health, communications, welfare, transport, human rights, trade, and environmental protection. The separate regimes establishing international free trade and environmental protection are well-established potential sources of conflict. The United States is party to many cases in GATT/WTO legal [30 ELR 10262] forums<sup>6</sup> arguing for free trade, and may have found it necessary to sacrifice sea turtles in order to further more important economic objectives.

Whether or not this is correct, what is clear, as Part II will demonstrate, is that GATT/WTO tribunals are ill-suited to deal with questions of environmental protection. The embryonic legal system prevailing in international society lacks compulsory judicial settlement, and there is little doubt that the GATT/WTO, which possesses a system of compulsory and binding dispute settlement, endeavors to overcome this weakness by bringing all trade-related disputes under its jurisprudential canopy. Their treaty mandate, however, shackles them to GATT/WTO law, and excludes all other areas of law including international environmental law (IEL). Not surprisingly, the decision in the US-Shrimp case is just the most recent in a string of decisions by the GATT/WTO striking down efforts by the United States to protect the international environment.<sup>7</sup>

Part II will also contend that the US-Shrimp case ignored IEL, while encouraging the kind of false admissions made by the United States. It reiterates the call for finding a more fair and just tribunal, such as those set up under the United Nations Convention on the Law of the Sea (UNCLOS),<sup>8</sup> possessed of jurisdiction to adjudicate both international trade and environmental law.

## Part I: Background and Analysis of US-Shrimp

### A. Facts

The facts about sea turtles killed by shrimp trawling are well documented and generally uncontested. Shrimp trawling is recognized as the most wasteful commercial fishery in the world.<sup>9</sup> In the Gulf of Mexico alone, shrimpers kill and waste approximately 2.5 billion pounds of fish a year, of which 70 percent would have been commercially valuable upon further maturation.<sup>10</sup> Among the by catch are sea turtles, the estimated yearly loss worldwide being 100,000 turtles.<sup>11</sup> These sea turtles represent a unique and vital part of the biodiversity of the ocean and may even be categorized as indicator species.<sup>12</sup> Their mortality presents a grave and present danger to their existence.<sup>13</sup>

The reason for anxiety over the possible extinction of sea turtles arises from the fact that they are late breeders. There is a high mortality rate of sea turtles before they reach breeding age due to natural conditions.<sup>14</sup> The study of the effects on protection of eggs and hatchlings have demonstrated that these efforts alone do not lead to significant increases in population.<sup>15</sup> Thus, the continued survival of juvenile, sub-adult, and adult sea turtles that have matured past the hatchling stage is important to the survival of the various species.<sup>16</sup> In order to protect these age groups of sea turtles from destructive shrimp trawling practices, turtle excluder devices (TEDs)<sup>17</sup> were developed and have proven to be the soundest and most effective method available for protection.<sup>18</sup>

There are six species of turtles present in U.S. waters that are protected by the Endangered Species Act (ESA).<sup>19</sup> The Olive Ridley, Loggerhead, and Green turtles are classified as "threatened," and the Hawksbill, Kemp Ridley, and Leatherback are listed as "endangered."<sup>20</sup> The actions of the United States to protect sea turtles are based on solid, generally uncontested, scientific data. In addition to numerous other studies,<sup>21</sup> the U.S. Congress in 1988 passed amending legislation to the ESA that directed the Secretary of Commerce to contract with the National Academy of Sciences (NAS) for a definitive report on the plight and conservation of sea turtles.<sup>22</sup> In 1990, the NAS report on the Conservation of Sea Turtles found that shrimp trawling was responsible for more sea turtle mortality than all other human activities combined and concluded that the use of TEDs is vital to control the mortality of these endangered species.<sup>23</sup> Furthermore, there was strong evidence that these turtles were migratory global species that were not confined to the waters of the United States and the outlying Caribbean areas. Pursuant to these studies, in § 609 of the 1989 U.S. Departments of Commerce, Justice, and State appropriations bill, the U.S. Congress added a legislative note to ESA § 8 entitled "Conservation of Sea Turtles: Importation of Shrimp" (Section 609),<sup>24</sup> which directed that the protection of these endangered [30 ELR 10263] turtles be extended on a worldwide basis. Toward this objective Section 609 required that two major procedural or implementing steps be taken. First, it called upon the U.S. Secretary of State to initiate bilateral and multilateral negotiations with foreign countries with a view to protecting sea turtles.<sup>25</sup> Second, it banned the importation of wild shrimp harvested with commercial fishing technology and established a certification procedure. No shrimp would be allowed into the United States unless the President certified annually that the nation concerned employed a regulatory program comparable to the United States and that the average rate of incidental takings of sea turtles in the course of shrimp harvesting was comparable to that of the United States, or that the harvesting techniques of a nation do not pose a threat of incidental takings of sea turtles.<sup>26</sup>

The certification requirements were challenged by complainants India, Malaysia, Pakistan, and Thailand.<sup>27</sup> They argued that the U.S. restrictions on the importation of shrimp violated Articles I:1, XI:1, and XIII:1 of GATT 1994.<sup>28</sup> In addition, the complainants argued that Section 609 did not qualify under the exceptions of Article XX(b) or XX(g) of GATT 1994<sup>29</sup> and that Section 609 and its implementing measures "nullified or impaired benefits" accruing to the complainants within the meaning of Article XXIII:1(a) of GATT 1994.<sup>30</sup> Both the Panel and the Appellate Body, though for different reasons, held that the attempt of the United States to protect endangered sea turtles by restricting imports from countries that did not use TEDs was GATT-illegal. The Appellate Body upheld the Panel's report finding the U.S. action to be inconsistent with Article XI of GATT 1994, but concluded specifically the action of the United States amounted to "unjustified discrimination" and "arbitrary discrimination" under the chapeau (introductory or preambular provision) to Article XX of GATT 1994.<sup>31</sup>

## B. Applicable Law

Before analyzing the decision of the Appellate Body it is necessary to sketch four fundamental aspects of the law that have been misconstrued, or not discussed at all in the order of the Appellate Body. They relate to the legal and constitutional status of the GATT/WTO as an international entity, the extent to which treaty negotiations are an integral and critical component of state sovereignty, the need for international tribunals to exercise judicial deference, and the decisions of U.S. courts on the very same issues addressed by the Appellate Body.

### 1. The Limited Powers of the WTO

It is important to bear in mind that the WTO is an international and not a supranational organization. The term "supranational" typically refers to an international organization that is empowered to exercise directly some of the functions otherwise reserved to international States (States).<sup>32</sup> A major distinguishing feature between supranational and international organizations is the greater transfer of or limitation on the State sovereignty involved in the establishment of a supranational organization.<sup>33</sup> The European Union (EU) is a paradigmatic example of a supranational organization.<sup>34</sup>

The treaties establishing the GATT/WTO are limited agreements between sovereign States that prevent or control the parties from engaging in protectionist policies.<sup>35</sup> The sovereignty or freedom of States otherwise to behave freely is left untouched except to the extent that members may have bound themselves or conferred specific powers upon the WTO to do so. The status of the WTO as an international, as distinct from a supranational organization, is buttressed by the fact that the agreement creating the WTO, and the various other covered agreements, do not set up a supranational or quasi-constitutional authority that is empowered directly to exercise the powers that are reserved to States.<sup>36</sup> Because it is an international, not a supranational organization, there are no national measures that concede sovereignty to the WTO. Moreover, unlike supranational organizations such as the EU, GATT/WTO tribunals clearly lack jurisdiction involving private parties, and suits are limited to inter-state litigation. Furthermore, the decisions of GATT/WTO Panels and the Appellate Body can remain unadopted by consensus of the Dispute Settlement Body (DSB).<sup>37</sup>

GATT/WTO treaties are subject to the international law rules of ratification, and are to be interpreted "in accordance with the customary rules of interpretation of public international [30 ELR 10264] law."<sup>38</sup> This means that they are subject to "Any relevant rules of international law applicable in the relations between parties."<sup>39</sup> These rules of international law must include those created by other treaties, custom, and general principles of law<sup>40</sup> unless they are excluded by the agreements themselves.

### 2. Treaty Negotiations

Within the international legal system, the limited powers of an international organization such as the GATT/WTO are juxtaposed with the more extensive powers of sovereign States, and "the type of international cooperation undertaken by an organization and its constituent treaty will normally leave the reserved domain of domestic jurisdiction untouched."<sup>41</sup>

The rules of international law make abundantly clear that the exercise of treaty making power is one of the essential attributes of sovereignty and independence. Thus, a State's capacity of entering into relations with other States, of its own free will, has been stressed by many jurists as the decisive criterion of statehood.<sup>42</sup> The Permanent Court of International Justice in the S.S. "Lotus" (Fr. v. Turk.)<sup>43</sup> case concluded that restrictions on the independence of States cannot be presumed.<sup>44</sup> A corollary of the independence of States is the duty of other States or international organizations to refrain from interfering with the treaty making power of States.<sup>45</sup> Any interference or intrusion into this "reserved domain" must be based on a specific and definite conferral of power on the international organization.<sup>46</sup> If there is no conferral of power to the international organization, the State in exercising its treaty making power must be independent of legal orders from other States or agencies.<sup>47</sup>

Moreover, this also means that a State is not answerable to another State or international organization on how it should conduct its foreign policy. That is a matter within the reserve domain of a State unless there is an explicit yielding of this power.<sup>48</sup> Even where this has happened, the international organization must be very sensitive about the manner in which it balances and draws the line of equilibrium between the sovereign rights of a State and the limited competence of the organization.<sup>49</sup>

### 3. Judicial Deference

Even where international tribunals are possessed of jurisdiction to review or overrule such decisions, it is important for international tribunals to recognize that the vertical command and control power structure governing politics and law within nations is conspicuously absent within the international legal order. In international society, power and authority rests on a horizontal base made up of sovereign [30 ELR 10265] States.<sup>50</sup> This horizontal nature of international law requires international tribunals to respect national sovereignty and give substantial deference to findings of fact and interpretations of law by national courts.<sup>51</sup> This principle is echoed in Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.<sup>52</sup> In essence, it directs the panel to give deference to the facts and the law as found by national tribunals. As to facts it states: "If the establishment of facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned. . . ."<sup>53</sup> In dealing with the law, it states:

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the

Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>54</sup>

By Ministerial Decision taken at the final Ministerial Conference of the Uruguay Round at Marrakesh, Morocco, in April 1994, it was decided that this standard of review under Article 17(6) would be reviewed after three years with a view to considering the question of whether it is capable of general application.<sup>55</sup> This has not happened but other provisions of the GATT treaty are even more relevant.

Illustrative of this relevance is Article X of GATT 1994. It provides for the setting up of special courts and tribunals

for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers . . . .<sup>56</sup>

Thus, if a special court has been set up for customs matters, Article X:3(b) of GATT 1994 appears to be stating that in the absence of appeals therefrom, the decisions of that court are determinative of the issues and shall govern the question at issue. If this interpretation is correct, the deference demanded is even greater than has hitherto been contended.

Even Croley and Jackson, who argue that the GATT/WTO is more of a supranational organization than appears to be the case, agree on the need for at least some deference to national bodies that are more representative of the popular will than the unelected GATT/WTO. They call for a balance between sovereignty on the one hand and the broader interest in realizing the gains of international coordination on the other.<sup>57</sup> In the least, this means that a "line of equilibrium," similar to that drawn by the Appellate Body in the US-Shrimp case between the rule of free trade and the exceptions under Article XX of GATT 1994,<sup>58</sup> must be drawn between the foundational rule of State sovereignty under public international law and the narrow exceptions created by GATT.

#### 4. Decisions of U.S. Courts

The protection of sea turtles has spawned a shoal of U.S. cases,<sup>59</sup> of which two decisions are of particular relevance. These two decisions have taken a totally different view on the pertinent issues raised before the WTO and the conclusions on those issues adopted by the Appellate Body in the US-Shrimp case. The first case concerns the attempt of an environmental group to secure an injunction ordering the Secretary of State to negotiate treaties.<sup>60</sup> The U.S. Court of Appeals for the Ninth Circuit held that those parts of Section 609

directing the Secretary of State to initiate treaty negotiations violated the separation of powers under the U.S. Constitution by infringing upon the President's exclusive power to negotiate with foreign governments and could not be enforced.<sup>61</sup>

The same case also decided that the Court of International Trade (CIT) possessed exclusive jurisdiction with regard to the certification procedures of Section 609.<sup>62</sup> Notwithstanding such a finding, the Secretary of State attempted to argue in the subsequent case of *Earth Island Institute v. Christopher*,<sup>63</sup> that his actions pertaining to certification were not subject to judicial review. The CIT's decision rejected this contention, holding that the certification procedures could be reviewed both under the Administrative Procedure Act (APA)<sup>64</sup> and the citizen suit provisions of the ESA.

[30 ELR 10266]

### C. The Conclusions of the Appellate Body

The Appellate Body in the US-Shrimp case concluded that the "United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994."<sup>65</sup> The exception in paragraph (g), referred to, allows for restrictions that "relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . ."<sup>66</sup> The chapeau provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.<sup>67</sup>

The Appellate Body held that the actions of the United States amounted to both unjustifiable and arbitrary discrimination.<sup>68</sup>

In arriving at their findings of "unjustifiable discrimination," one of the grounds upon which the Appellate Body relied was Section 609(a), which directs the Secretary of State to negotiate treaties for the protection of sea turtles. The Appellate Body determined that the United States had failed to engage "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against . . . shrimp. . . ."<sup>69</sup> According to the Appellate Body, apart from the Inter-American Convention for the Protection and Conservation of Sea Turtles, the United States did not make "any serious, substantial efforts to carry out these express directions of Congress."<sup>70</sup> Instead, the United States had acted in a discriminatory and unjustifiable manner by



negotiating seriously with some but not all GATT members (including the appellees) who exported shrimp to the United States.<sup>71</sup> The United States unsuccessfully argued that it had tried in good faith to enter into bilateral and multilateral negotiations to protect sea turtles and had succeeded in doing so with 19 other countries but not the complainants in this case. The United States additionally contended that it had successfully negotiated the Inter-American Convention on the Protection and Conservation of Sea Turtles in 1996 and proposed to other Asian nations, including the complainants, that they should also enter into multilateral negotiations, but were turned down by the complainants.<sup>72</sup> Moreover, the United States had transferred TED technology to over 30 developing countries, including many in Asia, prior to the imposition of the ban.<sup>73</sup>

Although these contentions were argued before the Panel, it held that the negotiating efforts of the United States merely consisted of an exchange of documents, and that the United States did not enter into negotiations before it imposed certification requirements.<sup>74</sup> The Appellate Body agreed with this finding of the Panel and by holding the importation ban of Section 609 constituted "unjustifiable discrimination,"<sup>75</sup> relied upon the inadequate negotiating efforts of the United States as a contributing factor.<sup>76</sup>

The Appellate Body also held that Section 609 was applied in a manner constituting "arbitrary discrimination" under the chapeau to Article XX of GATT 1994 because the certification procedures under Section 609(b)(2) were not "transparent" or "predictable."<sup>77</sup> According to the Appellate Body the Section 609's procedures consist principally of "administrative ex parte inquiry," with no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it.<sup>78</sup> No formal written, reasoned, decision is rendered. While a list of approved applications are published in the Federal Register, they are not notified specifically. Countries whose applications are denied are omitted from the list but receive no formal notification. Finally, "no procedure of, or appeal from, a denial of an application is provided."<sup>79</sup> In the view of the Appellate Body, there was no way for members to be certain that the terms of Section 609 and the administrative guidelines were being applied "in a fair and just manner."<sup>80</sup> They concluded that there was a lack of due process in violation of Article X:3 of GATT 1994 that amounted to "arbitrary discrimination."<sup>81</sup>

#### D. The Flawed Character of the Appellate Body Decision

The considerations criticized in this Article were not the only ones offered by the Appellate Body for arriving at their [30 ELR 10267] decision that the U.S. actions amounted to unjustifiable and arbitrary discrimination.<sup>82</sup> Consequently, a preliminary question that requires examination is the extent to which demonstrably, albeit partially, flawed reasoning taints the entirety of an international judicial order.

The authority and persuasiveness of any international order depends on the extent to which it can offer good and convincing reasons for the conclusions it reaches. The persuasive power of an opinion "must depend very largely on the force of the reasoning by which it is supported."<sup>83</sup> The reasoning adopted by an opinion supports and justifies its order, and the quality of this reasoning is an important factor that facilitates the acceptance, and enhances the authority, of international judicial decisions.<sup>84</sup>

If the Appellate Body chooses to rely on more than one reason for its conclusion, then each one of these reasons becomes an integral part of the material law and facts providing the doctrinal justification of that order. None of the reasons can be severed or cherry picked from the judgment. Where, therefore, the Appellate Body gives a number of reasons for its decision, all of them form part of the interlinked chain of reasoning that cannot be dismembered. Thus, it is not possible to sever or separate the bad reasons from the good, and rely only on the good while discarding the bad.

The judicial system of the WTO is not governed by *stare decisis* or the doctrine of binding precedent. Nonetheless, as judicial bodies, WTO tribunals first determine the material facts<sup>85</sup> and create doctrines<sup>86</sup> that provide the reasoned justification for the case being decided. The doctrines, rules, or conclusions arrived at in deciding a case may serve as persuasive, albeit nonbinding, precedents in subsequent cases. In the US-Shrimp case the Appellate Body chose to rely, at least partially, on demonstrably erroneous and flawed reasons for concluding that the application of Section 609 amounted to both "unjustifiable" and "arbitrary" discrimination. The infirmity of these reasons renders their conclusions on both standards unsupportable.

## 1. Unjustifiable Discrimination

There are at least three obvious problems with the Appellate Body's decision that the absence of diligent treaty negotiation by the United States amounted to "unjustifiable discrimination." First, it constitutes a violation of the principle of state sovereignty by attempting to second-guess the manner in which the United States should have conducted treaty negotiations. As we have seen, States possess the freedom to negotiate treaties as they deem proper. This is an essential attribute of sovereignty that gives rise to the corollary duty of other States or international organizations not to interfere with this power. This is precisely what the Appellate Body did. It entered into the reserved domain of the United States and passed judgment on the manner in which the United States had exercised this right.

Second, Section 609, which must be read a part of the ESA, does require the Secretary of State to negotiate bilateral and multilateral agreements. However, we have noted that the Ninth Circuit has ruled that this requirement violated the separation of powers within the constitution and that such directions are illegal and unenforceable. The Appellate Body's conclusion that the Secretary of State did not make "any serious and substantial efforts to carry out these express directions of Congress" ignores the unconstitutionality of that provision, and effectively overrules a decision of the U.S. Court of Appeals.<sup>87</sup> There is nothing in the GATT/WTO or its covered agreements conferring such powers on it.

Third, even if the GATT/WTO did possess the power to interfere with the sovereign decisions of States, their finding of "unjustifiable discrimination" also ignored the need to give substantial deference to the fact that the United States had tried to negotiate treaties and had in fact succeeded in doing so with 14 other nations. Croley and Jackson, although arguing that the GATT/WTO is something of a supranational organization, call for

a balance between sovereignty on the one hand and the broader interest in realizing the gains of international coordination on the other.<sup>88</sup>

In the US-Shrimp case the Appellate Body labored strenuously to draw a "line of equilibrium" between the rule of free trade and nondiscrimination created by the GATT on the one hand, and the exceptions under Article XX on the other.<sup>89</sup> The Appellate Body reasoned that their interpretation of the chapeau was an exercise in such equilibrium line drawing. Having held that the actions of the United States fell within the exceptions to Article XX, they struck down the U.S. certification program on the basis that the U.S. action amounted to "unjustifiable discrimination." On a parity of reasoning, they also should have balanced the sovereignty of a State, with special reference to the reserved domain of treaty making and deference on the one hand, with the limited powers conferred upon the GATT/WTO on the other. Their decision to draw just one line of equilibrium, without any mention or even awareness of their need to draw another, amounts to undisguised trespass into the reserved domain of States.

## 2. Arbitrary Discrimination

The Appellate Body's decision that the certification program lacked procedures for review and appeal flies in the face of the express decision of the CIT. A similar argument was raised in the CIT, and its June 1995 decision held that the certification decision could be reviewed both under the APA as well as the ESA.<sup>90</sup> As we have seen, the CIT is a special court set up for customs matters and Article X:3(b) of [30 ELR 10268] GATT 1994 appears to be stating that in the absence of appeals therefrom, the decisions of the CIT are determinative of the issues and shall govern the question at issue. If this interpretation is correct, the deference demanded is even greater than has hitherto been contended. Since the CIT possesses exclusive jurisdiction over the certification issues of Section 609,<sup>91</sup> and it has ruled that certification procedures are reviewable under both the APA and ESA, absent an appeal from such a decision, Article X:3(b) obligates GATT tribunals to be bound by such a ruling.

If anything, it is arbitrary and capricious for an international tribunal such as the Appellate Body, plainly untutored in American administrative law, to make the startling claim that the U.S. administrative process is lacking in elementary rules of administrative justice and that there is no review under U.S. law of a substantive administrative decision involving an entitlement such as the certification created by Section 609. The various Department of State guidelines implementing the certification program of Section 609 did state that the procedures were not subject to the notice comment and delayed effectiveness provisions of the APA,<sup>92</sup> but this did not in any way affect the ability of an aggrieved party, such as one of the complainants, from challenging the final order under the APA, 5 U.S.C. § 706, on grounds, inter alia, that it was conducted without observance of procedure required by law.<sup>93</sup> The APA has also specifically waived sovereign immunity for this kind of action.<sup>94</sup>

This question of entitlement to judicial review of Section 609's certification procedure is resolved implicitly in the decision of the Ninth Circuit, which did not recognize any obstacle to the CIT's jurisdiction over issues

arising under Section 609(b)'s importation ban for nations that fail to meet the certification requirements.<sup>95</sup> The question is also easily answered by a glance at provisions of the APA. The APA, in 5 U.S.C. § 701, permits actions of "each authority of the Government of the United States" to be subject to judicial review unless there is a statutory prohibition on review or the "agency action is committed to agency discretion by law."<sup>96</sup> In this case, there is no indication that judicial review of Section 609 is foreclosed because of statutory language. Nor is there any "showing of 'clear and convincing' evidence of a . . . legislative intent"<sup>97</sup> to foreclose access to judicial review.<sup>98</sup> Furthermore, Section 609(b) procedures do not fall within the exception for action "committed to agency discretion." This exception has been construed narrowly and the legislative history of the APA shows that it is applicable only in cases where statutes have been drawn so broadly that there is no law to apply.<sup>99</sup>

In light of the availability of judicial review of Section 609(b), it should be noted that Article X of GATT 1994, dealing with the publication and administration of trade regulations, stipulates the most minimal procedural safeguards. It requires only that the applicable laws and regulations be published,<sup>100</sup> that "each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings,"<sup>101</sup> and that contracting parties "shall maintain, or institute . . . judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters."<sup>102</sup> The APA thus more than satisfies these requirements.

### 3. The Sting in the Tale

At this stage we need to be appraised of the strange behavior of the United States. The Secretary of State, to whom the President delegated his power under Section 609, was not a willing party to a worldwide ban on the importation of turtle destroying shrimp. The Secretary initially limited its jurisdiction to countries in the wider Caribbean and western Atlantic regions. This decision was challenged by environmental groups and on December 29, 1995, the CIT ruled that Section 609 applied to all the oceans of the world, not merely the wider Caribbean, and that annual certification must apply to a nation as a whole, and not on a ship-by-ship basis.<sup>103</sup>

The equivocation of the United States is starkly framed by the manner in which the Secretary attempted to circumvent this court order. The Administration first requested and was denied an extension of one year.<sup>104</sup> Undaunted, it then published revised guidelines<sup>105</sup> (1996 Guidelines) permitting a declaration by the importer to take the place of the certification required by Section 609 of the Conservation of Sea Turtles Act.<sup>106</sup> Such declarations by countries engaged in industrial fishing would have permitted imports on a [30 ELR 10269] ship-by-ship basis, and eviscerated the objectives of Congress. Not surprisingly, these regulations were successfully challenged, for the second time, on the basis that they were not in conformity with the court's judgment.<sup>107</sup>

There is little doubt that these errant regulations would have defeated the objectives of Section 609 for a number of reasons. First, by requiring TEDs only on those vessels that harvest shrimp for export to the United States, the 1996 Guidelines placed sea turtles at a greater risk of incidental capture by non-TED equipped

boats. Second, it reduced incentives for countries to adopt comprehensive national programs, in which they equipped all their shrimp trawlers with TEDs, by opting instead for ship-by-ship and shipment-by-shipment authorization. Finally, it would be extremely difficult to verify whether or not imported shrimp alleged to be TED caught were in fact harvested in that manner.

Despite these reasons, the Secretary appealed the order of the CIT, and the Federal Circuit vacated on a technicality that had nothing to do with the merits or substance of the case.<sup>108</sup> The Administration then seized this technical victory to issue revised guidelines in August 1998<sup>109</sup> (1998 Guidelines) which reinstated the 1996 Guidelines. On challenge has now held that these 1998 Guidelines also conformity with the language of Section 609.<sup>110</sup>

At the same time that the misconceived 1998 Guidelines were issued, and were being supported by the U.S. government before Judge Aquilino of the CIT, the Administration was also defending its worldwide ban before the WTO panels. Facing both ways like Janus, they appeared in the words of Judge Aquilino to take "another attack"<sup>111</sup> before the WTO. The Administration's brief and arguments before the Appellate Body gave the impression that it was serious about the protection of sea turtles<sup>112</sup> This appearance, however, did not last long. What happened at the hearings before the Appellate Body provides a surprising, even bizarre, twist and sting to this tale.<sup>112</sup>

In arriving at their conclusion that the conduct of the United States amounted to "arbitrary discrimination" the Appellate Body relied upon the following facts:

With respect to neither type of certification under Section 609(b)(2) there is a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under section 609 consist principally of administrative ex parte inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or deny certification is made. Moreover, no formal written, reasoned decision whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C) . . . . No procedure for review of, or appeal from, a denial of an application is provided.<sup>113</sup>

These conclusions of the Appellate Body referenced statements by the United States at the oral hearing.<sup>114</sup> In particular, the Appellate Body's statement that "no procedure for review of, or appeal from, a denial of an application is provided," relied on such a U.S. admission as its basis in fact.<sup>115</sup> From this and other facts admitted by the United States, the Appellate Body arrived at the legal conclusion that "effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-a-vis those members which are granted certification."<sup>116</sup> It then discussed Article X:3 of the GATT 1994 and went on to state:

The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.<sup>117</sup>

Thus, the U.S. admission at the oral hearing that there is no formal legal procedure for appeal or review played a critical part in the Appellate Body's decision that the actions of the United States amounted to "arbitrary discrimination." As previously discussed, this admission flies in the face of a U.S. federal court decision on the same issue.<sup>118</sup> It also runs [30 ELR 10270] counter to the principles and rules of due process found both in the APA as well as the U.S. Constitution.

If the United States did not mean to make such a damaging and errant admission it should have sought to correct the record. The United States did not such thing. On the contrary it welcomed<sup>119</sup> and then scurried to comply with the order of the Appellate Body without any protest by issuing new regulations.<sup>120</sup> The revised Department of State regulations concerning Section 609 seek to bring the United States into compliance with GATT law, but it will not be known until it is challenged again if a subsequent GATT Panel or Appellate Body Report will find these revised regulations GATT-legal.

In the least, the admissions by the United States, along with the alacrity with which it welcomed the decision of the Appellate Body, cries out for public clarification. While such an explanation may or may not be forthcoming, it is evident that the US-Shrimp case serves the purpose of drawing attention to the failings of the GATT/WTO legal regime to deal fairly with questions involving IEL. It is imperative to move such disputes into a more satisfactory forum that can avoid the kind of suspicions surrounding the US-Shrimp case.

## Part II: Deciding International Trade and Environment Disputes

### A. A Fairer Judicial Forum Than GATT/WTO

There is little doubt that the absence of compulsory judicial settlement is a serious weakness in the embryonic legal system prevailing in international society. The GATT/WTO, which possesses a unique system of compulsory and binding dispute settlement, endeavors to overcome this weakness by bringing all trade-related disputes under its jurisprudential canopy. This system of compulsory dispute settlement could be seen as the jewel in the crown of free trade under which the world has enjoyed nearly half a century of unrivaled economic growth, prosperity, and comity following World War II.

In contrast, IEL institutions<sup>121</sup> are fragmented and lack the WTO's global authority, organizational structure, financial backing, and legal status. Many IEL legal forums, with the exception of UNCLOS, lack the international jurisdiction, authority, and implementing powers of the WTO.<sup>122</sup> Because of their institutional and legal prominence, first GATT panels, and now the stronger DSB under the WTO, have emerged as the sole legal forum for resolving many disputes where the goals of environmental protection and free trade conflict.

Environmentalists have reason to fear this assertion of jurisdiction by the GATT/WTO for a number of reasons.<sup>123</sup> First, the substantive or constitutional law of the GATT/WTO ignores international law dealing with environmental protection, and treats any law or treaty not embodied in GATT or its "Covered Agreements," as irrelevant. The GATT/WTO is precluded from taking cognizance of international environmental laws, even though these laws constitute an important segment of international law. By contrast, UNCLOS Tribunals "shall apply . . . other rules of international law not incompatible with this Convention."<sup>124</sup> This formulation is more receptive to international law, and less restrictive of non-UNCLOS law than the comparable provisions of the GATT/WTO that assiduously and systematically exclude all but GATT law.

The law applied by the GATT/WTO is confined to that found in its own treaties and does not recognize any broader corpus of general international law, let alone IEL.<sup>125</sup> Since environmental protection never was and is not a GATT/WTO objective, the GATT and its covered agreements do not deal with environmental protection apart from the exceptions found in Article XX of GATT 1994, and an exception in the Agreement on Technical Barriers to Trade.<sup>126</sup> It is abundantly clear that GATT/WTO Panels and Appellate Bodies must restrict themselves to Articles 16 and 17(14) of Annex 2 of the WTO Agreement—entitled Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)—and the Covered Agreements,<sup>127</sup> [30 ELR 10271] which, moreover, should be interpreted and construed strictly in a way that does not add to or diminish the rights and obligations provided by the treaties.<sup>128</sup>

UNCLOS, in contrast to the GATT, tries in various provisions to accommodate international law. The general provision dealing with its relation to other conventions,<sup>129</sup> the non-derogation clause notwithstanding, tries to reconcile, and not repudiate, the rights and obligations arising from other agreements. Consequently, UNCLOS tribunals can take cognizance of GATT law, while their GATT counter-parts are unable to take cognizance of UNCLOS.

Despite a rhetorical reference to environmental protection in the hortatory preamble of the WTO,<sup>130</sup> GATT/WTO treaties call for the advance of free trade effectively unrestrained by environmental constraints. Such an advancement of free trade, impervious to environmental concerns, apparently relied upon the Environmental Kuznets Curve (EKC), which posited that economic growth is a pre-condition to environmental protection. Such a view was adopted by an earlier report of the GATT Secretariat.<sup>131</sup> The present Secretariat appears to have moved away from such a doctrinaire position, and suggested that the EKC may not follow an immutable path. They have conceded that competitive pressure may prevent the turn around of the pollution path, and that economic growth driven by trade liberalization may defeat the mechanisms that could generate an EKC.<sup>132</sup> They also admit that economic growth is not sufficient for turning environmental damage around

and that appropriate environmental and regulatory policies are necessary.<sup>133</sup> Such a position appears to support the use of policies that promote environmental protection by way of trade measures. But turning its own logic on its head, the report asserts that the use of trade measures is fraught with risk for the multilateral trading system.<sup>134</sup> The underlying premise of this conclusion is that trade sanctions must remain the monopoly of the GATT/WTO.<sup>135</sup> While consistent with GATT/WTO treaties, which fail to recognize any other laws, such a position ignores the reality of an international legal system encompassing a much wider corpus of law including, *inter alia*, those protecting the environment and human rights.

Second, the track record of GATT/WTO litigation demonstrates the extent to which international environmental protection has been diminished. GATT/WTO judicial bodies view IEL trade restrictions as obstructions to the painfully engineered legal regime created by the GATT/WTO aimed at liberalizing trade by eliminating controls and restrictions. In an apparently candid admission, the GATT Secretariat once conceded that it is reasonable for concerned countries to seek to change the actions and policies of others that damage the global environment,<sup>136</sup> but the present Secretariat has recanted from this position, and the cases have been inconsistent in disallowing the use of trade restrictions that promote environmental protection.

The primary avenue of overcoming GATT prohibitions against trade restrictions<sup>137</sup> is by finding justification under Article XX of GATT 1994 and its chapeau. The chapeau provides that:

Subject to the requirement that such measures are not applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures. . . .<sup>138</sup>

The most important exceptions, found in paragraphs (b) & (g), allow restrictive measures that: "(b) [are] necessary to protect human, animal or plant life or health . . .," or "(g) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . ."<sup>139</sup>

There is an extensive jurisprudence dealing with the nature and ambit of these exceptions<sup>140</sup> which cannot be explored fully in this Article. Instead, this Article takes a functional look at the application of these exceptions in three previous cases that together offer a baseline for interpreting Article XX exceptions of GATT 1994. They are United States-Restrictions on Imports of Tuna (US-Tuna I),<sup>141</sup> United States-Restrictions on Imports of Tuna (US-Tuna [30 ELR 10272] II),<sup>142</sup> and United States-Standards for Reformulated and Conventional Gasoline (US-Gasoline).<sup>143</sup> The very narrow grounds on which these decisions justify environmental action do not provide a satisfactory basis for ensuring environmental protection.

The GATT Dispute Settlement Panel Report in US-Tuna I involved a case in which the Marine Mammal Protection Act (MMPA)<sup>144</sup> of the United States required the relevant authorities to ban the importation of



yellow tuna that had been caught with nets that resulted in the killing of dolphins. After years of fruitless negotiation between the United States and Mexico to establish rules for dolphin mortality, the United States placed a total embargo on the importation of yellow tuna caught with dolphin-killing rather than dolphin-friendly nets.<sup>145</sup> The GATT Panel held that the U.S. ban violated the GATT and did not fall within the exceptions in Article XX (b), (d), or (g).

Three years later, in US-Tuna II, the European Economic Community challenged the secondary embargo provisions of the MMPA that required any intermediary nation exporting yellow tuna to the United States to provide the relevant authorities with proof that such yellow tuna had not been caught with dolphin-killing nets.<sup>146</sup> Once again the GATT Panel held against the United States. According to the Panel, such action was not "necessary" under Article XX(b) of GATT 1994, and was not "primarily aimed at" the conservation of natural resources under Article XX(g) of GATT 1994.<sup>147</sup>

The report of the Appellate Body in US-Gasoline was an appeal from a WTO Dispute Panel that Venezuela and Brazil successfully called upon to review pollution standards for gasoline imposed by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA).<sup>148</sup> The dispute revolved around whether domestic refiners were given an unfair and preferential advantage over foreign refiners in the formulation and setting of the standards.<sup>149</sup> The Appellate Body ruled that the manner in which the United States determined the 1990 baselines, and the consequent pollution standards for gasoline under the CAA, could not be justified under Article XX (b), (d), and (g) of GATT 1947.<sup>150</sup>

In two of these three cases, the United States took action to protect the environment and did not argue that it was obliged to do so by treaty. In light of the apparently unilateral nature of the U.S. actions, a preliminary question is whether the GATT/WTO permits environmental action that has been authorized and mandated, though not obligated, by a multilateral treaty that did not include all GATT contractual parties.<sup>151</sup>

This question was in fact addressed in US-Tuna II.<sup>152</sup> The United States, while not claiming that its actions were obligated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>153</sup> did in fact offer treaty justification for its actions. It argued generally that its actions "were consistent with and directly furthered the objectives"<sup>154</sup> of CITES and other environmental treaties, and more specifically, that they were authorized and empowered by CITES. According to the United States:

All species of dolphins involved in the fishery of the eastern tropical Pacific were listed in CITES Appendix II. Moreover, while the United States was not obliged under CITES to adopt the measures at issue, CITES specifically provided for these measures in providing for "stricter domestic measures" in order to further the objectives of that agreement. The United States' measures were stricter domestic measures, as explicitly contemplated under CITES, taken to protect species of dolphins that CITES protects. These measures were in addition to the restrictions on trade in specimens of the dolphins themselves that are required under CITES . . .  
.155

Relying on CITES and other international environmental treaties, the United States contended that these treaties should, according to international law, be taken into account as general or special rules for interpreting Article XX of the GATT.<sup>156</sup> Further, the United States argued that the actions taken by the parties to these multilateral environmental treaties constituted "subsequent practice" under general international law and Article 31(3)(b) of the Vienna Convention. The Panel made short shrift of these arguments, asserting that the CITES and the other environmental treaties were not subsequent agreements signed by all the parties to the GATT. With regard to the use of IEL agreements in the interpretation [30 ELR 10273] or application of Article XX, the Panel bluntly declared that "they did not apply to the interpretation of the General Agreement or the application of its provisions."<sup>157</sup>

The Panel, by so holding, was acting in conformity with GATT law and jurisprudence. The recognition that environmental treaties affect the interpretation or application of the GATT would require judicial law making that GATT/WTO panels are forbidden from undertaking.<sup>158</sup> It would, in any case, be a mistake to argue that unilateral decisions are more difficult to justify than those based on multilateral treaties<sup>159</sup> because there is no distinction made in the language of Article XX of GATT 1947 between treaty and nontreaty justification.

There are other ways in which the GATT and the decisions of GATT/WTO tribunals can obstruct the implementation of environmental treaties. First, the word "necessary" (to protect human, animal, or plant life and health) in Article XX(b) of GATT 1994 has been restrictively interpreted<sup>160</sup> to mean that a government must employ the measure that is the least GATT-inconsistent. Even where a measure is required to protect human, animal, or plant life or health, it may well be held to be "unnecessary" in the view of the GATT/WTO tribunal, if such tribunal determines that other measures, more consistent with GATT, were available. Import and export restrictions under CITES could well be struck down on the basis that they are not the least trade restricting measures available to the country concerned.

Second, US-Tuna II interpreted "relating to" (the conservation of exhaustible natural resources) in Article XX(g) of GATT 1947 to allow extra-territorial conservation efforts that had been prohibited by US-Tuna I.<sup>161</sup> However, the Appellate Body in US-Gasoline reconfirmed the rule asserted in US-Tuna II that such policies should be primarily aimed at the conservation of exhaustible natural resources,<sup>162</sup> as determined by the GATT/WTO. This means that GATT/WTO tribunals can impugn any action taken under any IEL convention on the basis that the action is, in their view, not primarily aimed at conservation even if the concerned States assert a contrary view.

Third, GATT/WTO tribunals have assumed a disturbing interventionist character. Oblivious of their appellate status, they seem eager to override the judgment of sovereign nations with which they disagree, and make their own decisions on the facts. They seem unaware of judicial restraint, the need for deference to the decisions of national fact-finding bodies, or standards of review that restrain an Appellate Body from interfering in an executive action unless it is arbitrary, capricious, or an abuse of discretion.<sup>163</sup> This is most clearly born out by the manner in which the Appellate Body sought to interfere with U.S. treaty making, and overrule decisions of the U.S. courts in the US-Shrimp case.

Fourth, US-Tuna I reiterated the rule that Article XX of GATT 1947 could only be directed at products, not at process or production methods.<sup>164</sup> It concluded that measures aimed at reducing dolphin killing were a production method and thus were not covered by Article XX(g) of GATT 1947.

Finally, the Appellate Body in US-Gasoline created another formidable hurdle against GATT member States seeking to claim the environmental exemptions under Article XX of GATT 1994. It found that the burden placed on States that sought to come within Article XX was not confined to satisfying the narrow health, environment, and natural resource exemptions found within paragraphs (a) to (j). After doing so, they had to further prove that the measures taken did not violate the "chapeau" of Article XX that prohibit "arbitrary" or "unjustified" discrimination, or a "disguised restriction" of free trade. In holding that the United States had violated the chapeau,<sup>165</sup> the Appellate Body demonstrated no hesitation in second-guessing the judgment and overruling decisions and rules made by the EPA, the executive or administrative agency that makes decisions affecting national environmental policy. In doing so, it showed scant regard for the ordinary and well-recognized principles of deference accorded to the primary decisionmaker. We have seen how the sovereignty of the United States was assailed in even more stark fashion by the Appellate Body in the US-Shrimp case.

Furthermore, the panelists who interpret such substantive trade law are unfamiliar with, if not unfriendly toward, laws and agreements directed at international environmental protection. To begin, the DSU defines who may serve as a panel member:

[30 ELR 10274]

Persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.<sup>166</sup>

It is striking that this list does not include anyone with qualifications outside the field of trade law, and automatically excludes anyone with expertise in international environmental law who does not also have the Article 8 qualifications.

GATT/WTO panelists are prevented from engaging in the customary judicial role of interpreting and developing the law. This is because of the constraints imposed on panelists by Article 3(2) of the DSU. Article 3(2) is an interesting provision that has all the hallmarks of an unresolved disagreement. It reiterates that the dispute settlement system should first, preserve the rights and obligations of Members under the Covered Agreements and second, clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.<sup>167</sup> Having stated this, it proceeds immediately to attenuate future interpretation by prohibiting any tribunal from adding to or diminishing rights and obligations provided

in the Covered Agreements.<sup>168</sup> This flies in the face of judicial law making and assumes a set of precise, tailor made, predetermined and inflexible rights and duties that can be mechanically dispensed without any judicial intervention.<sup>169</sup>

Such an approach is untenable for a number of reasons. First, the DSU and the Covered Agreements were made by humans not gods, and cannot anticipate the multiplicity of contingencies and circumstance that could give rise to controversies about rights and duties. Second, the DSU and the Covered Agreements cannot anticipate the law that should be applied in every situation. Each set of rights and duties ought to be applied to the particular variegated fact situation; the scope of each right and duty could not possibly be ordained in advance. That is why international instruments are couched in various degrees of generality and indeterminacy.<sup>170</sup> Third, duties and rights are correlative concepts,<sup>171</sup> but they are "institutions" and tools of judicial reasoning for deriving and assigning benefits and burdens. It has persuasively been argued that institutional concepts consist of three sets of rules: (1) a set of constitutive rules specifying situations to which they might be applied, (2) a set of rules specifying the legal consequences, and (3) terminative rules specifying outcomes.<sup>172</sup> Each step involves judicial analysis, reasoning, discretion, and power within a continuing time frame to ascertain the nature, scope, and applicability of indeterminate rights and duties.

The DSU attenuates judicial discretion, or freedom, to adapt the law to new situations. It defies reality by assuming that an initial expression of law in a treaty freezes both time and content. In fact, any expression of law is intended to be applied to future events over an indefinite period of time during which its initial meaning is subject to change.

The customary international rules of interpretation, restated in the Vienna Convention,<sup>173</sup> assume there can be no omniscient expression of rights and obligations that can be applied automatically with dogmatic immutability. Instead, the Vienna Convention calls for any treaty to be interpreted according to its ordinary meaning in "context and in the light of its object and purpose."<sup>174</sup> In addition to context, the Vienna Convention states that any applicable rules of international law should be taken into account.<sup>175</sup>

The DSU has apparently rejected the Vienna Convention criteria by asserting that the rights and obligations set out in the Covered Agreements are sufficient for all purposes, and earlier references to rules of interpretation in the DSU must be understood as aspirational and cosmetic rather than obligatory. GATT/WTO's judicial system appears even more inward looking and blinkered when compared to International Court of Justice (ICJ) jurisprudence. ICJ decisions apply treaties, international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teachings of the publicists.<sup>176</sup> The law applied by the GATT/WTO is confined to its own agreements.

## B. Jurisdiction of UNCLOS in Trade and Environment Disputes

In light of all the shortcomings of GATT/WTO tribunals as a forum for trade and environment disputes, it is useful at this point to emphasize the importance and viability of UNCLOS as another international forum for such cases. The argument for resorting to UNCLOS tribunals has more fully been addressed<sup>177</sup> and those conclusions will only briefly be asserted here. Importantly, within key areas of potential conflict, the substantive international environmental obligations and the dispute settlement procedures of UNCLOS countervail GATT/WTO. UNCLOS not only incorporates substantive principles of IEL, it also creates a binding system of adjudication and dispute resolution that confers upon its legal forums the jurisdiction and adjudicatory authority to hear trade and environment [30 ELR 10275] disputes. Additionally, even where States are not parties to UNCLOS, but nevertheless accept its provisions as codifications of customary IEL, the ICJ is in a position to adjudicate trade and environment disputes in limited circumstances.

The countervailing jurisdiction of UNCLOS in trade environment disputes could raise some concerns and even give rise to the specter of judicial uncertainty resulting from competing jurisdiction between two lawfully constituted international tribunals. First, might there be a race to the most favorable courthouse? Second, what of the confusion and uncertainty resulting from two tribunals exercising jurisdiction over the same case? Third, might the absence of established rules of international law governing clashes between tribunals asserting concurrent jurisdiction lead to a form of judicial anarchy in which UNCLOS and WTO tribunals joust with each other for judicial supremacy? Finally, how might conflicting orders of these tribunals be implemented or enforced?

The question of competing jurisdiction amongst tribunals established by treaties (intergovernmental tribunals) has not hitherto been addressed by treaty or customary law.<sup>178</sup> In the absence of treaty or customary norms governing how international tribunals should act, two other sources of public international law, "general principles of law," and "judicial decisions . . . of the various nations,"<sup>179</sup> must be examined. There is no doubt that "general principles of law" enjoy parity of legal status, albeit not of importance, with treaties and custom, as primary sources of international law. The Statute of the ICJ underscored the primary status of "general principles" by characterizing the other sources of international law: "judicial decisions," and the "teachings of the most highly qualified publicists" as "subsidiary" means for determining the rules of law.<sup>180</sup>

The general principles of law referred to can be adopted or derived from conflict of laws (Conflicts) jurisprudence dealing with jurisdiction among the domestic (national) courts of various countries. There are two primary principles that can be determined from Conflicts theory dealing with issues of conflicting jurisdiction: reasonableness and fairness.<sup>181</sup> These foundational principles are also articulated through other more specific supplemental principles such as forum non conveniens, comity, and choice of law.

Conflicts analysis also divides a court's jurisdiction into two inquiries: legislative or prescriptive jurisdiction,<sup>182</sup> and judicial jurisdiction.<sup>183</sup> If we adopt this structural analysis, the primary and supplemental general principles of law deriving therefrom may be applied to the potential jurisdictional clash between the GATT/WTO and UNCLOS. The conclusion is that the application of these general principles of law and the judicial decisions of the various countries justifies the assertion of both legislative and judicial jurisdiction by UNCLOS tribunals.

The Conflicts experience in analogous cases also demonstrates that many of the fears articulated by a potential clash between the GATT/WTO and UNCLOS are unfounded, and that conflicting jurisdiction does not give rise to judicial anarchy. Domestic courts in different countries have arrived at a functional and legal understanding and accommodation of each other's concurrent jurisdiction, and have attempted to resolve conflicts on the basis of legal principle rather than arbitrary caprice.<sup>184</sup>

The answers to questions relating to the legislative and judicial jurisprudence of the GATT/WTO and UNCLOS all assume a further foundational premise: that both forums are engaged in the common pursuit of justice rather than of judicial hegemony. If this premise is correct, the existence of UNCLOS as an alternate forum to challenge the hitherto untouched monopoly of the GATT/WTO in trade and environment disputes might generate genuine reform within the latter body. Reform would both advance international comity by minimizing or eliminating potential conflict and promote the enlightened self-interest of the GATT/WTO.

## Conclusion

The US-Shrimp case is only the latest in a line of decisions made by GATT/WTO tribunals that have made significant inroads into the reserve domain of the United States. The case demonstrates, moreover, how an unsympathetic tribunal that does not recognize IEL can thwart environmental protection. The dominance of trade law to the exclusion of environmental law can pressurize States into surrendering or subjugating environmental objectives in order to advance their trade and economic interests. Countries such as the United States could become persuaded that the best way to promote important economic issues such as the export of beef into Europe or the removal of trade barriers in Japan, is by jettisoning the protection of the environment. This might explain the admissions by the United States in the US-Shrimp case.

Such a dilemma could be avoided by confining GATT/WTO adjudication to trade disputes alone, while referring trade and environmental cases to a tribunal under UNCLOS that applies both international trade and environmental law. The prosecution of environmental objectives in UNCLOS should be handled by environmental not trade agencies. Doing so would prevent trade representatives, who are not usually committed to environmental protection, from readily conceding environmental objectives in exchange for other favors, as they might have done in the US-Shrimp case in the GATT/WTO.

While the need for impartial legal forums that can decide trade and environment disputes is met by UNCLOS tribunals, one major barrier confronts the United States. It has not ratified UNCLOS and is thereby prevented from accessing [30 ELR 10276] UNCLOS tribunals. In the circumstances, it has become increasingly evident that the problems encountered in the GATT/WTO provide another powerful reason as to why the United States should ratify UNCLOS. Those who have objected to UNCLOS because of the alleged loss of sovereignty must now recognize that the boot is on the other foot. The GATT/WTO has encroached on the sovereignty of the United States, and UNCLOS gives the United States an opportunity to regain its sovereignty, and recoup some of the ground lost to the GATT/WTO.

From a political standpoint, it is conceivable that the presence of another forum challenging its judicial monopoly might produce genuine reforms within the GATT/WTO and lead to the recognition and accommodation of IEL. The reformation of the GATT/WTO to include IEL would, of course, obviate the need for taking trade environment disputes to another tribunal. It is, however, difficult to believe that the GATT/WTO will reform itself in the absence of competing UNCLOS jurisdiction. Political reality requires that the GATT/WTO be countervailed by UNCLOS.

1. World Trade Organization, Report of the Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, reprinted in 38 I.L.M. 118, 121 (1999) (adopted Nov. 6, 1998) [hereinafter US-Shrimp Appellate Body Report]. The Report of the Appellate Body is to be distinguished from the Panel Report of the same case. See World Trade Organization Dispute Panel Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, WT/DS58/R, reprinted in 37 I.L.M. 832 (1998) [hereinafter US-Shrimp Panel Report].

2. The General Agreement on Tariffs and Trade was implemented in 1947. See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. 1700, 55 U.N.T.S. 194 (annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended, or modified) [hereinafter GATT 1947]. GATT 1947 was further modified, supplemented, and adopted as Annex 1A of the World Trade Organization Charter [hereinafter GATT 1994]. The World Trade Organization was established by the Uruguay Round negotiations in 1994. See 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 (1994), reprinted in 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

3. See United States Mission to Australia, East Asia and Pacific Edition of the Daily Washington File, Statement by Ambassador Rita D. Hayes on the Adoption of the Appellate Body Report in the Shrimp-Turtle Dispute (visited Jan. 11, 2000) <http://www.usis-australia.gov/hyper/WF981106/epf509.htm> [hereinafter Statement on Adoption].

4. See Jay Mazur, Labor's New Internationalism, FOREIGN AFF., Jan./Feb. 2000, at 79.

5. See, e.g., Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1542 (1988).

6. See Overview of the State-of-Play of WTO Disputes (last modified Feb. 1, 2000) <http://www.wto.org/wto/dispute/bulletin.htm>. For a description of the dispute settlement process within the WTO, see WTO, Settling Disputes (visited Feb. 10, 2000) <http://www.wto.org/wto/about/dispute1.htm>.

7. See *infra* notes 141-65 and accompanying text.
8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter UNCLOS].
9. See Kathleen D. Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 290-91 (1995). See also Todd Steiner, *Sea Turtles, Shrimp Fisheries & the Turtle Excluder Device* (visited Nov. 24, 1999) <http://www.earthsummitwatch.org/shrimp/positions/pov2.html>.
10. Ted Williams, *The Exclusion of Sea Turtles*, AUDUBON, Jan. 1990, at 26.
11. Paul S. Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57 (1996-1997).
12. See Corinne Sam, *World Trade Organization Caught in the Middle: Are TEDs the Only Way Out?*, 29 ENVTL. L. 185, 191-92 (1999).
13. See NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION* 16 (1990).
14. Selina S. Heppell et al., *Models to Evaluate Headstarting as a Management Tool for Long-Lived Turtles*, 6 ECOLOGICAL APPLICATIONS 556, 557 (1996).
15. *Id.* at 563.
16. *Id.*
17. TEDs are panels of large mesh webbings or metal grids inserted into shrimp nets. As the nets are dragged along, shrimp and small sea creatures pass through the TED and are collected while other marine animals too large to fit through the panel, like sea turtles, are deflected out of the net by an escape hatch. Jack Rudloe & Anne Rudloe, *Shrimpers and Lawmakers Collide Over a Move to Save the Sea Turtles*, SMITHSONIAN, Dec. 1989, at 45. See also NATIONAL RESEARCH COUNCIL, *supra* note 13, at 128.
18. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 127-28.



19. 16 U.S.C. §§ 1531-1544, ELR STAT. ESA §§ 2-18.

20. *Id.* See also Yaninek, *supra* note 9, at 259-63 (describing the physical features and marine patterns of each of the six species).

21. See Yaninek, *supra* note 9, at 268-70 (tracing the history of National Marine Fisheries Service studies on sea turtles and the threat posed by shrimp harvesting).

22. See Pub. L. No. 100-478, tit. I, § 1008, 102 Stat. 2306, 2309-12 (1988).

23. See NATIONAL RESEARCH COUNCIL, *supra* note 13, at 74-75. See also Public Review of the National Academy of Sciences Report on the Decline of Sea Turtles—Causes and Prevention, 55 Fed. Reg. 23259 (1990).

24. Pub. L. No. 101-162, tit. VI, § 609, 103 Stat. 988, 1037-38 (1989) (codified as amended at 16 U.S.C.A. § 1537 (West Supp. 1999)).

25. *Id.* § 609(a).

26. *Id.* § 609(b).

27. In February 1997, the Dispute Settlement Body (DSB) of the WTO established Panels pursuant to the request of Malaysia, Thailand, and Pakistan regarding Section 609's importation ban. In April 1997, the DSB established a Panel in accordance with a request made by India and consolidated this Panel with the Panel already established. See US-Shrimp Panel Report, *supra* note 1, paras. 1-2.

28. Article I:1 of GATT 1994 outlines the most favored nation treatment obligation of GATT. Article XI:1 of GATT 1994 provides for the general elimination of quantitative restrictions imposed by any GATT party on the importation of any product from the territory of another GATT party or on the exportation or sale for export of any product destined for another GATT party. Article XIII:1 of GATT 1994 prohibits the discriminatory administration of quantitative restrictions. See GATT 1994, *supra* note 2.

29. See US-Shrimp Panel Report, *supra* note 1, para. 27. Article XX of GATT 1994 is a provision permitting measures adopted by a GATT/WTO Member State that would otherwise be GATT-illegal if the measure

satisfies the requirements of one of the enumerated exceptions in Article XX as well as the requirements of the chapeau or preambular provision of Article XX. See *infra* notes 137-39 and accompanying text.

30. See US-Shrimp Panel Report, *supra* note 1, para. 27.

31. US-Shrimp Appellate Body Report, *supra* note 1, para 187.

32. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 287 (1997).

33. *Id.*

34. *Id.*

35. See Judith H. Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 *AM. J. INT'L L.* 416, 417 (1996) (asserting that the WTO relies on voluntary compliance and that any WTO member may exercise its sovereignty and take action inconsistent with the WTO agreement, provided that compensation is afforded to adversely affected trading partners or that offsetting retaliation is permitted). See also Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 301, 306 (1998) (discussing the competing conceptions of the WTO legal order as either an international or supranational organization in the context of national security interests exceptions).

36. Helfer & Slaughter, *supra* note 32, at 289.

37. WTO Agreement, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, arts. 16, 17(14), 33 *I.L.M.* 1226 (1994) [hereinafter *DSU*].

38. *Id.* art. 3(2).

39. *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 31(3)(c), U.N. Doc. A/CONF.39/27 (entered into force Jan. 27, 1990) [hereinafter *Vienna Convention*]. Many provisions of the Vienna Convention are widely viewed as restatements of the customary international rules governing treaties. See I LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 1199 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

40. See Statute of the International Court of Justice, June 26, 1949, art. 38, annexed to U.N. Charter, 59 Stat. 1055 [hereinafter Statute of the ICJ].

41. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 690 (5th ed. 1998). Declaration of Principles on International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970). The important, albeit not immutable, extent of the domestic jurisdiction or the "reserved domain" of States was emphasized by the well known dictum of the Permanent Court of Justice (PCIJ) that "whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations." *Nationality Decrees Issued in Tunis and Morocco*, 1923 P.C.I.J. (ser. B) No. 4, at 24.

42. BROWNLIE, *supra* note 41, at 71. See also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 201 (1987) [hereinafter *RESTATEMENT (THIRD)*] ("Under international law, a State is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with such other entities.").

43. 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). This case involved the collision of a French ship with a Turkish ship on the high seas near Turkey, resulting in the death of Turkish nationals. Turkish officials then commenced criminal proceedings against the French watch officer for his supposed role in the collision. France claimed that this criminal prosecution violated international law. The PCIJ found that because no international rules covered such a situation, Turkey's assertion of jurisdiction in instituting criminal proceedings against the French officer did not violate international law.

44. The importance of the Lotus principle, upholding the freedom and independence of States as a source and expression of international law and judicial reasoning is discussed in HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*, 94-96 (1966). See also Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, U. PA. J. INT'L ECON. L. 745, 762-64 (1997) (discussing the concept of a State's autonomy as an "exercise" of sovereignty inherent in statehood).

45. BROWNLIE, *supra* note 41, at 293. See also Draft Declaration on Rights and Duties of States, reprinted in [1949] 2 Y.B. Int'l L. Comm'n 286, U.N. Doc. A/CN.4/SER.A/1949.

46. GEORG SCHWARZENBERGER, *3 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 29 (3d ed. 1976). Interpretative principles in international law specifically address the recognition of state sovereignty in interpreting treaties. In cases where the basic rule of interpretation in Article 31 of the Vienna Convention either has or has not established a clear and reasonable meaning, Article 32 allows recourse to supplementary means of interpretation for purposes of either confirmation or aid. One such supplementary means of interpretation is the principle of *in dubio mitius*, in deference to sovereignty of

States. When a term's meaning is ambiguous, "that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes [sic] less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." OPPENHEIM, *supra* note 39, at 1278. Since GATT/WTO treaties are subject to the customary international rules of interpretation, the above supplementary rule of interpretation would apply. It is noteworthy in this regard that GATT/WTO treaties make no express mention of any derogation of State sovereignty in the area of treaty making.

47. BROWNLIE, *supra* note 41, at 293.

48. For example, Article 2(7) of the Charter of the United Nations prevents the United Nations from intervening in matters that are essentially within the domestic jurisdiction of any State, but specifically affirms in the same subsection that "this principle shall not prejudice the application of enforcement of enforcement measures under Chapter VII."

49. Absent this guiding principle, the expansion of trade law into the area of environmental protection could give the WTO sovereign control over vital questions of domestic policy such as the conduct of foreign relations. See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 792-93 (1999) (summarizing the debate over issues of sovereignty between proponents and opponents of the dispute settlement process of the WTO). The Appellate Body's ruling clearly signals the encroachment of the WTO into the sovereignty of the United States.

50. RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 22 (1964).

51. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996) (proposing that there is an important policy value in recognizing the need for some deference to national government decisions in GATT/WTO's dispute settlement process).

52. See WTO Agreement, *supra* note 2, Annex 1A, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6.

53. *Id.*

54. *Id.*

55. See Ministerial Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 453 (1995).

56. GATT 1994, *supra* note 2, art. X:3(b) (emphasis added).

57. Croley & Jackson, *supra* note 51, at 212.

58. US-Shrimp Appellate Body Report, *supra* note 1, para. 159. According to the Appellate Body, "the task of interpreting and applying the chapeau is . . . essentially . . . one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions . . . of the GATT 1994." *Id.*

59. See, e.g., *Earth Island Inst. v. Christopher*, 6 F.3d 648, 23 ELR 21553 (9th Cir. 1993); *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085 (C.I.T. 1995); *Earth Island Inst. v. Christopher*, 1995 WL 604708 (C.I.T. 1995); *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (C.I.T. 1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996); *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (C.I.T. 1996); *Earth Island Inst. v. Christopher*, 942 F. Supp. 597, 27 ELR 20408 (C.I.T. 1996), vacated, *Earth Island Inst. v. Albright*, 147 F.3d 1352, 28 ELR 21421 (Fed. Cir. 1998); *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062 (C.I.T. 1996), vacated, *Earth Island Inst. v. Albright*, 147 F.3d 1352, 28 ELR 21421 (Fed. Cir. 1998); *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064 (C.I.T. 1999).

60. See *Earth Island Inst.*, 6 F.3d at 648, 23 ELR at 21553.

61. *Id.* at 652, 23 ELR at 21554-55.

62. *Id.* at 651, 23 ELR at 21554.

63. 890 F. Supp. 1085 (C.I.T. 1995).

64. 5 U.S.C. §§ 500-596, available in ELR STAT. ADMIN. PROC.

65. US-Shrimp Appellate Body Report, *supra* note 1, para. 187.

66. GATT 1994, *supra* note 2, art. XX(g).

67. *Id.* art. XX. The Appellate Body's analysis of Article XX of GATT 1994 is thus two tiered. First, a measure must be provisionally justified by reason of its characterization under one of the enumerated exceptions listed in Article XX. Second, the same measure must be appraised further under the chapeau or introductory clause of Article XX to be fully justified. US-Shrimp Appellate Body Report, *supra* note 1, para. 118.

68. US-Shrimp Appellate Body Report, *supra* note 1, para. 184.

69. *Id.* para. 166.

70. *Id.* para. 167.

71. *Id.* para. 172.

72. See First Submission of the United States, World Trade Organization Panel on United States—Import Prohibition on Certain Shrimp and Shrimp Products, 9-10 (June 9, 1997) [hereinafter U.S. Panel Submission].

73. *Id.* at 11.

74. US-Shrimp Panel Report, *supra* note 1, para. 7.56.

75. US-Shrimp Appellate Body Report, *supra* note 1, para. 172.

76. In its appraisal of whether Section 609 was applied in a manner constituting "unjustifiable discrimination," the Appellate Body listed several aspects that were then considered in their cumulative effect. First, the Appellate Body determined that the exclusiveness of the language in the 1996 Guidelines promulgated by the Department of State, see Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17342 (Apr. 19, 1996), eliminated flexibility in the determination of comparability under Section 609. US-Shrimp Appellate Body Report, *supra* note 1, paras. 161-165. A second aspect considered by the Appellate Body was "the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations. . . ." *Id.* para. 166. Third, the Appellate Body found that the application of Section 609 resulted in differential treatment among various countries because of different "phase-in" periods for the adjustment to the use of TED's on shrimp trawling vessels. *Id.* para. 173.

77. *Id.* para. 180.

78. *Id.*

79. *Id.*

80. *Id.* para. 181.

81. *Id.* para. 182.

82. See *supra* note 76.

83. Letter from Justice Samuel F. Miller to John F. Dillon (Nov. 16, 1885) (quoted in JOHN DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 263 (1895)).

84. Helfer & Slaughter, *supra* note 32, at 318.

85. See A.L. Goodhart, *The Ratio Decidendi of a Case*, 22 *MOD. L. REV.* 117, 119 (1959) (stating that the ratio decidendi of a case may be deduced by identifying the facts treated as material by the judge).

86. See EUGENE WAMBAUGH, *THE STUDY OF CASES* (2d ed. 1894). Wambaugh advances that the doctrine of a case may be discovered by "ascertaining the proposition of law for which a decision is authority." *Id.* at 8.

87. See *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652, 23 *ELR* 21553, 21554 (9th Cir. 1993).

88. Croley & Jackson, *supra* note 51, at 212.

89. US-Shrimp Appellate Body Report, *supra* note 1, para. 159 ("The task of interpreting and applying the chapeau is . . . essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions . . .").

90. *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1091-92 (C.I.T. 1995).

91. *Earth Island Inst.*, 6 F.3d at 651-52, 23 ELR at 21554-55.

92. See 56 Fed. Reg. 1051 (Jan. 10, 1991); 58 Fed. Reg. 9015 (Feb. 18, 1993); 61 Fed. Reg. 17342 (Apr. 19, 1996). Such exemption from the rulemaking procedures of the APA is provided by the § 553(a) exception for the involvement of a "foreign affairs function of the United States. . . ." 5 U.S.C. § 553(a).

93. See 5 U.S.C. § 706, available in ELR STAT. ADMIN. PROC.

94. See *id.* § 702, available in ELR STAT. ADMIN. PROC.

95. See *Earth Island Inst.*, 6 F.3d at 653-54, 23 ELR at 21555-56. The Ninth Circuit refused to enforce Section 609(a), which they described as a nonjusticiable statute that directs the conduct of foreign relations. Since Section 609(a) orders the Executive Branch to negotiate and enter into treaties, the court ruled that it "[could] not lawfully order the Executive to comply with the terms of a statute that impinges upon power exclusively granted to the Executive Branch under the Constitution." *Id.* at 653, 23 ELR at 21555. Therefore, since the plaintiffs in this case could not seek enforcement of Section 609 compelling the Executive Branch to initiate negotiations for the conservation of sea turtles, a fair reading of the doctrine would mean that foreign countries would similarly be foreclosed from asking for judicial enforcement of Section 609(a). Hence, any judicial review of Section 609 would be limited to the subsections of Section 609(b).

96. 5 U.S.C. § 701, available in ELR STAT. ADMIN. PROC.

97. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 1 ELR 20110 (1971). See also *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

98. *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1091-92 (C.I.T. 1995).

99. S. REP. NO. 79-752, at 26 (1945).

100. GATT 1994, *supra* note 2, art. X:1.

101. *Id.* art. X:3(a).



102. *Id.* art. X:3(b).

103. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 575 (C.I.T. 1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996).

104. See *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (C.I.T. 1996). This request for a one-year extension of time for enforcement of Section 609 and denial thereof by the CIT was filed as a motion for "modification" resulting from the CIT's decision requiring world-wide enforcement of Section 609.

105. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17342 (Apr. 19, 1996).

106. *Id.* at 17343.

107. See *Earth Island Inst. v. Christopher*, 942 F. Supp. 597, 27 ELR 20408 (C.I.T. 1996).

108. *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1356, 28 ELR 21421, 21423 (Fed. Cir. 1998). The basis for the order of the court of appeals was that Earth Island Institute by withdrawing beforehand the motion that led to the additional relief granted by the CIT had thereby deprived that court of jurisdiction.

109. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46094 (Aug. 28, 1998).

110. *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064 (C.I.T. 1999). The court decided on April 4, 1999, that the unambiguous language of Section 609 would not allow the importation of TED-caught shrimp from uncertified nations. However, the CIT declared it would delay entrance of a judgment until after the filing of the annual report to Congress required by Section 609(b)(2) and any responses received from prior notices of proposed revisions to guidelines for the implementation of Section 609. *Id.* at 1081. In July 1999, another set of Revised Guidelines were published, see Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946 (July 8, 1999), in response to recommendations made by the DSB of the WTO. The July 1999 Guidelines essentially reenact the 1998 Guidelines. They remain, therefore, in violation of the language of Section 609, as determined by the CIT.

111. *Earth Island Inst.*, 48 F. Supp. 2d at 1069.

112. See Submission of the United States Before the World Trade Organization Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products (July 23, 1998) [hereinafter U.S. Appellate Submission].

113. US-Shrimp Appellate Body Report, *supra* note 1, para. 180.

114. *Id.*

115. *Id.*

116. *Id.* para. 181. The appellate submission of the United States before the Appellate Body did not discuss the issue of judicial review of the certification provisions of Section 609. See U.S. Appellate Submission, *supra* note 112.

117. US-Shrimp Appellate Body Report, *supra* note 1, para. 183.

118. See *Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1091-92 (C.I.T. 1995).

119. See Statement on Adoption, *supra* note 3.

120. See Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946 (July 8, 1999). The United States also entered into an agreement with the complainants by which it agreed to comply with the decision of the Appellate Body by December 6, 1999. See *WTO Sets Up Dispute Panel on United States Antidumping Act of 1916*, 16 Int'l Trade Rep. (BNA) 192 (Feb. 3, 1999).

121. Organizations which have environmental functions include the Food and Agricultural Organization (FAO), the International Labor Organization (ILO), the World Health Organization (WHO), the World Meteorological Organization (WMO), the International Maritime Organization (IMO), the United Nations Education, Scientific, and Cultural Organization (UNESCO), the International Atomic Energy Agency (IAEA), the United Nations Environment Program (UNEP), and the Organization of Economic Cooperation and Development (OECD). This partial list exemplifies the fractured nature of international organizations exercising splintered oversight over fragmented areas of IEL.

122. None of the organizations referred to possess a compulsory system of dispute settlement or an overarching institutional body such as the WTO. The mission of UNEP, the most overtly environmental organization amongst them, is to persuade and convince States of the need for action by providing information, expertise, and advice. It does not, however, enjoy any executive or judicial powers.

123. The arguments summarized here are more fully delineated in Lakshman Guruswamy, *The Promise of UNCLOS: Justice in Trade and Environment Disputes*, 25 *ECOLOGY L.Q.* 189 (1998); and Lakshman Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 *MINN. J. GLOBAL TRADE* 287 (1998). This Article is intended to supplement and extend the arguments made in those two articles, and reproduces parts of those articles.

124. UNCLOS, *supra* note 8, art. 293(1).

125. See DSU, *supra* note 37, art. 3(2) (stating "the Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements . . .").

126. See Agreement on Technical Barriers to Trade, Dec. 15, 1993, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 27 (1994). Article 5(5.7) stipulates "subject to the provisions in the lead-in to paragraph 6, where urgent problems of . . . environmental protection . . . arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary . . ." *Id.* Additionally, in order to invoke this exception, the Member must comply with certain other requirements listed in Article 5(5.7).

127. See DSU, *supra* note 37, art. 3(4): ("Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.") (emphasis added). See also *id.* art. 3(5): ("All solutions . . . shall be consistent with those agreements, and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.") (emphasis added). Article 7 of the DSU deals with the terms of reference of Panels and confines them to "the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." *Id.* art. 7(2). Article 11 of the DSU deals with the functions of panels and requires them to assess the "applicability of and conformity with the relevant covered agreements." *Id.* art. 11. It does not refer to any other laws or principles.

128. *Id.* art. 3(2). It states conclusively that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (emphasis added).

129. See UNCLOS, *supra* note 8, art. 311.

130. See WTO Agreement, *supra* note 2. The preamble states, in part, "the Parties to this Agreement . . . seek[] both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

131. GATT Secretariat, Trade and the Environment, Doc. 1529, reprinted in 4 WORLD TRADE MATERIALS 37 (1992) [hereinafter GATT Secretariat]. According to the Environmental Kuznets Curve (EKC), pollution increases at the early stage of economic development but decreases after a certain income level has been reached. This results in a turn around of the curve that takes on the shape of an inverted "U." See also WTO Secretariat, Special Studies 4: Trade and Environment (Oct. 14, 1999).

132. WTO Press Release, Trade Liberalization Reinforces the Need for Environmental Cooperation (last visited Jan. 25, 2000) <http://www.wto.org/wto/new/press140.htm>.

133. See *id.*

134. *Id.*

135. See *id.*

136. GATT Secretariat, *supra* note 131, at 18.

137. See generally GATT 1994, *supra* note 2, arts. III & XI.

138. *Id.* art. XX.

139. *Id.*

140. See generally 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?, at 57-174 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Richard H. Steinberg, Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 AM. J. INT'L L. 231, 236-44 (1997); Thomas J. Schoenbaum, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 AM. J. INT'L L. 268, 269, 273-80 & *passim* (1997); John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict, 49 WASH. & LEE L. REV. 1227, 1239-42 (1992); Cynthia M. Mass, Should the WTO Expand GATT Article XX?: An Analysis of United States—Standards for Reformulated and Conventional Gasoline, 5 MINN. J. GLOBAL TRADE 381, 426-27 (1996); Chris Wold, Multilateral

Environmental Agreements and the GATT: Conflict and Resolution?, 26 ENVTL. L. 841, 854-61 (1996); 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, 352-57 (1996); Kazumochi Kometani, Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?, 16 NW. J. INT'L L. & BUS. 441, 466-76 (1996); Paul J. Yechout, In the Wake of Tuna II: New Possibilities for GATT—Compliant Environmental Standards, 5 MINN. J. GLOBAL TRADE 247, 255-57, 264-68 (1996).

141. GATT Dispute Panel Report, United States-Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (1991) (unadopted) [hereinafter US-Tuna I].

142. GATT Dispute Panel Report, United States-Restrictions on Imports of Tuna, June 16, 1994, GATT Doc. DS29/R, reprinted in 33 I.L.M. 839 (1994) (unadopted) [hereinafter US-Tuna II].

143. World Trade Organization, Report of the Appellate Body, United States—Standards for Reformulated and Conventional Gasoline, Apr. 29, 1996, WT/DS2/AB/R, reprinted in 35 I.L.M. 603 (1996) (adopted May 20, 1996) [hereinafter US-Gasoline Appeal]. This is to be distinguished from the Panel Report of the same case. See World Trade Organization Panel Report, United States—Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, WT/DS2/R, reprinted in 35 I.L.M. 274 (1996) [hereinafter US-Gasoline Panel Report]. As the Appellate Body Report modified the Panel Report, the two should be read in conjunction for this case.

144. See 16 U.S.C. §§ 1361-1421h, ELR STAT. MMPA §§ 2-409.

145. See Jeffrey L. Dunoff, Reconciling International Trade With Preservation of the Global Commons: Can We Prosper and Protect?, 49 WASH. & LEE L. REV. 1407, 1411, 1415-33 (1992).

146. US-Tuna II, *supra* note 142, para. 2.12.

147. *Id.* para. 5.27.

148. 42 U.S.C. §§ 7401-7671q, ELR STAT. CAA §§ 101-618.

149. The Panel Report noted that the Panel's task was to ensure that the provisions and objectives of the GATT were maintained notwithstanding the desirability or necessity of the environmental objectives of the proposed legislation in dispute. See US-Gasoline Panel Report, *supra* note 143, para. 7.1. In this case Venezuela was protesting the U.S. restrictions on the importation by the United States of reformulated

gasoline. Venezuela successfully claimed that the CAA was discriminatory because it forced foreign producers to meet U.S. refinery industry averages. *Id.* para. 6.15.

150. US-Gasoline Appeal, *supra* note 143, at 30.

151. There would, of course, be no problem if the multilateral treaties included all GATT parties and were (1) entered into subsequent to the GATT, or (2) seen as a "lex specialis"—a specialist treaty. In both cases such multilateral treaties would trump the GATT. See US-Tuna II, *supra* note 142, para. 3.41.

152. In US-Tuna II, the EU and the Netherlands successfully initiated GATT proceedings against the United States similar to Mexico's suit against the United States in US-Tuna I. The EU claimed that the U.S. intermediary ban on indirect imports of tuna was hurting European fishing industries. The WTO Panel concluded that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at . . . rendering effective restriction on domestic production or consumption." *Id.* para. 5.27.

153. 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 (entered into force July 1, 1975).

154. US-Tuna II, *supra* note 142, para. 3.23.

155. *Id.*

156. The United States relied on Articles 31 and 32 of the Vienna Convention.

157. US-Tuna II, *supra* note 142, para. 5.19.

158. See *supra* notes 123-28 and accompanying text.

159. Any attempt to draw support for such a proposition from the US-Tuna II decision would be to misconstrue it. In light of that Panel's holding that it is not open to a country to take unilateral measures that force or cajole others into changing their domestic environmental policies, it is a possible interpretation that such changes may be made by treaty. Consequently, action taken under treaty to implement agreed changes of domestic behavior might be justified under the GATT/WTO. However, as we have seen, the Panel dispelled

any such implication when it held that environmental treaties like CITES, that did not include all GATT parties, were irrelevant.

160. This happened in US-Tuna II, where the panel stated that U.S. measures to protect dolphin life or health were not necessary because it failed a proportionality test which requires the use of reasonable alternative measures not inconsistent with the GATT. See US-Tuna II, *supra* note 142, paras. 5.34-5.39. In the US-Gasoline Panel Report, the United States argued that the nondegradation requirements of the CAA were "necessary to protect human, animal and plant life or health." US-Gasoline Panel Report, *supra* note 143, para. 3.40. However, the WTO Panel, while noting that gasoline emissions are tied to human health, was more impressed by its finding that imported gasoline was accorded different treatment than U.S. gasoline, and held that the measures taken were not "necessary" to protect human, animal, or plant life or health. See *id.* para. 6.29. On appeal, the Appellate Body did not deem it necessary to address this question in light of its ruling that the United States had not satisfied the requirements of the "chapeau" or introductory clauses of Article XX by taking actions that constituted "unjustifiable discrimination" and a "disguised restriction" on international trade.

161. US-Tuna II, *supra* note 142, para. 5.26.

162. US-Gasoline Appeal, *supra* note 143, at 19. See also US-Tuna II, *supra* note 142, paras. 3.52-3.53.

163. The Appellate Body in US-Gasoline Appeal freely dismissed the difficulties facing the EPA in collecting evidence from foreign countries in order to give foreign refineries individual baselines. See US-Gasoline Appeal, *supra* note 143, at 28. There is recognition within trade circles of this problem. See generally Croley & Jackson, *supra* note 51, at 194. Unfortunately, these two distinguished authors come to the curious conclusion that a GATT tribunal cannot be compared to a court or judicial forum reviewing administrative or executive actions in domestic law. Such a conclusion is at variance with the fundamental assumptions underlying any allocation of power in an undeveloped international legal order lacking compulsory jurisdiction. Where sovereign States allocate limited power to a functional international tribunal under the GATT/WTO, such tribunals ought to be very sensitive to the demarcation of powers between sovereign States and international organizations. This should lead to greater, not less deference to national decisionmaking.

164. US-Tuna I, *supra* note 141, at para. 5.11.

165. US-Gasoline Appeal, *supra* note 143, at 29-30.

166. See DSU, *supra* note 37, art. 8.1.

167. Id. art. 3(2).

168. Id.

169. Apart from judicial interpretation, Article IX:2 of the WTO Agreement allows for "interpretation" that does not "undermine the amendment provisions of Art. X" provided it is agreed to by three quarters of the parties. See WTO Agreement, *supra* note 2, art. IX:2. However, the required three quarters majority renders this kind of interpretation impracticable, while any interpretation given is open to legal challenge as amounting to an amendment. See Michael Lennard, *The World Trade Organization and Disputes Involving Multilateral Environmental Agreements*, 5 EUR. ENV'T L. REV. 306, 310 (1996).

170. See HERBERT HART, *THE CONCEPT OF LAW* 124-25 (1961).

171. See generally WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (1923).

172. See generally Neil MacCormick, *Law as Institutional Fact*, 90 LAW Q. REV. 102, 106-07 (1974).

173. See Vienna Convention, *supra* note 39, arts. 31-32.

174. Id. art. 31(1).

175. See *id.* art. 31(3)(c). The Appellate Body in the US-Gasoline Appeal paid pro forma respect to Article 3(2) of the DSU and to the rules of interpretation in the Vienna Convention which it correctly identified as forming part of customary law. Having suggested that the GATT/WTO is not to be read in "clinical isolation from public international law," it could not, however, escape the predicament that all its decisions should be subject to the GATT and the Covered Agreements. US-Gasoline Appeal, *supra* note 143, at 17.

176. See Statute of the ICJ, *supra* note 40, art. 38.

177. See generally Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, *supra* note 123.

178. See RESTATEMENT (THIRD), *supra* note 42, § 403.



179. Statute of the ICJ, *supra* note 40, art. 38(c)-(d).

180. *Id.* art. 38(d).

181. According to the Restatement (Third) of the Foreign Relations Law of the United States, reasonableness is a rule of customary international law applicable to domestic courts. See *RESTATEMENT (THIRD)*, *supra* note 42, § 403 cmt. a. While both principles enjoy the status of custom, they also qualify as cardinal general principles of law applicable to intergovernmental tribunals.

182. Legislative jurisdiction refers to whether a tribunal possesses the jurisdiction, power, or right to entertain the dispute. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1* (3d ed. 1996).

183. Judicial jurisdiction asks whether a tribunal that possesses legislative jurisdiction should exercise that jurisdiction. See *id.* at 1-5.

184. See generally ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* (1996). Lowenfeld offers numerous cases supporting his thesis that there is an emerging consensus about the criteria employed in asserting both legislative and judicial jurisdiction. He argues that these cases display a confluence between national and international criteria based on fairness and reasonableness.