THE JUDICIAL RESOLUTION OF CONFLICTS BETWEEN TRADE AND THE ENVIRONMENT

*John H. Knox**

The legal conflicts between international trade agreements and environmental laws achieved notoriety after the 1991 Tuna-Dolphin *case, decided under the General Agreement on Tariffs and Trade (GATT). In stating that a U.S. environmental law was inconsistent with U.S. obligations under GATT, the* Tuna-Dolphin *decision announced that trade agreements could conflict with domestic and multilateral environmental laws, and that those conflicts could be heard by trade tribunals biased in favor of the trade agreements. Since the early 1990s, environmentalists have proposed several reforms to resolve this conflict. Yet although governments have discussed the proposed reforms, they have not adopted them in any political agreements.*

This Article argues that beneath the radar of most of the environmental critics and trade analysts, the Appellate Body of the World Trade Organization (WTO) has done what governments failed to do: it has reached a comprehensive resolution of trade/environment legal conflicts that incorporates the proposed reforms. The Article looks at how the Appellate Body shaped its resolution to receive political support and the degree to which it has been successful in achieving its aim. It concludes by identifying some effects the judicial resolution may have on other aspects of the debate over trade and the environment, suggesting that one important result of the judicial resolution of trade/environment legal conflicts may be to increase attention to the more fundamental question of how best to reconcile economic integration and environmental protection.

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* Associate Professor of Law, Pennsylvania State University, Dickinson School of Law; B.A., Rice University; J.D., Stanford Law School. I am grateful to Jeff Dunoff, Larry Helfer, Kal Raustiala, and David Wirth for their comments and advice.

I. INTRODUCTION

For more than a decade, environmentalists and academics have criticized trade agreements. To a large degree, their criticisms have been driven by the fear that tribunals convened under trade agreements will construe the agreements to conflict with domestic and international environmental laws. This fear had a concrete basis: it arose from the 1991 *Tuna-Dolphin* decision by an arbitral tribunal under the General Agreement on Tariffs and Trade (GATT), which held that a U.S. environmental law and, by implication, many other domestic laws and international treaties, were inconsistent with GATT.[1]

In response, the environmental critics proposed reforms to the trade regime in the early 1990s to protect environmental laws from conflicting with trade obligations without destroying the fundamental principles of trade law.

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[1] United States—GATT Dispute Panel Report on Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna-Dolphin I*].

They urged governments to adopt those reforms in political agreements. Their efforts failed. Governments continued to enter into new trade agreements—most important, the World Trade Organization ("WTO") family of agreements and the North American Free Trade Agreement ("NAFTA")—that did little or nothing to incorporate the critics' proposals. Instead, governments left the conflicts to the trade tribunals that helped to create them. Moreover, the new agreements strengthened the power of the tribunals by providing that their decisions would automatically take effect unless the parties to the agreements agreed otherwise. Critics predicted that the result would be an increasing number of decisions holding environmental laws inconsistent with the trade agreements.

Surprisingly, however, the most important of these tribunals, the Appellate Body of the WTO, has done what governments failed to do: reached a comprehensive resolution of trade/environment legal conflicts that incorporates most of the proposed reforms. The Appellate Body has overturned most elements of the *Tuna-Dolphin* interpretation of GATT, avoided construing other trade agreements in ways that would lead to conflicts with environmental laws, and even welcomed input into its deliberations by environmental experts and, in principle, environmental groups.

Why has the Appellate Body greened trade jurisprudence? This Article argues that the Appellate Body's incorporation of moderate environmental proposals results from an effort to attract as much support as possible for its decisions from member governments of the WTO. In particular, it has based its decisions on agreements (including non-trade agreements) with broad political support. This may seem paradoxical in light of the inability of governments to agree on a detailed resolution of trade/environment conflicts, but even in the absence of such a resolution, the Appellate Body has been able to find evidence of political agreement in two ways.

First, to avoid charges that it was changing the rights and obligations of WTO members, the Appellate Body has decided to stay as close as possible to the ordinary meaning of the text of the trade agreements. It has particularly eschewed teleological interpretations based on a general goal of promoting trade liberalization. Once it focused on the language of the treaties, it found them to be far more environmentally friendly than the *Tuna-Dolphin* decision had held and than environmental critics had feared. Second, when the language was unclear, the Appellate Body found evidence of political agreement outside it, including in environmental treaties and declarations. The result has been to move trade jurisprudence toward greener outcomes.

One might argue that the Appellate Body has exceeded the proper role of a judicial body by seeking extratextual agreement—that it is showing insufficient deference to the legislative arm of the WTO, the member governments that negotiate WTO law. But the WTO legislature does not work very well. In practice, the informal requirement that its decisions be made by consensus has prevented it from changing any legal interpretation by the Appellate Body, even when most governments seem to agree that such a change is desirable. In this context, a judicial search for governmental agreement, even if it goes

beyond the text under review, may be politically necessary to compensate for the legislative weakness of the WTO members.

The Appellate Body's approach does have an important flaw, however. To find evidence of extratextual agreement, the Appellate Body has used an *ad hoc* array of interpretive tools that lead to unpredictable results. A more consistent and justifiable method of interpretation would be to rely on provisions of the Vienna Convention on the Law of Treaties that allow interpreters to draw on evidence of extratextual agreement in specified, limited ways: by finding either subsequent agreements among the parties regarding the interpretation of the text in question or relevant rules of international law applicable among them. This approach would have more political support, be more predictable, and be more likely to lead the tribunal only to relevant extratextual agreements.

Despite its legal shortfalls, the Appellate Body has been extraordinarily successful at attracting support for its resolution of trade/environment conflicts. Although WTO member governments continue to debate these issues, they have begun to accept, or at least acquiesce in, almost all of the elements of the Appellate Body's resolution. Moreover, since the resolution also addresses the concerns of many environmental critics, it will lead to less attention to the strand of the trade/environment debate concerned with legal conflicts between trade agreements and environmental laws. That does not mean that all criticism will stop. On the contrary, the resolution of this aspect of the debate may increase critical attention to other potential legal conflicts, such as those between investment agreements and environmental laws. The resolution should also help to clear the way for governments and environmentalists to refocus attention on the most fundamental issue underlying the trade/en-vironment debate: how to reconcile economic growth and environmental protection.

Part II of this Article reviews the discovery of legal conflicts between trade agreements and environmental laws after *Tuna-Dolphin*, the failure of the WTO agreements and NAFTA to address them satisfactorily, and the inability of the post-WTO/NAFTA debate to resolve them. Part III shows that the WTO Appellate Body's judicial resolution of trade/environment conflicts largely incorporates proposals by moderate environmental critics. Part IV analyzes the way that the Appellate Body shaped its resolution to receive political support and the degree to which it has been successful in achieving its aim. Part V concludes by identifying some effects the judicial resolution may have on other aspects of the debate over trade and the environment.

II. The Failure of the Political Debate

The political debate over trade/environment legal conflicts began after the 1991 *Tuna-Dolphin* decision, as environmentalists awoke to the possibility that trade tribunals could decide that domestic and international environmental laws were inconsistent with trade agreements. The first Section of this Part describes the potential conflicts as they were identified by the environmental critics. In order to protect environmental laws from potential

conflicts, the critics proposed that modifications to GATT and other trade obligations be adopted in the ongoing negotiations that led to the WTO and NAFTA. The second Section describes the failure of governments to accept their proposals. Instead, the new agreements adopted much of the language to which environmental critics had objected and strengthened the trade tribunals that would hear the conflicts. However, governments did promise to consider trade/environment issues in new forums, the WTO Committee on Trade and the Environment and the North American Commission for Environmental Cooperation. The third Section makes clear that this chapter of the political debate has proved fruitless as well, as the institutions have failed to reach a comprehensive political resolution of trade/environment legal conflicts.

A. The Discovery of Legal Conflicts in the Wake of Tuna-Dolphin

In September 1991, a GATT[2] arbitral panel published a report concluding that provisions of a U.S. law, the Marine Mammal Protection Act ("MMPA"), were inconsistent with GATT.[3] That conclusion alone would have ensured that the report would receive attention. But the *Tuna-Dolphin* decision became infamous because, under its reasoning, other domestic environmental laws and multilateral environmental agreements also conflicted with GATT.

1. Conflicts Between GATT and Domestic Environmental Laws

Although GATT regulates international trade in many ways, at its core are two non-discrimination requirements, known as the most-favored-nation ("MFN") and national treatment standards. The MFN standard in Article I requires each party not to discriminate between like products from different trading partners or, in other words, to treat products from every other party the same way it treats products from its most favored trading partners.[4] The national treatment standard in Article III requires each party to treat products from other parties at least as favorably as it treats its own products.[5]

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[2] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT parties adopted GATT again, with minor changes, as part of the agreement creating the WTO. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. II:2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. When it is necessary to distinguish the two, they are called "GATT 1947" and "GATT 1994." WTO Agreement, art. II:4.

[3] *Tuna-Dolphin I*, *supra* note 1.

[4] GATT, *supra* note 2, art. I:1 (requiring that each party must accord virtually "any advantages, favour, privilege or immunity" it grants to any product originating in or destined for any other country "immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties").

[5] Specifically, Article III:4 provides that

> [t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and re-

Another provision, Article XI, prohibits parties from instituting or maintaining any "prohibitions or restrictions" (other than duties or other charges) "on the importation of any product of the territory of any other contracting party."[6] Read literally, Article XI would appear to prohibit any non-tariff restriction on imports, even if the importing country applied an identical restriction internally to its own goods.[7] But the GATT parties adopted an interpretive note to Article III (the "Note Ad Article III") providing that if a domestic law applies to both an imported product and the "like" domestic product, it should be analyzed under Article III rather than Article XI.[8] In other words, such laws do not violate Article XI's prohibition on import restrictions, although they may violate Article III's national treatment standard if they treat the imported products worse than the like domestic products.

At first glance, the MMPA might have seemed unlikely to run afoul of GATT. Its primary focus is on persons within U.S. jurisdiction, which it prohibits from, *inter alia*, killing dolphins in the course of fishing for tuna, except pursuant to a permit that caps the number of allowable incidental dolphin kills.[9] But the MMPA also directs the Secretary of the Treasury to ban the importation of fish caught with technology resulting in the incidental kill or serious injury of marine mammals "in excess of United States standards."[10] Amendments in the 1980s clarified that tuna harvested with purse seines in the eastern tropical Pacific Ocean could be imported only if the government of the exporting nation provided documentary evidence that its regulatory

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quirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Id. art. III:4. Article III also has a more specific provision prohibiting parties from subjecting the products of other parties to internal taxes in excess of those applied to "like" domestic products. *Id.* art. III:2.

[6] *Id.* art. XI:1. Article XI:1 also prohibits prohibitions or restrictions on the exportation of products to other parties. *Id.*

[7] Article XI:2 does provide some exceptions to the general prohibition in Article XI:1, and Article XII allows restrictions to safeguard the balance of payments, but these exceptions are not typically relevant to trade/environment conflicts.

[8] GATT, *supra* note 2, Note Ad art. III (stating that any law affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products "which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation" is to be treated as an internal regulation subject to Article III and (impliedly) not as an import restriction subject to Article XI). *See* Canada—GATT Dispute Panel Report on Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Oct. 16, 1991, adopted Feb. 18, 1992, GATT B.I.S.D. (39th supp.) at 27, ¶ 5.28 (1992).

[9] Marine Mammal Protection Act of 1972 §§ 101–102, 16 U.S.C. §§ 1371–1372 (2000) [hereinafter MMPA]. In the early 1990s, the cap for the U.S. fleet as a whole was 20,500 annual incidental kills. Taking of Marine Mammals Incidental to Commercial Fishing Operations-Permits, 45 Fed. Reg. 72,178 (Oct. 31, 1980). Dolphins are killed in the course of tuna fishing because schools of yellowfin tuna and herds of dolphins often associate with one another—the dolphins near the surface of the water and the tuna beneath them. Setting and gathering a purse seine around the dolphins will catch the tuna underneath them, but at the cost of killing the dolphins.

[10] MMPA § 101(a)(2), 16 U.S.C. § 1371(a)(2).

program governing incidental takes of marine mammals and its rate of incidental taking were both "comparable" to that of the United States. To be comparable, the average rate of incidental taking could be no more than 1.25 times that of U.S. vessels by the end of the 1990 fishing season and thereafter.[11] The Executive Branch delayed applying these requirements to imports, but after a federal court ordered it to do so in 1990,[12] it banned imports of tuna from Mexico, which had the largest tuna fleet fishing in the eastern Pacific.[13]

The effect on the Mexican industry was disastrous,[14] and in January 1991 the Mexican government requested a GATT arbitral panel to hear its claim that the MMPA ban violated Articles III and XI. The U.S. government argued that the MMPA applied to imported and domestic tuna, so under the Note Ad Article III it was not subject to Article XI. The U.S. then declared that the law did not violate its national treatment obligation under Article III, since it was applying essentially the same standard to imported tuna as to like domestic tuna. Specifically, the U.S. government said that imported tuna could enter the U.S. market as long as they were caught in a way comparable to that required for catching domestic tuna.[15]

This argument was specious. The variable, *post hoc* nature of the comparability finding discriminated against Mexican tuna because Mexican fishermen could not know the acceptable incidental take rate for their fleet until after the U.S. fleet had finished fishing. The GATT panel could have held that the MMPA violated the national treatment standard on that ground.

The panel instead reached a much broader holding. The implicit premise of the U.S. argument was that treating tuna differently based on how they were caught does not discriminate between them, since products produced by different methods are not "like" products. The panel flatly rejected this premise. It read Article III and the Note Ad Article III as limited to an examination of the imported and domestic products as such.[16] In the panel's view, differences in the way that the tuna were caught could not possibly affect tuna *as a product*. Since measures based on such differences were not

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[11] Pub. L. No. 98-364, § 101, 98 Stat. 440 (1984); Pub. L. No. 100-711, § 4, 102 Stat. 4755 (1988) (amending MMPA § 101(a)(2)).

[12] Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

[13] Taking and Importing of Marine Mammals, 56 Fed. Reg. 12,367 (Mar. 25, 1991). In 1991, Mexico had 43 boats fishing for tuna in the eastern Pacific, Venezuela had 21, the United States had 13, and Vanuatu had 10. James Brooke, *10 Nations Reach Accord on Saving Dolphins*, N.Y. TIMES, May 12, 1992, at C4. The United States later banned tuna imports from Venezuela and Vanuatu. Taking and Importing of Marine Mammals, 56 Fed. Reg. 41,308 (Aug. 20, 1991).

[14] Karla Casillas & Marvella Colin, *Times Are Improving for the Fishing Industry*, EL FINANCIERO INTERNATIONAL, Sept. 1, 1997 (estimating that the ban caused the loss of more than 6000 jobs in Mexico and more than half of the Mexican tuna fleet); *see also* James Brooke, *America—Environmental Dictator?*, N.Y. TIMES, May 3, 1992, § 3, at 7 (describing similar effect in Venezuela).

[15] *Tuna-Dolphin I*, *supra* note 1, ¶¶ 3.19–.20.

[16] *Id.* ¶¶ 5.14–.15.

covered by the Note Ad Article III, the ban was subject to Article XI, which barred it as a prohibition on imports.[17] Similarly, treating imported tuna less favorably than domestic tuna based solely on a method of production that did not affect them *as products* would necessarily discriminate against the imported tuna in violation of Article III.[18]

The implication of the panel's interpretation of GATT was that any law restricting imports on the basis of their process or production method ("PPM") would necessarily violate Articles III and XI unless the PPM affected the physical characteristics of the product. Even a clearly non-discriminatory PPM standard—for example, a law prohibiting the sale of any tuna caught by purse-seining, enforced against imported tuna at the point of importation—would be treated as an invalid import restriction under Article XI or as discriminatory under Article III. By extension of the *Tuna-Dolphin* reasoning, such a law would also necessarily violate the MFN standard under Article I, by treating imports of non-purse-seined tuna from some countries more favorably than purse-seined tuna from others. As a result of *Tuna-Dolphin*, several U.S. laws restricting or authorizing the restriction of imports of products made or harvested in an environmentally harmful manner appeared potentially inconsistent with GATT Articles I, III, and XI.[19]

Import restrictions based on the characteristics of the products as such, rather than their PPMs, seemed more likely to survive challenge. However, environmental critics realized that such laws could still be considered discriminatory if a GATT panel decided that the products were like other prod-

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[17] *Id.* ¶¶ 5.14–.18.

[18] *Id.* ¶ 5.15.

[19] For example, at the time of the *Tuna-Dolphin* decision, the Pelly Amendment to the Fishermen's Protective Act authorized the President to ban imports of fish or wildlife products from a country if the Secretary of Commerce certified that nationals of the country were fishing in a way that diminishes the effectiveness of an international fishery conservation program or engaging in trade or taking that diminishes the effectiveness of any international program for endangered species. 22 U.S.C. §§ 1971–1979 (2000). Similarly, the High Seas Driftnet Fisheries Enforcement Act of 1992 requires the President to prohibit importation of fish and fish products from nations certified by the Secretary of Commerce to be conducting driftnet fishing on the high seas. 16 U.S.C. § 1826a(b) (2000). Another law, discussed further below, restricts the importation of shrimp caught in a manner that may adversely affect sea turtles. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (1989) (codified as note after 16 U.S.C. § 1537 (2000)).

To make matters worse, in 1992 the Pelly Amendment was modified to authorize the President to ban imports of *any* products from a country certified by the Secretary of Commerce, and the Driftnet Fisheries Enforcement Act also mandates import restrictions on sport fishing equipment. Restricting importation of products on the basis of the PPM of *other* products seems even more certain to violate Articles I, III, or XI. (As later amended, the Pelly Amendment now authorizes import restrictions only to the extent that they are sanctioned by the WTO or specified multilateral trade agreements, but it does not appear to preclude the U.S. government from deciding for itself which prohibitions are so sanctioned).

For contemporary examinations of the potential inconsistency of these and other U.S. laws with GATT, see Steve Charnovitz, *Environmentalism Confronts GATT Rules*, 27 J. WORLD TRADE 37 (1993); Robert Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 595–99 (1992).

ucts not similarly regulated. For example, the U.S. government has objected for years to a European Community (EC) directive banning beef treated with growth hormones.[20] Although the ban is facially non-discriminatory, the United States argues that it discriminates against U.S. beef, since most U.S. beef is produced with hormones and EC beef is not. The EC argues that U.S. beef and EC beef are not "like" products because hormone-treated beef is not as safe as ordinary beef. After *Tuna-Dolphin*, environmentalists feared that GATT panels would show little deference to such arguments. If a panel decided that the two types of beef are equally healthy and thus "like," a ban on only one type would necessarily violate Article I, III or XI.[21]

As troubling as the *Tuna-Dolphin* reading of "like" products was to environmentalists, it was not in itself enough to demonstrate that the MMPA or similar laws were inconsistent with GATT as a whole. Measures otherwise inconsistent with GATT can be justified under Article XX, which states

> 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 . . . (b) necessary to protect human, animal or plant life or health; . . . [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[22]

The introductory part of Article XX, called the chapeau, also incorporates a non-discrimination standard. Although the standard is softer than that of Articles I or III, the *Tuna-Dolphin* panel could have rejected the U.S. argument on the ground that the *post hoc* comparability finding required by the MMPA amounted to arbitrary or unjustifiable discrimination between countries where the same conditions prevail (i.e., the United States and Mexico). But again it rested its decision on much broader grounds, which together appeared to come close to ensuring that Article XX could never be used to justify environmental trade restrictions otherwise in violation of GATT.

First, the panel said that Articles XX(b) and XX(g) concern only measures related to "human, animal or plant life or health" and "exhaustible natural resources," respectively, *within the jurisdiction* of the importing country.[23]

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[20] Council Directive 88/146/EEC of 7 March, 1988 O.J. (L 70) 16 (prohibiting the use in livestock farming of certain substances which have a hormonal action). For a description of the development of the ban, which took effect on January 1, 1989, see Werner P. Meng, *The Hormone Conflict Between the EEC and the United States Within the Context of GATT*, 11 MICH. J. INT'L L. 819 (1990).

[21] *See* Housman & Zaelke, *supra* note 19, at 541–42.

[22] GATT, *supra* note 2, art. XX.

[23] *Tuna-Dolphin I*, *supra* note 1, ¶¶ 5.26, 5.32.

Second, the panel said that even if XX(b) did permit extrajurisdictional protection of life and health, the U.S. measures would not be "necessary" for that protection. The panel relied on an earlier GATT panel decision that had said measures were necessary under Article XX(b) "only if there were no alternative measure consistent with [GATT], or less inconsistent with it, which [the party] could reasonably be expected to employ to achieve its . . . policy objectives."[24] The *Tuna-Dolphin* panel said that "[t]he United States had not demonstrated to the Panel—as required of the party invoking an Article XX exception—that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with [GATT], in particular through the negotiation of international cooperative arrangements."[25] This language both ignored efforts the U.S. government had made to negotiate agreements on dolphin conservation and appeared to extend the "least GATT-inconsistent" interpretation of "necessary" to all of the Article XX categories. Third, the panel said that under Article XX(g) a measure could be considered as "relating to the conservation of exhaustible natural resources" only if it was "primarily aimed at such conservation" and that a measure could be taken "in conjunction with" restrictions on domestic production only if it was "primarily aimed at rendering effective these restrictions."[26] Finally, the panel did point to the *post hoc* nature of the comparability finding, but only to conclude that it could not be regarded as either necessary to protect the dolphins' life and health or primarily aimed at their conservation.[27]

Under *Tuna-Dolphin*, then, if an import restriction were designed to protect humans, animals, plants, or natural resources outside the jurisdiction of the importing country—as laws restricting imports because of their PPM typically are[28]—it could never be justified under Article XX. And even if an import restriction did protect interests within the jurisdiction of the importing country, the other restrictive readings that *Tuna-Dolphin* had given Article XX appeared to make it virtually impossible to apply.

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[24] GATT Dispute Panel Report on Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Oct. 5, 1990, GATT B.I.S.D. (37th supp.) at 200, ¶ 75 (1990). The *Thailand—Cigarettes* panel had in turn relied on an earlier panel decision construing Article XX(d), which also contains the term "necessary." GATT Dispute Panel Report on United States—Section 337 of the Tariff Act of 1930, Jan. 16, 1989, GATT B.I.S.D. (36th Supp.) at 345, ¶ 5.26 (1990) [hereinafter 1930 Tariff Act Report]. The *Tuna-Dolphin* panel construed the *Thailand—Cigarettes* language to allow measures inconsistent with GATT only "to the extent that such inconsistencies were unavoidable." *Tuna-Dolphin I*, *supra* note 1, ¶ 5.27.

[25] *Tuna-Dolphin I*, *supra* note 1, ¶ 5.28.

[26] *Id.* ¶¶ 5.31, 5.33. The panel followed the reasoning of an earlier panel decision. *See* GATT Dispute Panel Report on Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, adopted Nov. 27, 1987, GATT B.I.S.D. (35th Supp.) at 98, ¶ 4.6 (1987).

[27] *Tuna-Dolphin I*, *supra* note 1, ¶¶ 5.28, .33.

[28] *See* Charnovitz, *supra* note 19, at 44 (noting that the Driftnet Enforcement Act, the Pelly Amendment, and similar U.S. laws are "unabashedly extrajurisdictional").

2. Conflicts Between GATT and Multilateral Environmental Agreements

The *Tuna-Dolphin* interpretation of Article XX suggested for the first time that important multilateral environmental agreements ("MEAs") might conflict with GATT. Several MEAs require parties to restrict trade. For example, the Basel Convention ("Basel") requires its parties not to permit the import or export of hazardous wastes if they have reason to believe that the wastes "will not be managed in an environmentally sound manner."[29] The Convention on International Trade in Endangered Species ("CITES") prohibits trade in listed species unless the exporting country and the importing country each determine, *inter alia*, that the trade will not be detrimental to the survival of the species and the importing country determines that the specimen will not be used for primarily commercial purposes.[30] The Montreal Protocol ("Montreal") does not restrict trade between parties, but bans trade in listed ozone-depleting substances (and products containing them) with non-parties unless the non-parties have been determined by the parties to Montreal to be in full compliance with its restrictions on production and consumption.[31]

The trade restrictions all appear inconsistent with GATT Article XI, which generally prohibits non-tariff restrictions on exports as well as imports.[32]

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[29] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, arts. 4(2)(e),(g), S. Treaty Doc. No. 106-32, 1673 U.N.T.S. 57. Article 4(2) applies to trade between parties; Articles 4(5) and 11 prohibit trade in hazardous waste with non-parties unless pursuant to agreements that "stipulate provisions which are not less environmentally sound than those provided for by this Convention."

[30] Convention to Regulate International Trade in Endangered Species of Flora and Fauna, Mar. 3, 1973, art. III, 27. U.S.T. 1087, 993 U.N.T.S. 243, 246–47. These requirements apply to species that the parties determine are "threatened with extinction which are or may be affected by trade." *Id.* art. II(1), 993 U.N.T.S. at 245. Trade in species that may become threatened with extinction is allowed if the exporting state determines, *inter alia*, that export will not be detrimental to the survival of the species. *Id.* art. IV, 993 U.N.T.S. at 247. CITES allows trade with non-parties if the non-party provides "comparable documentation" that "substantially conforms with the requirements of the present Convention." *Id.* art. X, 993 U.N.T.S. at 251.

[31] Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, art. 4(8), S. Treaty Doc. No. 102-5, 1522 U.N.T.S. 3, 34; *see also* London Amendments to the Montreal Protocol, June 29, 1990, art. 1(O)(2), S. Treaty Doc. No. 103-9, 30 I.L.M. 537 (amending article 4(8) of the Montreal Protocol), *available at* www.unep.org/ozone/London-Amendment.shtml (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review).

[32] Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 887 (1996); Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 332–35, 345 (1994); James Cameron & Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 2 Y.B. INT'L ENVTL. L. 3, 8, 11, 14 (1991). As noted above, the Note Ad Article III indicates that an internal regulation that applies to an imported product and the "like" domestic product and that is enforced against the imported product upon importation should be analyzed under Article III rather than Article XI. But the Note applies only to imported products, so it is irrelevant to the three agreements' restrictions on exports. Moreover, the import restrictions required by the MEAs are not internal regulations applied at the border. Of course, a country might implement these restrictions in ways that extend or at least accompany domestic laws. In that case the import restriction might

Moreover, a country implementing an MEA would only satisfy the MFN and national treatment obligations of Articles I and III if it treated the products regulated by the MEA no less favorably than "like" products originating from or destined to any other country and "like" products of national origin.[33] A party might be able to satisfy Article III if its domestic law implementing the MEA treated its domestic products no more favorably than like products from another country, but this possibility would depend on the domestic law, not the MEA, which does not call for even-handedness between foreign and domestic products. And while most of the trade restrictions in the MEAs do not appear obviously inconsistent with MFN, since they generally allow trade with non-parties to the MEA under the same conditions as they allow trade with parties, non-parties might argue that they face some more onerous restrictions.[34]

As a result, Article XX is necessary to protect the trade restrictions in the MEAs from potential conflicts with GATT. In the absence of *Tuna-Dolphin*, applying Article XX(b) would not be difficult, since each of these MEAs represents the collective judgment of many governments that restricting trade in specified ways is necessary to protect human or animal life and health. Some MEA restrictions might also fit within Article XX(g), since they "relat[e] to the conservation of exhaustible natural resources," as long as they have been "made effective in conjunction with restrictions on domestic production or consumption."[35] And since the MEAs are all open to every country in the world and apply their trade restrictions only to countries whose behavior does not conform to the norms in the agreements, they would appear to meet the requirement in the chapeau of Article XX that the measures not be "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." Even GATT legal experts consulted during the drafting of CITES and Montreal had said that the trade restrictions in those agreements would fall within Article XX.[36]

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be analyzed as an internal regulation under Article III, but the importing country would be defending it on the basis of its own law, rather than on the basis of the MEA.

[33] GATT, *supra* note 2, arts. I:1, III:4.

[34] For example, the requirement that non-parties to Montreal obtain approval from the parties as a whole under Article 4(8) of the Protocol is not matched by a similar obligation for parties. Similarly, the CITES parties recommended in 1994 that trade with non-parties should be allowed only "where it benefits the conservation of the species or provides for the welfare of the specimens, and only after consultation with the [CITES] Secretariat," a requirement not imposed on parties. Wold, *supra* note 32, at 898 (quoting a CITES conference resolution).

[35] This soft national treatment requirement might be met by the restrictions on production and consumption required by Montreal, as well as by domestic restrictions on hazardous waste and endangered species in laws implementing Basel and CITES.

[36] RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY 91 (1991); Chris Wold, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora, in* THE USE OF TRADE MEASURES IN SELECT MULTILATERAL ENVIRONMENTAL AGREEMENTS 163, 165 (Robert Housman et al. eds., 1995).

But *Tuna-Dolphin* cast doubt on that conclusion. First, if Articles XX(b) and XX(g) do not apply to extrajurisdictional harm, neither provision could apply to CITES' restrictions on importation of endangered species and Basel's restrictions on exportation of hazardous waste.[37] Second, the panel's view that to defend a measure as "necessary" the United States would have to demonstrate that "it had exhausted all options reasonably available to it" to pursue its objectives through alternative measures consistent with GATT[38] might allow panels to question the necessity of any trade restrictions, even if taken on the basis of a broad international agreement.[39] Although *Tuna-Dolphin* faulted the U.S. government for not pursuing an agreement with Mexico, environmental critics did not read it as suggesting that trade restrictions taken pursuant to an MEA would necessarily be insulated from challenge under GATT.[40] Third, the panel had interpreted Article XX(g) to apply only to restrictions that were *primarily aimed* at making restrictions on domestic production or consumption of those resources effective.[41] Even if domestic laws implementing MEAs placed similar restrictions on like domestic products, it would be difficult to argue that the trade restrictions mandated by the MEAs were primarily aimed at making the domestic restrictions effective. As a result, it seemed possible, or even likely, that under the *Tuna-Dolphin* reading of Article XX some important MEAs were inconsistent with GATT.

B. Negotiation of the Uruguay Round Agreements and NAFTA

Because *Tuna-Dolphin* was decided during the negotiations that led to the Uruguay Round Agreements and NAFTA, environmental critics had an opportunity to convince governments to amend GATT and draft NAFTA to reverse the decision, or at least to avoid its worst implications. Rather than do so, governments re-adopted GATT virtually unchanged and incorporated its key provisions into NAFTA. Article 104 of NAFTA does purport to protect

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[37] Conversely, restricting *exports* of endangered species and *imports* of hazardous waste would protect resources or life and health within the jurisdiction of the state imposing the restrictions. Cameron & Robinson, *supra* note 32, at 10–13. Since trade restrictions taken under the Montreal Protocol are designed to prevent depletion of the ozone layer everywhere, they could be seen as protecting human and animal health within the country imposing the restrictions. Charnovitz, *supra* note 32, at 346–47.

[38] *Tuna-Dolphin I*, *supra* note 1, ¶¶ 5.27–.28.

[39] *See, e.g.*, Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 49 (1991) (asserting that a ban on importing ivory under CITES "could be challenged on the grounds that a more effective (and more GATT-consistent) way to save African elephants is to privatize them").

[40] Cameron & Robinson, *supra* note 32, at 28; Charnovitz, *supra* note 32, at 308. At least one official in the GATT Secretariat apparently agreed. *See* Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 21, 33 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (stating that Article XX "does not distinguish between unilateral and multilaterally agreed action"). Mr. Roessler was the Director of the Legal Affairs Division of the Secretariat. *Id.* at 53.

[41] *Tuna-Dolphin I*, *supra* note 1, ¶ 5.31.

some environmental agreements from conflict, but it is close to, and perhaps worse than, useless. Moreover, the Uruguay Round and NAFTA negotiators adopted new disciplines on technical barriers to trade and sanitary and phytosanitary standards, which increased the potential for conflicts between domestic laws and trade agreements. Worst of all from the point of view of the environmental critics, the governments greatly strengthened the trade tribunals that would hear claims that environmental laws conflicted with trade agreements.

1. Failures To Amend GATT To Address Environmental Concerns

During the Uruguay Round and NAFTA negotiations, environmental critics proposed ways to avoid or resolve the potential conflicts between GATT and environmental laws identified as a result of *Tuna-Dolphin*. Some of the proposals would have required major changes to the existing framework for international trade. For example, some critics argued that countries with relatively low environmental standards effectively subsidize their exports and proposed that they therefore should be subject to a countervailing duty.[42] But many critics, for pragmatic or other reasons, proposed more moderate reforms, which would

- allow the environmental consequences of products throughout their lifecycle (from their production to their disposal) to be taken into account in considering whether products are "like";[43]
- overrule the *Tuna-Dolphin* panel's restrictive reading of Article XX, either by making it easier for laws to meet the requirements of Articles XX(b) and (g)[44] or replacing the GATT approach with a balancing test, which would assess the validity of an environmentally related trade restriction by weighing the importance of the environmental interest (or the legitimacy of the country's interest in it), whether the measure is discriminatory, and whether the effect on trade is disproportionate to the interest;[45] and

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[42] Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 89–90 (1992) (citing supporters). As Roht-Arriaza notes, this idea even attracted some support in the U.S. Congress. *See* International Pollution Deterrence Act of 1991, S. 984, 102d Cong. (1991).

[43] DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 220 (1994); HILARY F. FRENCH, COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT 50 (1993); Housman & Zaelke, *supra* note 19, at 605; Roht-Arriaza, *supra* note 42, at 75.

[44] Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 514, 516 (1993); Charles Arden-Clarke, *An Action Agenda for Trade Policy Reform to Support Sustainable Development: A United Nations Conference on Environment and Development Follow-up*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 71, 77 (Durwood Zaelke et al. eds., 1993); Peter L. Lallas et al., *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271, 337 (1992).

[45] *See generally* Esty, *supra* note 43, at 116–30; Jeffrey L. Dunoff, *Reconciling Interna-*

- safeguard trade restrictions taken pursuant to MEAs, either by adding a new subparagraph to Article XX covering such restrictions (in which case they would still have to meet the requirements of the chapeau),[46] or by exempting them entirely from GATT through waiver or amendment.[47]

Governments did not adopt any of these proposals. Outside the United States, environmental objections to *Tuna-Dolphin* seemed to carry no weight with GATT parties. Eleven governments had made third-party submissions to the *Tuna-Dolphin* panel, none of which supported the U.S. position.[48] After Mexico failed to pursue adoption of the *Tuna-Dolphin* report, the EC and the Netherlands brought another claim to GATT dispute resolution, *Tuna-Dolphin II,* challenging not only the direct ban on tuna that had been the subject of the first *Tuna-Dolphin* case, but also a secondary ban imposed by the MMPA on imports of tuna from "intermediary" nations that could not prove they had not imported tuna subject to the direct ban within the preceding six months.[49] Seven governments made third-party submissions to the second *Tuna-Dolphin* panel, all arguing that the U.S. measure was inconsistent with its obligations under GATT.[50] The second *Tuna-Dolphin* report, issued in 1994, closely followed the reasoning of the first report in concluding that the import restrictions were inconsistent with Article XI and that Article XX could not justify the law.[51]

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tional Trade with Preservation of the Global Commons: Can We Prosper and Protect?, 49 WASH. & LEE L. REV. 1407 (1992).

[46] Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 467 (1993); Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 814 (1993).

[47] Esty, *supra* note 43, at 219; Charnovitz, *supra* note 44, at 516. GATT Article XXV:5 allows GATT parties to decide by a two-thirds majority of those voting and a simple majority of the parties to waive an obligation under the agreement. The need to safeguard MEAs received support even from trade experts not otherwise among the environmental critics. *See, e.g.*, John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1258 (1992); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 720 (1992).

[48] *Tuna-Dolphin I, supra* note 1, ¶¶ 4.1–.30. Australia, Canada, Indonesia, Japan, Korea, Norway, Thailand, and Venezuela took positions in favor of Mexico. The EC concentrated its fire on the MMPA's embargo on tuna from intermediary nations, although in passing it expressed its "doubts as to whether the direct embargo by the United States was GATT-compatible." *Id.* ¶ 4.11. The Philippines and Senegal refrained from taking a legal position. *Id.* ¶¶ 4.22–.23.

[49] MMPA, 16 U.S.C. §§ 1362(5), 1371(a)(2)(D) (2000).

[50] GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R, ¶¶ 4.1–.47 (June 16, 1994), reprinted in 33 I.L.M 839, 876-86 (1994) [hereinafter *Tuna-Dolphin II*] (describing positions of Australia, Canada, Costa Rica, Japan, New Zealand, Thailand, and Venezuela).

[51] For example, the panel read Article XX(g) to require measures to be "primarily aimed" at rendering effective restrictions on domestic production or consumption, and interpreted the term "necessary" in Article XX(b) to incorporate the "least GATT-inconsistent" requirement. *Id.* ¶¶ 5.8–.10, 5.22, 5.35. Some commentators have nevertheless interpreted the second report to be more environmentally friendly than the first, because where the first panel had said that Articles

Although *Tuna-Dolphin II*, like *Tuna-Dolphin I*, was not adopted by the GATT Council and therefore has no legal effect, it received widespread approval from GATT parties. Robert Hudec calculates that, including the governments that spoke or were spoken for in the GATT Council meetings on the two reports, the reports "received the general support of 39 of the 40 GATT member countries that [took] a position on the matter—all, that is, except for the United States."[52] He adds, "[t]o old GATT hands, the degree of support shown for these two panel rulings amounts to virtual unanimity, because the rest of the 110-odd GATT member countries either do not attend Council meetings or almost never speak anyway."[53]

The reaction by trade officials to the *Tuna-Dolphin* decisions might be attributed to a pro-trade bias, but environmental critics were unable to make headway in other governmental forums presumably more sympathetic to environmental concerns. In June 1992, at the United Nations ("UN") Conference on Environment and Development, governments included in Principle 12 of the Rio Declaration language reflecting the fears of unilateralism underlying the *Tuna-Dolphin* decisions:

> Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.[54]

XX(b) and XX(g) only covered measures relating to humans, animals, plants, and natural resources within the jurisdiction of the importing country, the second panel said that policies related to the protection of extraterritorial animals and the conservation of extraterritorial natural resources might fall within the scope of Articles XX(b) and XX(g). *See, e.g.*, Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 279–80 (1997). But any difference was in presentation, not in substance. The first panel had said Articles XX(b) and XX(g) could not be applied extrajurisdictionally, but did not say anything about applying it extraterritorially. *Tuna-Dolphin I*, *supra* note 1, ¶¶ 5.25–.27, 5.31–.32. The second panel said that the U.S. policy concerning extraterritorial animals and resources was within the scope of Article XX only to the extent that the U.S. government pursued the policy within its jurisdiction over its own nationals and vessels. *Tuna-Dolphin II*, *supra* note 50, ¶¶ 5.20, .33. It emphasized that measures taken so as to force other countries to change their policies with respect to animals or natural resources within *their* jurisdiction could not be justified by Article XX(b) or XX(g). *Id.* ¶¶ 5.26–.27, 5.38–.39. And the two panels based their jurisdictional limitation on the same logic: that allowing each GATT party to use trade measures to force other countries to change their policies within these countries' jurisdictions would prevent GATT from serving as a multilateral framework for trade among all parties, rather than just among those with identical domestic laws. *Tuna-Dolphin I*, *supra* note 1, ¶¶ 5.27, 5.32; *Tuna-Dolphin II*, *supra* note 50, ¶¶ 5.26, 5.38.

[52] Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* FAIR TRADE AND HARMONIZATION, *supra* note 40, at 117.

[53] *Id.* at 167 n.108.

[54] UN Conference on Environment and Development, Rio Declaration on Environment and

The obvious explanation for the almost uniform opposition to unilateral trade restrictions such as those required by the MMPA is that domestic laws restricting imports on the basis of their PPMs are primarily a U.S. phenomenon, and other governments view the laws as efforts to bully them into adopting the environmental policies of the rich.[55] It was unsurprising, then, that other countries refused to add provisions to GATT or NAFTA that would explicitly authorize such laws. And the U.S. government evidently did not believe that obtaining approval of its ability to use such laws was worth refusing to agree to the WTO agreements or NAFTA. In the end, GATT 1994 made no change to Articles I, III, XI, or XX, and NAFTA incorporated GATT Articles III, XI, and XX virtually intact.[56]

It is less obvious why governments did not agree on language protecting MEAs from conflict with GATT, since trade restrictions pursuant to MEAs avoid concerns over unilateralism. But it is more difficult than it may first appear to draft universally acceptable language addressing GATT/MEA conflicts. Many governments were not prepared to accept broad language exempting all provisions taken pursuant to an MEA for fear that it would provide support for measures beyond those required by the MEA. Moreover, some governments were reluctant to agree to exempting MEA trade restrictions against non-parties to the MEA.

Article 104 of NAFTA, which appears superficially to have resolved the potential conflicts between MEAs, actually illustrates the difficulty of finding a workable resolution. It provides that

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in [Basel, CITES, Montreal, and two bilateral agreements], such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses

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Development, Princ. 12, UN Doc. A/Conf151/5/Rev.1 (June 13, 1992), *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration Princ. 12]. The move to include Principle 12 was led by Mexico and the EC, the plaintiffs in the *Tuna-Dolphin* cases. Jeffrey Kovar, *A Short Guide to the Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119, 132 (1993). Principle 12 includes enough soft language ("should be avoided," "as far as possible") that the U.S. government could accept it without prejudicing the U.S. position that "in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns, including . . . environmental concerns outside national jurisdiction." *Id.* at 133.

[55] The other source of such laws has been the EC and its members, despite their opposition to the U.S. MMPA. *See* André Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs from Animals Taken by Leghold Traps*, 8 J. ENVTL. L. 237 (1996).

[56] NAFTA, Dec. 17, 1992, arts. 301, 309, 2101, 32 I.L.M. 289. NAFTA Article 2101(1) does clarify that Article XX(g) covers living as well as non-living exhaustible natural resources, but this was a possible restriction on which even the *Tuna-Dolphin* panels had not relied. NAFTA does not address, much less seek to overturn or avoid, *any* of the grounds on which the *Tuna-Dolphin* panels did rely in rejecting the U.S. interpretation of Article XX.

> the alternative that is the least inconsistent with the other provisions of this Agreement.[57]

Although Article 104 has many champions,[58] in fact it is ineffective at best, and may actually worsen the problem it purports to solve.

It is ineffective because it only applies to conflicts that will never arise: conflicts between parties to both an MEA and NAFTA over trade restrictions required by the MEA. There is no reason to think that a claim based on such a conflict would ever be brought; common sense indicates that no government that has become a party to an MEA is going to complain that measures required by it are inconsistent with NAFTA.[59] And if such a claim were brought to a trade tribunal, the tribunal would be likely to conclude that by joining an MEA mandating trade restrictions, a party to GATT or NAFTA had waived its rights under the trade agreement to the extent of the conflict,[60] or that under the doctrine of *lex specialis*, the specific MEA restrictions should prevail over the general principles of non-discrimination in NAFTA.[61]

So Article 104 provides no more protection against the least likely type of MEA conflict than background treaty law would provide.[62] Moreover, the act of including a special provision to exclude disputes among parties arising from potential conflicts between those agreements and NAFTA could suggest that Article XX and underlying treaty law would not otherwise protect against such conflicts. The implication might be that other conflicts less clearly protected by background treaty law, such as conflicts arising with respect to a non-party to the MEA, or with respect to an action not clearly required by the MEA, would not be protected at all.[63]

In light of the longstanding support among the North American countries for MEAs with trade restrictions, it may seem odd that the NAFTA parties did not simply agree that any reasonable interpretation of Article XX would

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[57] *Id.* art. 104(1).

[58] *See, e.g.*, RICHARD H. STEINBERG, *Explaining Similarities and Differences across International Trade Organizations*, *in* THE GREENING OF TRADE LAW 277, 283 (Richard H. Steinberg ed., 2002); Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 398–400 (1994); Daniel C. Esty, *Integrating Trade and Environment Policy Making: First Steps in the North American Free Trade Agreement*, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS,AND POLICY, *supra* note 44, at 51.

[59] *See* Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 45–46 (1994).

[60] Hudec, *supra* note 52, at 121.

[61] Wold, *supra* note 32, at 912–13. Ian Sinclair observes that "[t]he principle of the *lex specialis* is not expressed as such in [the Vienna Convention on the Law of Treaties], but is widely supported in doctrine." IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 96 (1984).

[62] In fact, in some ways it provides less, since by its terms it does not cover Basel until the United States ratifies it, and it does not include any agreement other than those listed—even the regular amendments to the Montreal Protocol—unless the NAFTA parties unanimously agree to add it. NAFTA, *supra* note 56, art. 104.

[63] Bradly Condon, *Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?*, 9 TULSA J. COMP. & INT'L L. 533, 560 (2002).

necessarily protect trade restrictions such as those required by the MEAs. The obstacle to reaching such an agreement presumably was Canadian and Mexican concern that it could lend support to the United States in a future case involving unilateral U.S. trade restrictions. But the compromise the negotiators reached provides little or no protection to MEAs. The nearly universal relief with which environmental critics greeted Article 104 testified to their fear after *Tuna-Dolphin* that trade tribunals would reach even worse results if left to their own devices.

2. *Conflicts Between Domestic Environmental Laws and New Trade Agreements*

After the first *Tuna-Dolphin* decision, environmental critics recognized that even if domestic environmental laws were consistent with the non-discrimination requirements in GATT, they might be interpreted to violate new agreements under negotiation in the Uruguay Round and NAFTA talks. A December 1991 draft of the Uruguay Round agreements included agreements on technical barriers to trade ("TBT") and on sanitary and phytosanitary ("SPS") measures, which would create new minimum requirements, beyond non-discrimination, for domestic standards relating to products.[64]

Although product standards are undeniably essential to protect life, health, and the environment, trade negotiators had long feared that governments used them inadvertently or intentionally for protectionist purposes. For example, standards could be introduced with insufficient information or time to let foreign producers adjust to them, they could be written "in terms of design rather than performance in order to suit the production methods of domestic suppliers," or testing requirements or certification systems could be manipulated to disadvantage foreign producers.[65] Although such laws would have adverse effects on imported goods, protectionist product standards could easily appear non-discriminatory on their face, and the negotiators believed that they could not be left to the GATT non-discrimination requirements.

Before the Uruguay Round, the principal trade agreement limiting product standards was the 1979 Agreement on Technical Barriers to Trade, known

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[64] Agreement on Technical Barriers to Trade [hereinafter *Draft TBT Agreement*], *in* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA, G.1 (Dec. 20, 1991) [hereinafter *Dunkel Draft*], *reprinted in* "The Dunkel Draft" from the GATT Secretariat (Institute for International Legal Information ed., 1992); Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures [hereinafter *Draft SPS Agreement*], *in id.* at L.35. The draft was issued by Arthur Dunkel, then GATT Director-General. It "incorporated the texts agreed to by the various negotiating groups, and then, on unresolved issues, it contained terms drafted by the Secretariat that the Secretariat believed all parties would have to accept if there were to be agreement." ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 186 (1993).

[65] REPORT BY THE DIRECTOR-GENERAL OF GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 62 (1979).

as the Standards Code.[66] The Standards Code included two general limitations on domestic standards. First, it required parties to use relevant international standards "as a basis" for their domestic standards except where they "are inappropriate for the Parties concerned" for a variety of reasons, including "protection for human health or safety, animal or plant life or health, or the environment." Second, it required parties to ensure their standards are not prepared, adopted or applied with a view to, or with the effect of, creating "unnecessary obstacles to international trade."[67] The dispute over the EC ban on hormone-treated beef showed how that language could be used: the U.S. government argued that the ban was "unnecessary" because scientific evidence showed that beef treated with hormones is not dangerous to human health.[68] The dispute also demonstrated its limits: the EC did not accept the U.S. interpretation and refused to lift the ban.

The new agreements would make these minimum standards much more detailed and specific, and as a result increase the likelihood of conflicts with environmental laws as well as with other laws aimed at protecting human health and safety. The Draft TBT Agreement would toughen the requirement that standards not create unnecessary obstacles to trade by specifying that the standards could not be "more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[69] It would also require parties to use international standards except when they "would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographic factors or fundamental technological problems," and would establish a presumption that a domestic requirement that is in accordance with a relevant international standard is not an unnecessary obstacle to trade.[70]

Similarly, the Draft SPS Agreement would require parties to apply SPS measures "only to the extent necessary to protect human, animal or plant life

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[66] Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405. Although I use the term "standards" to include both mandatory rules and voluntary guidelines, trade agreements usually apply the term only to non-binding guidelines and refer to binding rules as "regulations." *See, e.g., id.* ann. I, 31 U.S.T. at 433.

[67] *Id.* arts. 2.1, 2.2, 31 U.S.T. at 414. Article 2.1 also required parties not to use their product standards to discriminate against imports in favor of domestic products or other imports, but this provision was just a clarification of the parties' obligations under GATT Articles I and III.

[68] Holly Hammonds, *A U.S. Perspective on the EC Hormones Directive*, 11 MICH. J. INT'L L. 840, 843 (1990).

[69] Draft TBT Agreement, *supra* note 64, art. 2.2, at G.2, G.3. The Agreement's list of "legitimate objectives" includes "protection of human health or safety, animal or plant life or health, or the environment." *Id.*

[70] *Id.* arts. 2.4–.5, at G.3. To receive the benefit of the presumption, the domestic standard would have to be prepared, adopted, or applied for one of the listed legitimate objectives. *Id.* The Draft TBT Agreement would also go beyond the Standards Code by including within its scope standards relating to process and production methods, as well as product characteristics. *Id.*, ann. I. As a result, the Agreement could apply to disputes like that over the EC ban, even if the ban were considered to be a PPM rather than a product standard. *See* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 73 (2d ed. 1999) (suggesting that the United States proposed this addition in response to the EC hormone ban and similar restrictions).

or health."[71] It would also generally require parties to base their SPS measures on international standards, where they exist, and would create a presumption that SPS measures in conformity with international standards were consistent with the Agreement.[72] But rather than allowing parties to depart from international standards when they would be ineffective or inappropriate, like the Draft TBT Agreement, the Draft SPS Agreement would only allow parties to provide a higher level of protection than an international standard "if there is a scientific justification, or as a consequence of the level of protection a contracting party determines to be appropriate in accordance with the relevant provisions of paragraphs 16 through 23."[73] Those paragraphs set out a detailed procedure for determining the "appropriate" level of protection, which, *inter alia*, would require parties to conduct a risk assessment taking into account specified factors, avoid "arbitrary or unjustifiable distinctions" that result in discrimination or disguised restrictions on trade, and ensure that the measures eventually established or maintained "are the least restrictive to trade, taking into account technical and economic feasibility."[74]

Environmental critics opposed each of these new minimum standards. They objected to the "necessary" requirement, especially as interpreted to require that measures be the least trade-restrictive possible:

> [A]s a general rule, the most effective solutions to environmental problems will be more restrictive to trade than the less effective alternatives. For example, it could almost always be argued that it is less restrictive to trade to require disclosures of the adverse health or environmental effects of a product than it would be to ban the product, but a ban is unquestionably a more effective environmental solution.[75]

Critics also argued that pushing parties to adopt international standards was inappropriate because national standards often are and should be more

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[71] Draft SPS Agreement, *supra* note 64, ¶ 6. The Agreement defined SPS measures to include any measure applied to protect human, animal or plant life or health within the territory of the party applying the measure from risks arising from pests, diseases, and additives, contaminants, and toxins in foods. *Id.* Annex A. SPS measures were excluded from the coverage of the TBT Agreement. Draft TBT Agreement, *supra* note 64, art. 1.5.

[72] Draft SPS Agreement, *supra* note 64, ¶¶ 9–10.

[73] *Id.* ¶ 11. More generally, the Agreement would require parties to ensure that their SPS measures "are based on scientific principles and are not maintained against available scientific evidence." *Id.* ¶ 6.

[74] *Id.* ¶¶ 16–23.

[75] Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1296 (1992); *see also* Letter from Seven Environmental NGOs to Ambassador Carla Hills (Nov. 29, 1990) [hereinafter 1990 NGO Letter], *reprinted in* NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS 637, 641 (Daniel Magraw ed., 1995) (arguing that allowing SPS measures only to the extent "necessary" would call into question standards that included a margin of safety in order to "err on the side of human health").

protective.[76] And they said that requiring countries to defend SPS measures more protective than an international standard by showing that the measures are somehow scientifically justified would be problematic because "unanimous scientific agreement on the level of risk a society should tolerate is impossible" and governments often take action in the face of scientific uncertainty on the basis of a political assessment of the risks.[77] They argued that "science can properly inform policy-makers who set S&P standards, but that the final decision is inherently political, and must be based upon the level of risk a society is willing to accept as well as available scientific evidence."[78] Moreover, even if the SPS Agreement were interpreted to require only "*some* level of scientific backing, rather than unanimity," it would still "thwart legitimate food safety or environmental measures taken for reasons other than science, such as maintaining family farms or satisfying consumer preference."[79] Critics predicted that a law such as the Delaney Clause of the Federal Food, Drug and Cosmetic Act,[80] which prohibits the introduction of any cancer-causing substances into food, could be successfully challenged as inconsistent with the Draft SPS Agreement since its standard is stricter than international standards and is based (in their view) on a policy determination rather than science.[81]

As a result, many critics argued that the negotiators should drop all three requirements and allow challenges to a standard only on the ground that it is discriminatory or a disguised barrier to trade.[82] More moderate, or pragmatic, proposals would establish that a government may adopt SPS and TBT standards with higher levels of protection than international standards[83] and based on the level of risk it decides to accept rather than solely on scientific considerations,[84] and that any party challenging such a standard would have a substantial burden of proof.[85]

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[76] Housman & Zaelke, *supra* note 19, at 567–68.

[77] Roht-Arriaza, *supra* note 42, at 72–73; *see also* Goldman, *supra* note 75, at 1295.

[78] 1990 NGO Letter, *supra* note 75, at 638.

[79] Roht-Arriaza, *supra* note 42, at 73 n.73.

[80] 21 U.S.C. § 348(c)(3)(A) (2000) (addressing food additives). Another Delaney Clause, 21 U.S.C. § 376(b)(5)(B) (2000), applies to color additives. With respect to pesticide chemical residues in food, the Food Quality Protection Act of 1996 replaced the previous flat prohibition in the food additives Delaney Clause with a new standard of "reasonable certainty of no harm." 21 U.S.C. § 321(s) (2000).

[81] *See* Goldman, *supra* note 75, at 1295–96; Housman & Zaelke, *supra* note 19, at 568.

[82] *See* Letter from Seven Environmental NGOs to Ambassador Michael Kantor (May 4, 1993) [hereinafter 1993 NGO Letter], *reprinted in* Magraw, *supra* note 75, at 717.

[83] *Hearing on Trade and the Environment Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 102d Cong 101–02 (1991) (statement of Justin R. Ward on behalf of the Natural Resources Defense Council) [hereinafter *Ward Statement*].

[84] *Id.* at 102; 1990 NGO Letter, *supra* note 75, at 638; Housman & Orbuch, *supra* note 46, at 810.

[85] For example, it would not be possible to challenge a decision taken merely on the basis of scientific uncertainty or disagreement; rather, it would be necessary to show "obvious protectionist intent or total lack of scientific justification." Ward Statement, *supra* note 83, at 103; *see also* 1990 NGO Letter, *supra* note 75, at 638.

Again, the Uruguay Round negotiators made no substantive changes to address environmental concerns. The final TBT Agreement is virtually identical to the December 1991 draft,[86] and the negotiators made only minor changes to the final SPS Agreement.[87] The NAFTA chapters on TBT and SPS closely track the Uruguay Round TBT and SPS Agreements.[88] They encourage parties to base their standards on international standards in language very similar to that of the Uruguay Round Agreements,[89] and require parties to ensure that their SPS measures have a scientific basis and are based on a risk assessment procedure virtually identical to that of the SPS Agreement.[90] The U.S. government argued that the SPS/TBT provisions in the Uruguay Round Agreements and NAFTA could nevertheless be interpreted in ways that would address environmental concerns.[91] But environmental critics doubted

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[86] *Compare* Agreement on Technical Barriers to Trade [hereinafter TBT Agreement], Apr. 15, 1994, WTO Agreement, supra note 2, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 27 (1994) *with* Draft TBT Agreement, *supra* note 64.

[87] *Compare* Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement], Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 27 (1994), arts. 2.2, 3.1, 3.2, 3.3, 5, *with* Dunkel Draft, *supra* note 64, ¶¶ 6, 9, 10, 11, 16–23. The final SPS Agreement does change the requirement that SPS measures be the "least restrictive to trade" to read that they be "not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection," and includes a footnote stating that for purposes of this provision, "a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade." SPS Agreement, *supra*, art. 5.6. Although the clarification is useful, it does not necessarily change the meaning of the previous draft. The U.S. government failed to obtain a similar footnote to equivalent "least trade-restrictive" language in the TBT Agreement, apparently because participants in that negotiation "felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative." Letter from Peter Sutherland to Ambassador John Schmidt, Dec. 15, 1993, *reprinted in* The Uruguay Round Agreements Act Statement of Administrative Action [hereinafter Uruguay Round SAA], *reprinted in* 1994 U.S.C.C.A.N. 4040, 4139. *But see* Esty, *supra* note 43, at 50 ("[T]he word 'significantly' narrows the obligation to search for less trade-restrictive means to those cases where an alternative policy will be clearly superior.").

[88] *See* Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 34–35 (1999); Charnovitz, *supra* note 59, at 72–75.

[89] *Compare* NAFTA, *supra* note 56, arts. 713(1), 713(2), 905(1), 905(2), *with* SPS Agreement, *supra* note 87, arts. 3.1, 3.2, *and* TBT Agreement, *supra* note 86, arts. 2.4, 2.5.

[90] *Compare* NAFTA, *supra* note 56, arts. 712(3), 715, *with* SPS Agreement, *supra* note 87, arts. 2.2, 5. NAFTA also provides that SPS and TBT measures should only be applied if necessary, but it does not include the Uruguay Round Agreements' "least trade-restrictive" gloss on necessity. *Compare* NAFTA, arts. 712(5), 904(4), *with* SPS Agreement, arts. 2.2, 5.6, *and* TBT Agreement, *supra* note 86, art. 2.2. NAFTA also spells out what was already practiced under GATT: that the party seeking to show that a measure is inconsistent with the agreement has the burden to establish the inconsistency. NAFTA, arts. 723(6), 914(4); *see also* North American Free Trade Agreement Implementation Act Statement of Administrative Action, H. R. Doc. 103-159, at 359, 377 (1993) [hereinafter NAFTA SAA].

[91] The United States argued, for example, that the agreements do not *require* the parties to adopt international standards and that under the SPS provisions, each party still has unfettered discretion to choose its preferred level of protection of life, health, or the environment. NAFTA SAA, *supra* note 90, at 346, 352, 371; Uruguay Round SAA, *supra* note 87, at 4104–06, 4131. Some commentators at the time agreed. Schoenbaum, *supra* note 51, at 285–86; David Wirth,

that trade tribunals deciding cases under these provisions would agree with the U.S. interpretations.

3. Locking in Trade Tribunal Resolution of Trade/Environment Legal Conflicts

Perhaps the most troubling aspect of the two *Tuna-Dolphin* reports was the procedure that produced them—their own PPMs. Most panel members were trade experts with no apparent knowledge of environmental issues, they construed the trade/environment conflict in the context of an agreement designed to liberalize trade, and the proceedings were closed to non-governmental input. It was unsurprising that the panels seemed to dismiss environmental concerns out of hand. Critics drew the conclusion that if heard under these conditions, trade/environment legal conflicts would always be resolved in favor of trade.

Initially, concerns over the implications of the *Tuna-Dolphin* decisions could be ameliorated by their lack of legal force. Under the practice that had grown up around the vague provisions on dispute resolution in the GATT, establishment of an arbitral panel in response to a claim by one party against another, adoption of the panel's report, and authorization of suspension of GATT benefits against the losing party (if it did not comply with the report) all required consensus decisions by the GATT parties.[92] Since a single party could block the procedure at any of these points, the United States could prevent the reports from having legal effect.[93]

This was where the Uruguay Round and NAFTA negotiations seemed to pose the greatest threat to environmentally sensitive resolution of trade/environment legal conflicts. The December 1991 Uruguay Round draft included a new agreement on dispute resolution that would give a complaining government the automatic right to have a panel established, to have its report adopted, and to receive authorization to suspend benefits in response to non-compliance unless the GATT members agreed otherwise by consensus.[94] Of course, a

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The Role of Science in the Uruguay Round and NAFTA Trade Disciplines, 27 CORNELL INT'L L.J. 817, 836 (1994).

[92] JOHN H. JACKSON, THE WORLD TRADING SYSTEM 94–99 (1989); *see also* Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980) (expressing the GATT parties' understanding, at the conclusion of the Tokyo Round, of the dispute resolution procedure).

[93] In actuality, the United States did not have to block adoption of either report. Mexico never requested the GATT parties to adopt *Tuna-Dolphin I*, apparently because of its concern over the consequences a request might have on the willingness of Congress to approve NAFTA, and the WTO replaced the GATT system soon after *Tuna-Dolphin II* was issued.

[94] Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, §§ 4.1, 14.4, 20.3 [hereinafter Draft Dispute Settlement Understanding], *in* Dunkel Draft, *supra* note 64, at S.1; *see also* Hudec, *supra* note 64, at 237 ("Taken as a whole, the 1991 Understanding converted the GATT dispute settlement procedure into a thoroughly automatic conveyor belt that took a legal claim from complaint to retaliation without any need to obtain the defendant's consent at any stage.").

losing party could still refuse to comply with a decision, but only at the price of incurring trade sanctions.[95]

Environmental critics recognized that the increased judicialization of the process for resolving disputes would "exacerbat[e] the potential for direct conflicts between GATT obligations and environmental protections."[96] Some critics suggested creating a neutral forum to decide trade/environment cases.[97] At a minimum, critics argued, trade tribunals should be encouraged or required to obtain information from environmental experts and to allow environmental groups to file amicus briefs.[98]

On these issues, the environmental critics did not have even rhetorical success. The Uruguay Round negotiators adopted a Dispute Settlement Understanding ("DSU") that made no significant changes to the December 1991 draft. As a result, complaining parties can automatically obtain the creation of a panel, panel reports are automatically adopted, and sanctions for noncompliance automatically imposed, unless the WTO members agree otherwise by consensus.[99] NAFTA is virtually identical on these points.[100] And neither the DSU nor NAFTA gives non-governmental entities a right to participate in the dispute resolution procedure, or requires a panel hearing an environmental dispute to have environmental expertise or consult those who do.[101]

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[95] Draft Dispute Settlement Understanding, *supra* note 94, § 20. In both its draft and final forms, the Dispute Settlement Understanding strongly encourages losing parties to comply with decisions of panels and the Appellate Body, but there has been some dispute over whether such compliance is legally required. *Compare* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996) ("Compliance with the WTO, as interpreted through dispute settlement panels, remains elective."), *with* John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62 (1997) ("An adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes."). Either way, the Understanding provides that a non-complying party will have to pay compensation or suffer the loss of trade benefits. But Jackson notes that violating international law might subject the violating state to additional sanctions. *Id.* at 61.

[96] Housman & Zaelke, *supra* note 19, at 569.

[97] Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607, 622–25 (1994); Goldman, *supra* note 75, at 1297–98.

[98] Esty, *supra* note 43, at 212–13; Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 570 (1993); Charnovitz, *supra* note 44, at 516; 1993 NGO Letter, *supra* note 82, at 717–18, 725–26.

[99] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994), arts. 6.1, 16.4, 22.6. Moreover, the Uruguay Round DSU covers disputes arising under the entire range of agreements adopted by the Uruguay Round, including the TBT and SPS Agreements. *Id.* art. 1.

[100] NAFTA, *supra* note 56, arts. 2008(2), 2017(4), 2019(1).

[101] The DSU does authorize panels to "seek information from any relevant source and . . . consult experts to obtain their opinion." DSU, *supra* note 99, art. 13.2. NAFTA conditions its panels' ability to seek such information upon the agreement of the disputing parties, except that a panel may request a report from a scientific review board on environmental or other scientific matters unless the disputing parties disapprove. NAFTA, *supra* note 56, arts. 2014–15.

One important difference between the agreements is that NAFTA provides no right to appeal from a panel decision, while the DSU creates an Appellate Body whose decisions are likewise automatically adopted in the absence of a consensus to the contrary.[102] At the time, critics could not have foreseen the importance of the Appellate Body to the resolution of legal conflicts between trade and the environment.

C. Negotiation Within and Around the WTO and NAFTA Institutions

Although the environmental critics did not obtain what they sought in the Uruguay Round and NAFTA negotiations, most continued to believe that a political agreement among governments would be necessary to resolve conflicts between trade and the environment. It seemed unrealistic to hope that trade tribunals would either reinterpret GATT to undo the snarl they had made or interpret the new agreements to avoid the problems the critics foresaw.[103] They therefore placed their hopes on new intergovernmental institutions, created as a result of the negotiations, which had been given mandates to address trade and environment issues.

In 1993, the North American governments created the Commission for Environmental Cooperation (CEC), which is headed by a Council of the parties' environmental ministers. The agreement creating the CEC gave the Council a long list of mandates, one of which is to cooperate with the NAFTA Free Trade Commission (composed of the parties' trade ministers) by "contributing to the prevention or resolution of environment-related trade disputes by . . . seeking to avoid disputes between the Parties [and] making recommendations to the Free Trade Commission with respect to the avoidance of such disputes."[104] The following year, at the formal conclusion of the Uruguay Round, governments established a Committee on Trade and Environment ("CTE"), open to all WTO member governments, and gave it a mandate to examine a variety of trade/environment issues, including "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements . . . ."[105]

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[102] DSU, *supra* note 99, art. 17.14.

[103] *See, e.g.*, ESTY, *supra* note 43, at 217 (noting that the dispute resolution procedure is "inherently ad hoc and dependent on issues being raised in a dispute between GATT parties," with "only limited opportunities to instruct panels as to how they should decide cases, making this approach unreliable as the basis for comprehensive GATT reform"). *But see* Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1349 (1992) ("While amendments to the GATT to deal more specifically with trade and environment issues may well be desirable, the current GATT text provides sufficient flexibility to afford environmental values equal footing with trade values.").

[104] North American Agreement on Environmental Cooperation, Sept. 14, 1993, art. 10(6)(c), 32 I.L.M. 1480, 1486 (1993) [hereinafter NAAEC].

[105] Marrakesh Ministerial Decision on Trade and Environment, GATT Doc. MTN/TNC/45(MIN) (Apr. 14, 1994), *reprinted in* 32 I.L.M. 1267 (1994). Gregory Shaffer has said that one of the implicit purposes of the CTE was "to attempt to provide guidance from a

The second chapter of the political debate on trade/environment legal conflicts therefore opened in 1994-1995, after NAFTA and the WTO agreements entered into force. That part of the debate has also been fruitless. The CEC has done almost nothing to try to avoid legal conflicts; as of November 2003, nearly ten years after its creation, the Council has yet to meet with its counterparts on the NAFTA Free Trade Commission, much less make any recommendation to it as to how to avoid future conflicts between NAFTA and environmental laws. Some commentators were optimistic that the creation of the CTE would lead to a general political resolution of trade/environment issues,[106] but it has produced virtually nothing of substance. After two years of meetings, it issued a lengthy report in 1996 that did little more than catalog the different positions of governments and echo the call in Rio Principle 12 for multilateral solutions to international environmental problems.[107] Seven years later, the 1996 report remains the chief product of the CTE.[108]

Gregory Shaffer has explained why the CTE member governments have been unable to agree on a detailed resolution of trade/environmental conflicts. Because of political disagreement within the United States and the European Union ("EU") (the two most powerful WTO members) over how to address trade/environment issues, their governments have been unable to play a more aggressive role in proposing changes to the WTO agreements.[109] Since they could not agree internally, they could not agree with each other on a coherent negotiating package.[110] When they and other governments did develop positions on particular issues, the parties were unable to reconcile their positions.

Shaffer emphasizes that the chief obstacle to political resolution of trade/environment issues is not the simplistic idea that most members of the WTO and CTE are solely focused on liberalizing trade and see environmental laws as a potential impediment to that goal.[111] Instead, countries' positions are

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WTO political body to WTO judicial panels" with respect to trade/environment disputes. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 55–56 (2001).

[106] James Cameron & Karen Campbell, *A Reluctant Global Policymaker*, *in* THE GREENING OF TRADE LAW, *supra* note 58, at 23, 31–32; Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423, 425–26 (1995). The CTE agenda has extended beyond legal conflicts to include topics such as eco-labeling, transparency of environmental measures, and the environmental benefits of removing trade restrictions and distortions. For a complete description and analysis of the agenda, see Shaffer, *supra* note 105, at 24–35.

[107] Report of the Committee on Trade and Environment, WTO Doc. WT/CTE/1 (Nov. 12, 1996) [hereinafter 1996 CTE Report]. *See* Schoenbaum, *supra* note 51, at 269–70 (describing the report as "primarily a compilation of the debates within the CTE and the views of its members" with "very little analysis and evaluation and virtually no recommendations for specific actions").

[108] Cameron & Campbell, *supra* note 106, at 32.

[109] Shaffer, *supra* note 105, at 42 ("In the United States, for example, conflicts between powerful business and environmental constituents impeded the Clinton Administration from forming a clear position on the permissibility of trade restrictions on environmental grounds.").

[110] *Id.* at 45.

[111] *Id.* at 48.

driven primarily by their narrow "mercantilist" interests.[112] For example, developing countries fear that the United States will use environmental grounds to justify trade restrictions directed against them. They have therefore argued that such restrictions violate GATT. At the same time, developing countries have raised concerns that another WTO agreement—the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")—may interfere with provisions of the 1992 Convention on Biological Diversity that they believe benefit them. In that potential dispute, the U.S. government thinks that its interests are in strong enforcement of TRIPS, and it has therefore opposed consideration of the developing countries' nominally environmental concerns in the WTO.[113]

Shaffer concludes that "the likelihood of significant change in WTO trade and environment rules through action by the CTE remains slim."[114] Schoenbaum goes further and suggests that the parties' conflicting objectives and the myriad number of ways these objectives can give rise to potential

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[112] *Id.* at 52 ("[S]tate delegates were careful to advance (if on the offensive) and not compromise (if on the defensive) their national positions within the CTE for future WTO negotiations over agriculture, intellectual property rights, technical standards, and other matters. State representatives were not predominantly neoliberal, but mercantilist.").

[113] *Id.* at 33–34. TRIPS requires WTO members to provide patent protection for new inventions, provided that they involve an inventive step and are capable of industrial application. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 27.1. WTO Agreement, *supra* note 2, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994). It allows a member to exclude inventions from patentability if preventing their commercial exploitation within the member's territory is necessary to protect human, animal, or plant life or health or to avoid serious prejudice to the environment; members may also exclude from patentability plants and animals other than micro-organisms, but they must provide for the protection of plant varieties. *Id.* art. 27.2–.3. Activists and government officials in developing countries such as India are concerned that TRIPS will be construed to protect genetic or other modifications to indigenous knowledge about biodiversity, but not the indigenous knowledge itself, thus making it more difficult to protect that knowledge from "biopiracy" by foreign companies. They argue that this result would be contrary to provisions in the Convention on Biodiversity governing access to genetic resources and technology derived from such resources, as well as contrary to its goals of promoting biodiversity. *See* Convention on Biological Diversity, June 5, 1992, arts. 15, 16, 1760 U.N.T.S. 79, 31 I.L.M. 818 (1992); Shalini Bhutani & Ashish Kothari, *Rio's Decade: Reassessing the 1992 Earth Summit: Reassessing the 1992 Biodiversity Convention: The Biodiversity Rights of Developing Nations: A Perspective from India*, 32 GOLDEN GATE U. L. REV. 587, 610–12 (2002). Other observers argue that the provisions are compatible. *See* Jim Chen, *Diversity and Deadlock: Transcending Conventional Wisdom on the Relationship Between Biological Diversity and Intellectual Property*, 31 ENVTL. L. REP. 10625 (2001); Charles R. McManis, *The Interface Between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology*, 76 WASH. U. L.Q. 255 (1998).

The more fundamental problem may be that, as Sean Murphy says, neither treaty confronts directly the competing interests of states and private actors in this area, "resulting in ambiguous treaty norms that may influence transnational behavior, but that fall short of regulating it." Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT'L L.J. 47, 73 (2001). WTO tribunals might clarify these ambiguities, but they have not issued any decisions on the TRIPS/biodiversity interface.

[114] Shaffer, *supra* note 105, at 84.

trade/environment legal conflicts make a political resolution of the conflicts impossible.[115]

III. The Greening of Trade Jurisprudence

As environmental critics feared, while political efforts to resolve conflicts between environmental laws and trade agreements sputtered, cases raising those conflicts continued to be brought to the revitalized WTO dispute resolution procedure.[116] The WTO Appellate Body has issued four decisions concerning conflicts between GATT and domestic environmental laws, and several others concerning the SPS and TBT Agreements.

Surprisingly, in these decisions the Appellate Body has rejected the restrictive *Tuna-Dolphin* interpretations of Article XX, incorporated a kind of balancing test into the chapeau of Article XX, and effectively concluded that measures pursuant to MEAs—and even certain unilateral measures taken in connection with multilateral negotiations—satisfy that test. It has interpreted the SPS and TBT Agreements as providing that every WTO member has the right to adopt a standard with a higher level of protection than the international standard, and that a party challenging an SPS or TBT measure whose level of protection exceeds the international standard faces a substantial burden of proof. And it has made clear that trade tribunals can seek information from environmental experts and accept amicus briefs from environmental groups. In short, as this Part describes, the Appellate Body has adopted almost every element of the moderate environmental proposals described in Part II.

A. Reinterpreting GATT

The *Tuna-Dolphin* decisions suggested that products with different environmental histories or effects might nevertheless be considered "like," so laws treating them differently would be discriminatory in violation of GATT. The decisions also interpreted Article XX in ways that seemed to prevent it from ever justifying such laws. To protect domestic laws and international agreements called into question by the decisions, moderate environmental critics proposed broadening the scope of likeness and revitalizing the environmental exceptions in Article XX. These proposals were linked, in that a more accessible Article XX would make the *Tuna-Dolphin* view of "likeness" less troubling, and treating environmentally different products as unlike would make recourse to Article XX less necessary.

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[115] *See* Schoenbaum, *supra* note 51, at 270–71 ("[B]ecause of the complexity and numbers of issues involved and the multiplicity of viewpoints, there may be no comprehensive reconciliation of trade and environment questions").

[116] In contrast, none of the trade/environment conflicts described in Part II have been brought to dispute resolution under NAFTA.

Although the Appellate Body has not directly addressed the *Tuna-Dolphin* holding that products cannot be differentiated—cannot be un-like—solely on the basis of their PPM, it has rejected an attempt by a WTO panel to narrow the scope of likeness far more drastically than had the *Tuna-Dolphin* panels. Moreover, it has completely revitalized Article XX.

1. Likeness

In 1998, Canada requested a WTO panel to hear its challenge to a French ban on the manufacture, sale, and import of products containing asbestos. The panel accepted Canada's argument that asbestos products are like certain substitutes for those products made in France, and that banning imports of asbestos products therefore provided them less favorable treatment in violation of the national treatment standard in Article III of GATT.[117] The key step in the panel's analysis was its decision not to take into account the relative risk to human health of the asbestos products and of the substitute products in determining whether they were like one another. It said that because the protection of human life and health is covered by Article XX(b), "[i]ntroducing the protection of human health and life into the likeness criteria would allow the Member concerned to avoid the obligations in Article XX, particularly the test of necessity for the measure under paragraph (b) and the control exerted by the introductory clause to Article XX."[118] The panel thus took the *Tuna-Dolphin* approach to likeness—that only product characteristics, not PPMs, are relevant—one step further, to say that even product characteristics would not be relevant if they are covered by an Article XX exception.

But the Appellate Body overturned the panel's analysis on appeal, saying, "We do not see how this highly significant physical difference [between asbestos, which is carcinogenic, and substitutes, which are not, 'at least to the same extent'] *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4."[119] Its decision avoids an interpretation that would have ensured that virtually any regulatory distinction based on environmental considerations would violate Article III, since such considerations can always be raised under Article XX(b) or XX(g). More generally, the decision opens the door for environmental considerations to be taken into account in determining whether products are like. It is still unclear, however, whether the Appellate Body would

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[117] WTO Dispute Settlement Panel Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/R, ¶¶ 8.154–.158 (Sept. 18, 2000) [hereinafter *Asbestos* Panel Report]. Specifically, Canada argued that chrysotile fibre is like polyvinyl alcohol, cellulose, and glass fibres, and that chrysotile-cement products are like fibro-cement products. *Id.* ¶ 8.101.

[118] *Id.* ¶ 8.130.

[119] WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R, ¶ 114 (Mar. 12, 2001) [hereinafter *Asbestos* Appellate Body Report] (emphasis in original).

allow environmental concerns arising solely from the PPM of a product to be taken into account in the "likeness" inquiry.[120]

2. Article XX(b)

In *Asbestos*, after holding that the French ban violated Article III, the panel determined that it satisfied Article XX(b) because it was "necessary to protect human life or health."[121] Although the Appellate Body's decision that the ban did not violate Article III meant that it did not need to reach Article XX, it nevertheless upheld the panel's interpretation of XX(b) on appeal. Like the panel—and like the *Tuna-Dolphin* panels—the Appellate Body read Article XX(b) to incorporate a least GATT-inconsistent requirement: a measure is not "necessary" under Article XX(b) if "an alternative measure which [the party] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it," and if no GATT-consistent measure is reasonably available, the party is "bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[122] But it applied this interpretation in a way that avoided the worst fears of environmental critics.

Canada had argued that a ban on asbestos was unnecessary because France could have pursued the less GATT-inconsistent alternative of strictly controlling dangerous use of asbestos. After the *Tuna-Dolphin* decisions, this was precisely the type of argument that critics had feared trade tribunals would accept. But the Appellate Body said that "France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that [its ban] seeks to 'halt.' Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection."[123] The Appellate Body emphasized that all "WTO Members have the right to determine the level of protection that they consider appropriate in a given situation," and noted that France's chosen level of health protection was a complete halt in the spread of asbestos-related health risks.[124] Because continued use of asbestos, even if controlled, could result in higher risks of developing asbestos-related diseases, controlled use would

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[120] *Compare* Robert Howse & Elizabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 297–98 (Gráinne de Búrca & Joanne Scott eds., 2001) (observing that the analysis in *Asbestos* would allow governments to differentiate among products based on their PPMs as long as the differentiation does not result in less favorable treatment, if less favorable treatment is "understood as protection of domestic production"), *with* Steve Charnovitz, *The Law of Environmental PPMs*, 27 YALE J. INT'L L. 59, 92 (2002) ("[A]ny optimism that future WTO panels will tolerate origin-neutral PPMs in the context of Article III would be unfounded.").

[121] *Asbestos* Panel Report, *supra* note 117, ¶¶ 8.169–240.

[122] *Asbestos* Appellate Body Report, *supra* note 119, ¶ 171 (quoting 1930 Tariff Act Report, *supra* note 24, ¶ 5.26).

[123] *Id.* ¶¶ 173–74.

[124] *Id.* ¶¶ 168, 173.

not allow France to achieve its chosen level of health protection and was therefore not a reasonably available alternative.[125] The Appellate Body thus showed that even with the "least GATT-inconsistent" gloss, Article XX(b) could justify some environmental and health measures.

3. Article XX(g)

The Appellate Body's most striking rejections of the *Tuna-Dolphin* interpretation of GATT have come with respect to Article XX(g), in two cases known as *Gasoline* and *Shrimp-Turtle*.

In 1995, in the first case brought to dispute resolution under the WTO, Brazil and Venezuela challenged EPA regulations implementing the Clean Air Act. The regulations required U.S. refiners and importers to ensure that their gasoline was at least as clean (in certain respects) as it was in 1990. If possible, each refiner and importer had to establish an individual baseline reflecting the cleanliness of its gasoline as of 1990. If the data from 1990 were not available, refiners could use a method of devising individual baselines based on post-1990 data, if necessary, but importers could not use alternative methods of arriving at an individual baseline; instead, they had to use a "statutory" baseline developed by EPA that reflected the average cleanliness of *all* U.S. gasoline in 1990.[126] An importer or refiner whose gasoline was dirtier than average in 1990 would obviously prefer to use its individual baseline rather than the statutory average baseline. Because that option was more available to refiners than to importers, Brazil and Venezuela argued that the United States was according less favorable treatment to imported gasoline than to like gasoline of U.S. origin, in violation of Article III.

The panel agreed. It brushed aside the U.S. argument that the differential treatment was justified because importers could not reliably establish their 1990 gasoline quality or had greater flexibility than refiners to meet a statutory baseline. Its reasoning echoed that of the *Tuna-Dolphin* panels; it stated that Article III "deals with the treatment to be accorded to like products; its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it."[127]

The panel also rejected the U.S. attempt to justify its law under Article XX(b), saying that the United States could have used less GATT-inconsistent measures to protect human health: it could have applied a single statutory baseline to both refiners and importers, or it could have allowed importers to derive an individual baseline from secondary evidence of the quality of the gasoline produced by the foreign refiners with which the importers dealt.[128]

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[125] *Id.* ¶ 174.

[126] WTO Dispute Settlement Panel Report on United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R, ¶¶ 2.1–13 (Jan. 29, 1996) [hereinafter *Gasoline* Panel Report].

[127] *Id.* ¶ 6.11.

[128] *Id.* ¶¶ 6.24–.25. The panel rejected U.S. arguments that such a method would produce

And it followed the *Tuna-Dolphin* approach to Article XX(g) by asking whether the discriminatory U.S. regulations were *primarily aimed at* the conservation of clean air. It concluded that they were not, because "being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources . . . . Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished."[129] Thus, like the first *Tuna-Dolphin* panel, it seemed to incorporate the Article XX(b) least GATT-inconsistent test into Article XX(g).

On appeal in *Gasoline*, the Appellate Body overturned most of the panel's analysis of Article XX(g), the only part of the panel decision the United States had appealed. In the process, the Appellate Body cleared away two obstacles to using Article XX(g) that dated back to the first *Tuna-Dolphin* report. First, it held that the least GATT-inconsistent test could not be imported into Article XX(g).[130] Second, it said that the Article XX(g) language requiring measures to be "made effective in conjunction with restrictions on domestic production or consumption" could not be read to require such measures to be "primarily aimed at" making the domestic restrictions effective. Instead, the language required only "*even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[131] That the U.S. government had regulated the domestic production of gasoline jointly with corresponding restrictions on imported gasoline met this requirement.[132]

The second case concerning Article XX(g) arose from a U.S. statute very similar to the law at issue in the *Tuna-Dolphin* cases. Just as dolphins are often killed in the course of fishing for tuna, sea turtles are often caught and drowned in shrimp trawls. In 1987, pursuant to the Endangered Species Act, the U.S. government adopted a regulation requiring shrimp trawlers within U.S. jurisdiction to use turtle excluder devices ("TEDs") that enable turtles to escape.[133] In 1989, Congress enacted a law banning the importation of shrimp harvested with methods that may harm endangered species of sea turtles, and providing that the ban shall not apply if the President certifies to Congress that the harvesting nation has a regulatory program and an average rate of incidental taking that are "comparable" to those of the United States.[134]

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unreliable information, saying that "the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation." *Id.* ¶ 6.28.

[129] *Id.* ¶ 6.40.

[130] WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 15–16 (Apr. 29, 1996) [hereinafter *Gasoline* Appellate Body Report].

[131] *Id.* at 19–21 (emphasis in original).

[132] *Id.* at 19.

[133] Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987). For the current regulations concerning TEDs see 50 C.F.R. §§ 223.205–.207 (2003).

[134] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Ap-

The U.S. government initially applied the "shrimp/turtle" law only to countries in Latin America and the Caribbean,[135] but in 1995, a federal court ordered the State Department to extend its implementation of the law to all countries.[136]

In early 1997, Malaysia, Thailand, Pakistan, and India brought a complaint about the law to the WTO dispute resolution procedure. Like the *Tuna-Dolphin* plaintiffs, they argued that the U.S. import restrictions violated GATT Article XI.[137] The U.S. government did not dispute that its law violated Article XI and the panel suggested, citing the *Tuna-Dolphin* reports, that it would have found against the United States if it had,[138] so the key issue was again the scope of Article XX, and in particular whether it applies to unilateral measures taken to protect animals beyond the jurisdiction of the importing country. The panel decided against the United States on the basis of its interpretation of the chapeau of Article XX, and therefore did not reach Articles XX(b) or XX(g).

But on appeal, the Appellate Body held that analysis of an Article XX exception should begin with the specific exception claimed, and that the chapeau addresses only the *application* of a measure that has been determined to fall within a specific exception. It therefore began by examining whether the U.S. law as designed fell within the scope of Article XX(g). It said that the term "exhaustible natural resources" includes living resources such as endangered sea turtles. Although it left open the possibility that Article XX(g) has a jurisdictional limitation, it said that since the species of sea tur-

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propriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 1037, § 609 (codified as note after 16 U.S.C. § 1537 (2000)).

[135] In 1993, the United States issued guidelines stating that imports of shrimp would be permitted from those countries only if they were certified under the law, and that to be certified a country would have to require TEDs on all of its shrimp trawlers, not just those harvesting shrimp for the U.S. market. Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015 (Feb. 18, 1993).

[136] Earth Island Inst. v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995). The State Department issued new guidelines in 1996 that complied with the court order. The 1996 guidelines also replaced the previous guidelines' "country-by-country" approach, under which shipments were allowed only from certified countries, with a "shipment-by-shipment" approach, under which a shipment of shrimp from a non-certified country could be imported if it was accompanied by a declaration, signed by the exporter and an official of the country of export, attesting that the shipment was harvested under conditions that did not adversely affect sea turtles. Revised Notice of Guidelines for Determining Compatibility of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342, 17,343 (Apr. 19, 1996). The Court of International Trade then held that the shipment-by-shipment standard was invalid and ordered the government to return to the country-by-country approach. 942 F. Supp. 597 (Ct. Int'l Trade 1996), *vacated*, 147 F.3d 1352 (Fed. Cir. 1998).

[137] They also argued that by treating physically identical shrimp differently depending on the method of harvest and the policies of the government where the shrimp was harvested, the law violated GATT Articles I:1 (the MFN standard) and XIII:1 (which prohibits applying a quantitative restriction in a way that discriminates between trading partners). WTO Dispute Settlement Panel Report on United States—Import Prohibition of Certain Shrimp, WTO Doc. WT/DS58/R, ¶¶ 3.135–.142 (May 15, 1998) [hereinafter *Shrimp-Turtle I* Panel Report].

[138] *Id.* ¶¶ 3.143, 7.16.

tles occur in waters under U.S. jurisdiction, "in the specific circumstances of the case before us, there is a sufficient nexus" between the turtles and the United States for purposes of Article XX(g).[139] It thus suggested that any such limitation would be easier to meet than that imposed by the *Tuna-Dolphin* panels, which had not taken into account whether the species of dolphins at issue in those cases were found in U.S. waters. It also concluded that the U.S. law "relates to the conservation of" the resources and was "made effective in conjunction with" similar domestic restrictions.[140] Therefore, as in *Gasoline*, the Appellate Body held that the U.S. law met the requirements of Article XX(g).

By removing the *Tuna-Dolphin* obstacles to using Article XX(g), the Appellate Body greatly increased the likelihood that domestic and international environmental measures would be able to meet its requirements. Almost any environmental law or agreement can be characterized as protecting exhaustible natural resources, and environmentally motivated trade restrictions are often implemented in conjunction with domestic restrictions on consumption or production.

4. Article XX's Chapeau

The revitalization of Articles XX(b) and XX(g) increased the importance of Article XX's chapeau, which provides that measures that fall within a specific exception under Article XX may not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. In its first two decisions interpreting the chapeau, the Appellate Body incorporated a balancing test facially similar to that proposed by environmental critics. And in its third decision, it applied that test to uphold the U.S. implementation of the shrimp/turtle law.

In *Gasoline*, the panel had said that the United States could have avoided discrimination by allowing importers to use the same types of individual baselines as domestic refiners, or imposing a uniform statutory baseline on refiners and importers alike. The U.S. government argued on appeal that allowing individual baselines for foreign refiners would have caused administrative difficulties with respect to verification and enforcement and that im-

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[139] WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, ¶¶ 131, 133 (Oct. 12, 1998) [hereinafter *Shrimp-Turtle I* Appellate Body Report].

[140] *Id.* ¶¶ 135–145. The Appellate Body analyzed whether the law relates to the conservation of an exhaustible natural resource by looking at the law as a means to an end, i.e., the conservation of a resource. It found that "[t]he means are, in principle, reasonably related to the ends," and that the "means and ends relationship . . . is observably a close and real one." *Id.* ¶ 141. The Appellate Body thus seemed to do away with another restrictive interpretation of *Tuna-Dolphin*, which had said that the "relating to" language had required that the measure be primarily aimed at conservation. *See supra* text accompanying note 26. In practice, however, it is unclear whether the Appellate Body standard is significantly less stringent.

posing a uniform statutory baseline on all domestic refiners would have required them to bear large financial burdens. The Appellate Body rejected these arguments, noting that the United States had not tried to cooperate with Venezuela and Brazil to address the administrative problems and that it appeared to have disregarded the potential financial burdens on foreign refiners.[141] It concluded that the U.S. regulations, "although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole."[142]

More generally, the Appellate Body said that

> [t]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the [GATT 1994]. In other words, if those exceptions are not to be abused or misused, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[143]

In *Shrimp-Turtle I*, the Appellate Body elaborated on this characterization of the chapeau, saying

> [W]e consider that [the chapeau] embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an

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[141] *Gasoline* Appellate Body Report, *supra* note 130, at 25, ¶ 1.
[142] *Id.* at 29–30.
[143] *Id.* at 22.

> exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.[144]

Later in the opinion, the Appellate Body said that the task of interpreting the chapeau was

> 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 (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[145]

The Appellate Body thus read the chapeau as giving it broad powers to strike a balance, or draw a "line of equilibrium," between the environmental interests protected by the specific exceptions in Article XX and the trade interests furthered by what it called the "substantive" provisions of GATT. While this balancing test resembles those proposed by some environmental critics, it suffers from the unpredictability inherent in all balancing tests. How would the Appellate Body actually strike a balance between environmental and trade interests?

The key consideration in the Appellate Body's analysis is obvious from its application of the chapeau to the shrimp/turtle law. It emphasized, as "[p]erhaps the most conspicuous flaw" in the law as applied, "its intended and actual coercive effect on the specific policy decisions made by foreign governments," which results from the fact that it "*requires* other WTO members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels," even with respect to shrimp not exported to the United States.[146] The next fault in the application of the U.S. law cited 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 with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition."[147] The Appellate Body pointed to an Inter-American Convention between the United States and several Latin American and Car-

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[144] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 156 (emphasis in original).
[145] *Id.* ¶ 159.
[146] *Id.* ¶¶ 161, 163 (emphasis in original).
[147] *Id.* ¶ 166.

ibbean countries on the protection and conservation of sea turtles, and concluded that the United States had discriminated against the Asian plaintiffs vis-a-vis the other countries by not trying to negotiate such an agreement with them.[148]

More importantly, the Appellate Body said that the parties to the Inter-American Convention "together marked out the equilibrium line" between trade and environmental interests under the chapeau, and that the agreement "thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition."[149] The Appellate Body emphasized that the U.S. failure to pursue negotiation of multilateral agreements led directly to the unilateralism it had initially condemned:

> The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.[150]

The Appellate Body also found evidence of this disregard in the U.S. process for deciding whether to certify nations as meeting the requirements of the U.S. law. It noted that a government applying for certification had no formal opportunity to be heard or to respond to any arguments that may be made against it, governments whose applications were denied received no notice of the denial or the reasons for it, and the United States provided no procedure for review or appeal of a denial.[151]

After *Shrimp-Turtle I*, it seemed clear that MEA-mandated trade restrictions against MEA parties would satisfy the chapeau, since in such cases the parties themselves would have demarcated their own "line of equilib-

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[148] *Id.* ¶¶ 171–172. The Appellate Body noted that the United States also treated the Western Hemisphere countries more favorably by giving them a longer phase-in period before the restrictions took effect and making more efforts to transfer TED technology to them. *Id.* ¶¶ 173–175.

[149] *Shrimp-Turtle I* Appellate Body report, *supra* note 139, ¶¶ 170–171.

[150] *Id.* ¶ 172.

[151] *Id.* ¶ 180.

rium" between trade and environmental concerns, just as the parties to the Inter-American Agreement had. But it remained doubtful that other trade restrictions, especially if aimed at an extrajurisdictional resource, would survive the chapeau.

That question was squarely presented in *Shrimp-Turtle II*. In 2000, Malaysia requested a panel to find that the United States had failed to comply with the decision in *Shrimp-Turtle I*.[152] Malaysia concentrated its fire on the continuing unilateralism of the U.S. measure. Although Malaysia, the United States, and other countries had engaged in negotiations toward an agreement on sea turtle conservation, the only product to date of the negotiations was a non-binding memorandum of understanding that did not authorize trade restrictions. Malaysia argued that under the reasoning of *Shrimp-Turtle I*, the U.S. government could not impose any import prohibition in the absence of an international agreement allowing it,[153] and that even after revision, the U.S. guidelines still impermissibly sought to coerce sovereign nations into "adopting sea turtle conservation measures comparable to the one that has been unilaterally determined by the United States."[154] By focusing on the unilateral nature of the U.S. action, Malaysia drew on the concern that seemed to underlie the Appellate Body's reasoning in the first *Shrimp-Turtle* decision, as well as the panel decisions in the *Tuna-Dolphin* cases. So it seemed possible, and even likely, that the panel and Appellate Body would accept the Malaysian position: unilateral efforts to condition trade on changes in other countries' policies would be disfavored; multilateral agreements authorizing trade restrictions would be upheld.

But both the panel and the Appellate Body rejected Malaysia's arguments. The panel characterized the Appellate Body decision in *Shrimp-Turtle I* as holding that the U.S. government could impose the restrictions only after it pursued serious efforts in good faith to negotiate an agreement on sea turtle conservation with all interested parties, not that an agreement had to be *concluded* before the restrictions could be imposed.[155] After reviewing U.S. efforts to reach an agreement, the panel concluded that the United States was in compliance with this requirement.[156] The panel also said that while the Appellate Body condemned laws that required essentially the same policy as

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[152] After the first decision, the parties to the dispute had agreed that the United States would have thirteen months (until December 1999) to comply. Malaysia brought its claim under the DSU, which provides that disagreements as to whether measures taken to comply with a previous decision are consistent with a WTO agreement should be decided through recourse to the dispute settlement procedure. *See* DSU, *supra* note 99, art. 21.5.

[153] WTO Dispute Settlement Panel Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/RW, ¶ 5.24 (June 15, 2001) [hereinafter *Shrimp-Turtle II* Panel Report].

[154] *Id.* ¶ 3.125.

[155] *Id.* ¶¶ 5.66–.67.

[156] *Shrimp Turtle II* Panel Report, *supra* note 153, ¶ 5.87. The panel emphasized, however, that the requirement was ongoing and that the unilateral import restrictions could be in compliance with the chapeau only as long as the serious, good faith efforts to reach an agreement continue. *Id.* ¶¶ 5.86, 6.1–.2.

that of the importing country, its decision accepted, "at least implicitly," that the chapeau would not forbid a law requiring that the policy of the exporting country be "comparable in effectiveness" to that of the U.S. law.[157] It decided that as revised and implemented, the U.S. guidelines provided the required amount of flexibility to avoid unjustifiable or arbitrary discrimination under the chapeau to Article XX.[158]

On appeal, the Appellate Body endorsed the panel's decision on both points. It said that

> it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.[159]

The Appellate Body emphasized that while the United States "would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other," it "cannot be held to have engaged in 'arbitrary or unjustifiable discrimination' under Article XX solely because one international negotiation resulted in an agreement while another did not."[160] Thus, the fact that the United States had entered into a binding agreement on sea turtle conservation with Latin American countries did not mean that it had violated the chapeau by failing to reach such an agreement with Malaysia. It affirmed the panel's conclusion that the

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[157] *Id.* ¶ 5.93.

[158] *Shrimp-Turtle II* Panel Report, supra note 153, ¶¶ 5.94–.104. The panel also decided that the U.S. government had satisfactorily addressed the other problems identified by the Appellate Body, since: (a) the guidelines returned to the shipment-by-shipment approach, so that shrimp that meet the requirements may be imported even if they are from a country not certified under the law; (b) the guidelines address "due process" concerns by giving interested governments an opportunity to be heard and providing clearer, more transparent procedures; and (c) the U.S. government had made greater efforts to transfer TED technology. *Id.* ¶¶ 5.105–.144; *see also* 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. 36,946 (July 8, 1999).

The State Department was able to reinstate the shipment-by-shipment approach in the 1999 guidelines because the 1996 decision by the Court of International Trade had been vacated on technical grounds in 1998. *See supra* note 136. In 2000, the Court of International Trade again held that the shipment-by-shipment approach was invalid, although it denied the plaintiffs injunctive relief. Turtle Island Restoration Network v. Mallett, 110 F. Supp. 2d. 1005 (Ct. Int'l Trade 2000). On appeal, the Federal Circuit overturned the decision and upheld the 1999 guidelines. Turtle Island Restoration Network v. Evans, 284 F.3d 1282 (Fed. Cir. 2002), *reh'g en banc denied*, 299 F.3d 1373 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1748 (2003).

[159] WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia, WTO Doc. WT/DS58/AB/RW, ¶ 124 (Oct. 22, 2001) [hereinafter *Shrimp-Turtle II* Appellate Body Report] (emphasis in original).

[160] *Id.* ¶¶ 122–123.

U.S. efforts in the Indian Ocean and Southeast Asia region were "serious, good faith efforts comparable to those that led to the conclusion of the Inter-American Convention."[161]

And, finally, the Appellate Body agreed with the panel that "there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*."[162] The latter approach "gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory."[163] Specifically, the revised guidelines will allow the U.S. government "to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification."[164]

The Appellate Body reading of the chapeau is consistent with the spirit of many of the environmental critics' proposals. It allows the chapeau to justify unilateral measures—even a unilateral measure identical in many respects to the law that led to the *Tuna-Dolphin* decisions—as long as they are applied flexibly and in connection with good-faith efforts to reach a multilateral agreement.[165] Measures taken pursuant to an MEA, even if taken against

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[161] *Id.* ¶ 133.

[162] *Id.* ¶ 144 (emphasis in orginal).

[163] *Id.*

[164] *Shrimp-Turtle II* Appellate Body Report, *supra* note 159, ¶ 148.

[165] Robert Howse reads the Appellate Body decision in *Shrimp-Turtle II* quite differently, as requiring the United States "to negotiate seriously with the complainants exactly to the extent it had already negotiated with the western hemisphere countries, no more and no less . . . . The 'unjustified discrimination' was not the failure to negotiate as such, but the failure to treat the complainants as well as the U.S. had treated the western hemisphere countries." Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 508 (2002). He draws the implication that "had the U.S. negotiated with no-one, it would not have run afoul of the chapeau." *Id.* at 509 n.39.

Howse can only reach his interpretation by reading the second *Shrimp-Turtle* decision in complete isolation from the first, which made clear that the Inter-American Convention was relevant not just as an indication that the United States had treated some countries better than others, but as an example of where the "equilibrium line" between trade and environmental interests could be demarcated. *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 170. It is impossible to reconcile the language in that case that the Convention "provides convincing demonstration that an alternative course of action . . . other than the unilateral and non-consensual procedures of the import prohibition" was "reasonably open to the United States for securing [its] legitimate policy goal," *id.* ¶ 171, with Howse's conclusion that the United States could have complied with the chapeau by refusing to negotiate with anyone. Moreover, the panel in *Shrimp-Turtle II* read the previous Appellate Body decision as requiring good faith efforts to negotiate an international agreement in its own right, not just as a way to avoid discrimination vis-a-vis the Latin American signatories to the Inter-American Convention. *Shrimp-Turtle II* Panel Report, *supra* note 153, ¶¶ 5.59, 5.74, 5.76. If Howse were right, surely the Appellate Body would have corrected the panel's basic mischaracterization of its earlier decision.

In context, then, the Appellate Body statement in *Shrimp-Turtle II* that the United States "would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiations to the other" expresses two requirements: (1) to make good faith efforts to negotiate international agreements; and (2) to make sure that the efforts are comparable across the board. Accordingly, in *Shrimp-Turtle II* the panel and Appellate Body

non-parties, appear virtually certain to pass muster. Any multilaterally agreed trade restriction would appear to satisfy concerns about inflexible unilateralism, as long as negotiation and membership of the MEA were open to all nations against which the restriction was directed and did not otherwise discriminate against them. The major MEAs employing trade restrictions—Basel, CITES, and Montreal—all satisfy these requirements. One effect of the *Shrimp-Turtle* decisions is, therefore, that the Appellate Body's judicial resolution appears to be as protective of MEA-related sanctions as the strongest of the moderate environmental proposals would have been, and much more protective than is Article 104 of NAFTA.

B. Avoiding Pitfalls in the SPS and TBT Agreements

The Appellate Body has also interpreted the minimum standards of the TBT and SPS Agreements in ways consistent with moderate proposals on the role of international standards, the right to set domestic levels of protection, and the burden of proof. And, again, the Appellate Body has reached these interpretations by overruling panel decisions that would have given governments less flexibility to consider non-trade interests.

The first SPS case set the pattern. As described above, the United States and the EC have had a long-standing dispute over an EC ban on hormone-treated beef. In 1996, the U.S. government brought a claim that the ban violates the SPS Agreement to a WTO panel.[166] The panel interpreted the requirements in the Agreement pertaining to international standards in two ways that reinforced the fears of environmental critics that parties would effectively be forced to adopt such standards. First, the panel said that the Agreement's requirement that parties base their SPS measures on international standards means that a measure "needs to reflect the *same* level of sanitary protection as the [international] standard."[167] Second, while the panel acknowledged that the Agreement provides that a party may adopt a measure more protective than the international standard if it does so in accordance with the specified risk assessment procedure, the panel called this provision an "exception" to the general requirement that parties adopt the international standard. It concluded that if a complaining party shows that the general requirement is not met (i.e., if the domestic measure is more protective than

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compared the negotiations that led to the Inter-American Convention with the efforts to negotiate a new agreement with the Asian countries not just because meeting the standard set by the Convention would ensure that the complainants were not discriminated against vis-a-vis the Convention signatories, but also because meeting that standard would mean that the United States had taken the multilateral "alternative course of action" promoted by *Shrimp-Turtle I*.

[166] Canada also brought a claim. The same panel heard the claims together and issued two virtually identical decisions, one for each country. Citations here are to the U.S. panel decision, WTO Dispute Settlement Panel Report on EC Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/R/USA (Aug. 18, 1997) [hereinafter *Hormones* Panel Report].

[167] *Id.* ¶ 8.73 (emphasis added).

the international standard), the burden of proof shifts to the defending party to demonstrate that it adopted its measure in accordance with the risk assessment procedure.[168]

The Appellate Body overturned both of these interpretations. It rejected the panel's view that the SPS Agreement requires parties to adopt the same level of protection as international standards, and said that even if a domestic measure is not based on an international standard, the burden of proof remains on the complaining party to show that the measure is inconsistent with the Agreement.[169] The Appellate Body did affirm that the Agreement requires domestic measures with higher levels of protection than relevant international standards to be based on a risk assessment,[170] but, recognizing that scientific opinions can differ, the Appellate Body said that parties need not only adopt measures consistent with the mainstream view in the scientific community. Rather, "the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake. The requirement that an SPS measure be 'based on' a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment."[171] The difficulty for the EC was that the scientific risk assessments of the banned hormones had all concluded they were safe. Since the risk assessments did not reasonably support a ban, the Appellate Body upheld the panel conclusion that the ban violated the SPS Agreement.[172]

Several years later, the role of international standards under the TBT Agreement came before a panel in another case, *European Communities—Trade Description of Sardines*.[173] Similarly to the SPS Agreement, the TBT Agreement requires its parties to use relevant international standards "as a basis for" their domestic TBT measures except when the international standards "would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued."[174] The panel interpreted the language "as a basis for" in accordance with the decision of the Appellate Body in *Hormones*,[175] but again treated the requirement to use international standards as the general rule to which the option of adopting more protective domestic standards is an ex-

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[168] *Id.* ¶¶ 8.86–.88.

[169] WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R, ¶¶ 104, 109, 165 (Jan. 16, 1998) [hereinafter *Hormones* Appellate Body Report]; *see also* David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865, 900–01 (2000) ("This approach of the Appellate Body, though obviously more consistent with the purpose of the SPS Agreement than the narrow interpretation imposed by the Dispute Panel, was nonetheless a watershed—it removed a legal interpretation that could have resulted in international standards becoming the feared straitjacket.").

[170] *Hormones* Appellate Body Report, *supra* note 169, ¶ 177.

[171] *Id.* ¶¶ 193–194.

[172] *Id.* ¶¶ 196–197.

[173] WTO Dispute Settlement Panel Report on European Communities—Trade Description of Sardines, WTO Doc. WT/DS231/R (May 29, 2002) [hereinafter *Sardines* Panel Report].

[174] TBT Agreement, *supra* note 86, art. 2.4.

[175] *Sardines* Panel Report, *supra* note 173, ¶ 7.110.

ception. As a result, the panel said that the burden of proof was on the party defending a measure more protective than a relevant international standard to show that the international standard would be ineffective or inappropriate to meet the legitimate objectives of the party.[176] The Appellate Body reversed on the basis of its reasoning in *Hormones* and again concluded that the burden of proof is on the complaining party.[177]

Another restriction in the SPS and TBT Agreements of concern to environmental critics was the requirement that such measures be not more trade-restrictive than necessary to fulfill a legitimate objective (the language in the TBT Agreement), or not more trade-restrictive than required to achieve the appropriate level of sanitary or phytosanitary protection (the language in the SPS Agreement).[178] Some critics feared that the language would be interpreted to require governments to enact less-effective environmental measures on the ground that such measures would be less trade restrictive.[179] But in a case involving Australian restrictions on importation of salmon, the Appellate Body said that a measure will fail this requirement in the SPS Agreement only if there is a reasonably available alternative that is significantly less trade restrictive and that "achieves the [WTO] Member's appropriate level of sanitary or phytosanitary protection"—that is, the level of protection that the party itself decides is appropriate.[180] As a result, if it is unclear what level of protection could be achieved by an alternative SPS measure, that measure cannot be reasonably available.[181]

Another decision makes clear that the party defending a measure under the SPS Agreement need not show that there is no reasonably available measure other than the one it chose; rather, the burden of proof is on the party challenging a measure to show that there is another measure that is significantly less trade restrictive and that achieves the appropriate level of protection.[182] Given the similarity in relevant language between the two Agreements, and the willingness of the Appellate Body to apply its interpretations of one to

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[176] *Id.* ¶ 7.50.

[177] Specifically, the burden is to show that the international standard was not used as a basis for the domestic measure and that the international standard is effective and appropriate to fulfill the legitimate objectives pursued by the defending party through the challenged measure. WTO Appellate Body Report on European Communities—Trade Description of Sardines, WTO Doc. WT/DS231/AB, ¶ 275 (Sept. 26, 2002) [hereinafter *Sardines* Appellate Body Report].

[178] TBT Agreement, *supra* note 86, art. 2.2; SPS Agreement, *supra* note 87, art. 5.6.

[179] *See* Goldman, *supra* note 75, at 1296.

[180] WTO Appellate Body Report on Australia—Measures Affecting Importation of Salmon, WTO Doc. WT/DS18/AB/R, ¶ 194 (Oct. 20, 1998) [hereinafter *Salmon* Appellate Body Report] (citing footnote to Article 5.6). The Appellate Body suggested that a party may determine that its appropriate level of protection is "zero risk." *Id.* ¶ 125. This reading is obviously similar to the *Asbestos* decision's interpretation of GATT Article XX(b). An important difference, however, is in the burden of proof, which is on the challenging party under the SPS Agreement, but on the party defending the measure under Article XX. *Asbestos* Panel Report, *supra* note 117, ¶ 8.177.

[181] *Salmon* Appellate Body Report, *supra* note 180, ¶¶ 208–212.

[182] WTO Appellate Body Report on Japan—Measures Affecting Agricultural Products, WTO Doc. WT/DS76/AB, ¶ 126 (Feb. 22, 1999).

the other,[183] it seems very likely that the Appellate Body will reach a similar interpretation of the equivalent language in the TBT Agreement.

In sum, the Appellate Body has adopted interpretations of the SPS and TBT Agreements that mirror several moderate proposals made by environmental critics (as well as the interpretations offered by the U.S. government): that every party has the right to adopt a standard with a higher level of protection than the international standard; that SPS measures with higher levels of protection need not be in accord with the "majority" scientific view; and that a substantial burden of proof is on the party challenging an SPS or TBT measure even if the measure exceeds the international standard.

C. Inviting in Experts and Amici

The environmental critics' primary proposals for reforming the dispute resolution procedure were that trade tribunals should seek information from environmental experts and that environmental groups should be able to contribute to the deliberations through amicus briefs. Panels have adopted the first position in practice, and the Appellate Body has adopted the second in principle, although it has not truly embraced it in practice.

In several trade/environment cases, the panel has consulted independent experts at length. In *Hormones*, the panel selected experts, asked them questions, and held a meeting with them and representatives of the parties.[184] Similarly, in *Shrimp-Turtle I* and *Asbestos*, the panels decided to consult independent experts, asked them questions individually, gave the parties an opportunity to comment on their responses, invited the experts to discuss their written responses with the panel and the parties at a joint meeting, and cited the information from the experts extensively in their findings.[185]

The amicus issue was presented in *Shrimp-Turtle I* when the panel received two submissions from environmental groups. The panel rejected them on the ground that "pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of the information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel."[186] The panel did state that parties may submit whatever documents they consider relevant, however, and it allowed the U.S. government to designate one of the briefs as an annex to one of its submissions to the panel.

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[183] *See, e.g., Sardines* Appellate Body Report, *supra* note 177, ¶¶ 242, 274–275.

[184] *See Hormones* Panel Report, *supra* note 166. The panel acted pursuant to Article 11.2 of the SPS Agreement, which says that "[i]n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute," SPS Agreement, *supra* note 87, art. II.2, and Article 13.1 of the DSU, which provides, "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate." DSU, *supra* note 99, art. 13.1.

[185] *See Shrimp-Turtle I* Panel Report, *supra* note 137; *Asbestos* Panel Report, *supra* note 117.

[186] *Shrimp-Turtle I* Panel Report, *supra* note 137, ¶ 7.8.

On the U.S. appeal from the panel's decision, the Appellate Body noted that Article 13 of the DSU gives panels broad authority to seek information from any individual or body it considers appropriate, and that Article 12 of the DSU authorizes panels to develop their own working procedures after consultation with the parties. It said that as a result, the DSU "accords to a panel . . . ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."[187] It concluded that in the context of this broad authority, the word "seek" in Article 13 should not be read "in too literal a manner," and a panel has discretion "either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*."[188] In a later case, the Appellate Body held that it, too, has the power to receive amicus briefs if it chooses.[189]

Although these holdings appeared to open the door to amicus briefs, the promise of access has proved illusory. After the Appellate Body announced in November 2000 that it had established a procedure through which it would receive applications for permission to file an amicus brief in *Asbestos*,[190] the WTO members held a special session of the General Council just to criticize the Appellate Body position. Developing countries unanimously condemned it, and while some developed countries expressed general support for the possibility of amicus briefs in some circumstances, only the United States argued that the Appellate Body outcome was legally justified by the current language of the DSU.[191] The chair of the meeting informed the Appellate Body that it should exercise "extreme caution" until the member governments had decided what rules were needed.[192]

The Appellate Body seems to have heard the message. In *Asbestos*, it received eleven applications within the specified time limits but denied leave to every one to file an amicus brief, indicating without explanation that each had failed to comply "sufficiently" with all of the requirements.[193] In *Shrimp-Turtle II*, the Appellate Body also declined without explanation to consider the one amicus brief it received.[194] Nor did it take into account arguments made in an environmental group's brief attached to the U.S. submission, af-

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[187] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 106.

[188] *Id.* ¶¶ 107–108 (emphasis in original).

[189] WTO Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WTO Doc. WT/DS138/AB/R, ¶ 42 (May 10, 2000) (hereinafter *Hot-Rolled Lead* Appellate Body Report).

[190] *Asbestos* Appellate Body Report, *supra* note 119, ¶ 51.

[191] WTO General Council, Minutes of Meeting of Nov. 22, 2000, WTO Doc. WT/GC/M/60 (Jan. 23, 2001). For the U.S. position, see *id.* ¶ 74.

[192] *Id.* ¶ 120.

[193] *Asbestos* Appellate Body Report, *supra* note 119, ¶ 56. Among other requirements, an application had to indicate "in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute . . . ." *Id.* ¶ 52.

[194] *Shrimp-Turtle II* Appellate Body Report, *supra* note 159, ¶ 78.

ter the U.S. representative said that the United States adopted the views in the brief only "to the extent they are the same as ours."[195] Panels in trade/environment cases have followed a similar approach: denying briefs unless they are attached to a party submission and taking them into account only to the extent that they are adopted by the party.[196]

IV. THE JUDICIAL SEARCH FOR POLITICAL AGREEMENT

Why has the Appellate Body greened trade jurisprudence? This is not the result that many scholars had predicted. Richard Shell, for example, argued in his influential analysis of the WTO that the Appellate Body would be likely to invalidate socially useful laws that pose a threat to trade and might even institute a new Lochner era in which countries would be subject to governance by unelected judges issuing rulings on the basis of economic theory, unless it opened its dispute resolution procedure to all "trade stakeholders"—that is, to all groups with an interest in trade disputes.[197] But the WTO has not transformed itself into Shell's trade stakeholders model. The principal actors in the WTO remain national governments, which alone negotiate the laws the Appellate Body construes, appoint its members, bring and defend cases before it, and review its reports.

The WTO thus continues to resemble what Shell called the regime management model of trade governance. In that model, the only relevant actors are states, which use international agreements to structure carefully circumscribed reciprocal relationships among themselves in order to facilitate cooperation.[198] In trade regimes, states carefully balance their interests in opening markets for their exporters and protecting their own producers and workers or, stated more generally, their commitment to free trade and their desire to maintain their domestic autonomy.[199] Trade tribunals can help to maintain this balance, but only if they are sensitive to states' interests.[200] One would therefore expect such tribunals to seek interpretations of trade agreements that maximize the political support for their decisions among WTO member governments.

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[195] *Id.* ¶ 77.

[196] *See, e.g.*, *Shrimp-Turtle II* Panel Report, *supra* note 153, ¶¶ 5.15–16; *Asbestos* Panel Report, *supra* note 117, ¶¶ 6.1–.4.

[197] G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 905–06 (1995).

[198] *Id.* at 863 (citing ROBERT O. KEOHANE, AFTER HEGEMONY 89 (1984)).

[199] In particular, Shell points to John Ruggie's well-known suggestion that trade institutions are "'embedded' within an international framework that recognizes the need for states to exercise political control over the distributional consequences of global economic change." Shell, *supra* note 197, at 861–62 (citing John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393 (1982)).

To Shell's emphasis on governments' desire to maintain as much domestic autonomy as possible, I would add their wish to avoid unnecessary conflicts among different international regimes, including the detailed, complex regimes created by many environmental agreements.

[200] *See* Shell, *supra* note 197, at 864–65.

And that is exactly what the Appellate Body has done in its trade/environment cases. As the first Section of this Part explains, it has based its decisions on texts and principles that have received widespread endorsement by governments. Where possible, it has relied on the ordinary meaning of the language in the trade agreement before it, in order to protect itself from criticism that its interpretation is adding to or diminishing the rights and obligations negotiated by the governments.[201] But when that language is unclear, the Appellate Body has looked beyond it for extrinsic evidence of political agreement.

The judicial search for political agreement has led directly to greener decisions in two ways. First, following the plain text of the trade agreement removed many of the most egregious *Tuna-Dolphin* interpretations, which were based on the panels' narrow views of the goals of GATT rather than on a close reading of its text. When the Appellate Body returned to the text, it found it much less hostile to environmental considerations than the *Tuna-Dolphin* panels had suggested. Second, by looking beyond the trade text the Appellate Body found points of political agreement in non-trade contexts, including in international environmental instruments such as the Rio Declaration and CITES. The almost unavoidable effect, then, of looking for indicia of extratextual agreement in trade/environment cases was to import more environmental principles into the trade jurisprudence.[202]

This result is less surprising, and more in keeping with the role of a tribunal in a government-dominated trade regime, than it may once have seemed. After all, in every conflict between a trade agreement and an environmental law brought to the Appellate Body, there is at least one government defending the environmental law. A tribunal seeking to maximize political support for its decisions among governments could not reasonably conclude that it would best achieve that result by holding that their domestic environmental laws or their obligations under MEAs were inconsistent with their trade obligations. On the contrary, one would expect it to try to avoid or resolve such conflicts in politically satisfactory ways.[203]

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[201] Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 617 (2002) ("[T]he method of literal interpretation is relatively safe, and . . . its results are more easily accepted than results reached by other interpretative tools."); James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT'L L. 1021, 1033 (2002) ("The meaning of the words of the treaty is thus our constant focus in reaching and rendering our judgments."). Ehlermann and Bacchus were two of the original seven members of the Appellate Body. *See also* Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L L. 619, 633 (1998).

[202] *See* Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35, 55 (J. H. H. Weiler ed., 2000) (considering non-WTO international legal rules that may "reflect or prioritize other values and interests than those of trade liberalization . . . counter[ing] the undue privileging of the latter in WTO interpretation").

[203] I therefore find it unnecessary to reach J. H. H. Weiler's view that the Appellate Body is

Nevertheless, the Appellate Body's approach can be criticized. Its literalist approach to interpretation is relatively uncontroversial: an obvious route for a tribunal seeking political support for its decisions is to hew as closely as possible to the ordinary meaning of the text it is interpreting, which under principles both of international law and of common sense is the primary evidence of the agreement of the parties. But its search for political agreement beyond the text can be challenged as unjustifiable politically and legally.

The second Section of this Part defends the Appellate Body against the first count and indicts it on the second. In light of the relative weakness of the legislative arm of the WTO, an attempt by the Appellate Body to look hard for evidence of political agreement is appropriate even if the search takes the tribunal beyond the text. Under either a regime or a stake-holder model, it is reasonable for an international tribunal to ground its decisions on substantive principles on which there is universal, or close to universal, agreement. If those principles are not expressed in the treaty itself, the tribunal must find them elsewhere. Legally, however, the approach of the Appellate Body is flawed. It has used interpretive tools with little coherence or consistency. A far better approach would be to rely on Article 31(3) of the Vienna Convention on the Law of Treaties, which provides a firm basis for connecting a treaty text to certain specified types of extratextual agreement.

Finally, one might suppose that whatever its merits in the abstract, a judicial effort to find a politically acceptable resolution of trade/environment conflicts would be doomed to failure in practice, in light of the inability of governments to agree on how to resolve trade/environment conflicts. But while governments failed to reach a detailed resolution of the conflicts, they did readopt Article XX of GATT, which provides a general framework for resolving conflicts between GATT and non-trade laws, and adopted other provisions and principles that could be used as building blocks for a resolution. Moreover, they continued to negotiate, ratify, and implement MEAs including MEAs with trade restrictions. The failure did not result from a rejection of non-trade interests, therefore, so much as an inability to agree on the precise fit between trade agreements on the one hand and their domestic laws and other international regimes on the other.

This failure left the Appellate Body with a difficult task. Its efforts to build the detailed resolution that governments had failed to establish could have led to the crisis of legitimacy that many predicted, if its decisions had met with widespread rejection. With the important exception of its efforts to

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trying to legitimate WTO dispute settlement with both an "internal" audience (government delegations to the WTO, Secretariat, and dispute resolution panels) and an "external" audience (states and their organs, corporations, non-governmental organizations, the media, and citizens). J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 334 (Roger B. Porter et al. eds., 2001). There is no doubt that the Appellate Body is looking at interests in addition to the pro-trade interests often associated with national trade ministries. But it may be doing so simply by taking into account the positions of governments in cases before it, which extend far beyond narrow pro-trade concerns.

allow amicus briefs, however, the judicial resolution has been politically successful. As the last Section of this Part explains, WTO member governments have moved toward acceptance of most aspects of the judicial resolution.

A. The Appellate Body Two-Step

This Section describes the two-step interpretive process the Appellate Body has followed in the trade/environment cases: (1) to follow the ordinary meaning of the text before it as far as possible; and (2) when the ordinary meaning is unclear, to look beyond the text for substantive principles with widespread political support, upon which an interpretation can be based.

1. Looking for the Ordinary Meaning of the Text

Looking to the ordinary meaning of the language of the text to be interpreted hardly seems a radical innovation. But the GATT panels in the *Tuna-Dolphin* cases had had relatively little concern for the exact language of the text. With respect to GATT Article XX(g), for example, they had read "relating to" to mean "primarily aimed at" (or even "necessary for"); read "are made effective in conjunction with" to mean "primarily aimed at making effective"; and added "within the jurisdiction of the importing country" after "exhaustible natural resources." As Robert Howse has said, the "tendency of panels to assume they understood the general purpose of a provision, and to give sense to it in light of that purpose, without regard to the individual words and phrases, almost always resulted in rulings tilted towards one particular value among the competing values at stake, namely that of liberal trade," and as a result their decisions ignored the balance the trade agreement actually strikes between trade and non-trade values.[204]

The Appellate Body therefore took an important step toward placing its decisions on a more secure basis politically as well as legally when it decided that its starting point would always be the ordinary meaning of the text, and relegated the teleological approach favored by the *Tuna-Dolphin* panels to a secondary, or even tertiary, position.[205]

Reading the text according to its ordinary meaning immediately stripped away many of the obstacles the *Tuna-Dolphin* panels had placed around Article XX. For example, in *Gasoline*, the Appellate Body held that the "least GATT-inconsistent" test could not be imported into Article XX(g)

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[204] Howse, *supra* note 202, at 52–53.

[205] Ehlermann, *supra* note 201, at 615–16:

> Among these three criteria [in Article 31.1 of the Vienna Convention], the Appellate Body has certainly attached the greatest weight to the first, i.e., "the ordinary meaning of the terms of the treaty." . . . The second criterion, i.e., "context" has less weight than the first, but is certainly more often used and relied upon than the third, i.e., "object and purpose."

from Article XX(b) because the paragraphs in Article XX use different language and it would be unreasonable to suppose that the drafters intended the same kind of relationship between the measure and the state interest or policy sought to be promoted.[206] It also held that the ordinary meaning of the Article XX(g) language requires *even-handedness* in the imposition of restrictions on domestic and foreign products and cannot be read to require trade restrictions to be "primarily aimed at" making domestic restrictions effective.[207] Similarly, in *Shrimp-Turtle I*, it refused to read a non-existent geographical limitation into Article XX(g) (although it failed to state clearly that the language does not include any such limitation).[208]

Its focus on straightforward readings also led the Appellate Body to overturn new WTO panel interpretations of agreements that would have increased the likelihood of conflicts with domestic environmental laws. In overruling the strange decision by the *Asbestos* panel that a "likeness" inquiry could not take into account considerations addressed by Article XX, the Appellate Body stressed that the text of Article III:4 offered no support for excluding any evidence concerning likeness *a priori*, and that the "scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4."[209] And in *Hormones*, in rejecting the panel interpretation that Article 3.1 of the SPS Agreement provides a general rule that WTO members must adopt international SPS standards, the Appellate Body emphasized that the ordinary language of Article 3.1 says that parties should "base their [SPS] measures on international standards," not that they should "conform their measures to" such standards.[210]

The Appellate Body's most striking rejection of a WTO panel decision was its refusal to accept the *Shrimp-Turtle I* panel's interpretation of the chapeau to Article XX. Like the *Tuna-Dolphin* panels, the *Shrimp-Turtle* panel took a teleological approach to the chapeau, saying that it must be interpreted in light of the objects and purposes of GATT and the WTO Agreement, which include, according to the panel, "the promotion of economic development through trade," "liberalization of access to markets on a nondiscriminatory basis," and "a multilateral approach to trade issues."[211] As a result, the panel decided that the chapeau "only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX."[212] Since trade restrictions conditioning access to a domestic market on

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[206] *Gasoline* Appellate Body Report, *supra* note 130, at 15–16.
[207] *Id.* at 18.
[208] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 133.
[209] *Asbestos* Appellate Body Report, *supra* note 119, ¶¶ 113, 115.
[210] *Hormones* Appellate Body Report, *supra* note 169, ¶¶ 163–164.
[211] *Shrimp-Turtle I* Panel Report, *supra* note 137, ¶¶ 7.42–43.
[212] *Id.* ¶ 7.44.

compliance with a policy unilaterally prescribed by the importing country would undermine the multilateral trading system, they could not be justified by the chapeau.[213]

The Appellate Body sharply rejected this interpretation, emphasizing that it "finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States."[214] The Appellate Body said,

> [m]aintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretive rule which can be employed in the appraisal of a given measure under the chapeau of Article XX.[215]

The textual focus explains much of the trade/environment jurisprudence, but not all of it. Some provisions, such as the Article XX chapeau itself, do not necessarily have a plain meaning around which political agreement may be assumed. As a result, the Appellate Body has looked beyond the text of the trade agreements.

2. Looking Beyond the Text

In *Hormones*, *Asbestos*, and *Shrimp-Turtle I*, the Appellate Body looked beyond the text before it to cite three substantive principles on which there is

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[213] *Id.* ¶ 7.45:

> This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. If that happened, it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements.

Id. The panel recognized that this conflict could occur only if the policy required by a party was not limited to products exported to it, but rather affected the exporting country's domestic production generally. In that case, "it would be impossible for a country to adopt one of those policies without running the risk of breaching other Members' conflicting policy requirements for the same product . . . ." *Id.* Since as a result of the then-valid federal order, *see supra* note 136, the U.S. law allowed imports of shrimp only from countries that required TEDs on all their trawlers, not just those harvesting shrimp for the U.S. market, it could have exactly this type of sweeping effect on domestic production. *Shrimp-Turtle I* Panel Report, *supra* note 137, ¶ 7.51.

[214] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 121.

[215] *Id.* ¶ 116. Moreover, the Appellate Body said that the panel's interpretation threatened to render Article XX "inutile," because "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another the exceptions (a) to (j) of Article XX." *Id.* ¶ 121. The Appellate Body's characterization overstates the panel decision, which had made clear that import restrictions that did not require general changes in domestic production would not give rise to the conflicting requirements that it feared would undermine the multilateral trade regime. *See supra* note 213.

widespread agreement among WTO members, but for which the trade agreements themselves provide little or no substantive support: (a) each WTO member has the right to determine its own level of protection of health and safety; (b) natural resources are generally understood to include living natural resources; and (c) actions to protect the international environment should normally be based on multilateral agreement.

a. The Right To Determine Domestic Levels of Protection

In *Hormones,* the rejected panel interpretation was not completely implausible: Articles 3.1, 3.2, and 3.3 of the SPS Agreement do encourage states to adopt international standards, and they could be read as creating a general rule that states must do so unless they can show that they satisfy the strict requirements for adopting a measure with a higher level of protection. In explaining why the panel's interpretation failed, the Appellate Body did not stop at the ordinary language of the provisions. It also looked to the object and purpose of Article 3, which it said is to harmonize SPS measures in the future, rather than in the "here and now." And it emphasized that the right of each WTO member to determine its own level of protection of health and safety is an important "autonomous" right, rather than an exception from a general obligation to base SPS measures on international standards, and that the WTO members had not clearly agreed to impose upon themselves the onerous obligation to conform to international standards.[216] In support, it cited the "interpretative principle of *in dubio mitius*," which it described as stating that "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation."[217]

Where did it find the autonomous right of each government to set its own domestic levels of protection? The Appellate Body cited Article 3.3, but that article provides that a party may introduce or maintain SPS measures resulting in a higher level of protection than the international standard only if there is a scientific justification or as a consequence of the level of protection the party determines to be appropriate in accordance with the agreement's specific requirements on risk assessment.[218] In other words, the article is a limitation on the ability of WTO members to set their own levels of protection. It seems odd to cite it as authority for a right that is *autonomous*, which means in part "free of external influence or control."[219] It seems stranger in light of the fact that the SPS Agreement includes an article entitled "Basic Rights and Obligations" that does not refer to this right at all.[220]

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[216] *Hormones* Appellate Body Report, *supra* note 169, ¶¶ 104, 165, 172.

[217] *Id.* ¶ 165 n.154.

[218] *Id.* ¶¶ 104, 172 (citing SPS Agreement, *supra* note 87, art. 3.3).

[219] THE NEW SHORTER OXFORD ENGLISH DICTIONARY 153 (1993).

[220] SPS Agreement, *supra* note 87, art. 2.1. The closest it comes is the statement that "Members have the right to take [SPS] measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement." *Id.*

In *Asbestos*, the panel and Appellate Body again emphasized, this time in the context of GATT Article XX(b), that "WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation."[221] The Appellate Body made clear that while a measure could not be considered "necessary" under Article XX(b) if there is a reasonably available alternative that is more consistent with GATT, an alternative is only reasonably available if it would achieve the level of protection sought by the party.[222] In that case, neither the panel nor the Appellate Body attempted to base the right on the text of the treaty at all. Instead, the panel simply said that it has long been established, and the Appellate Body noted that the parties did not dispute its existence.[223]

On this point, of course, the Appellate Body must be right. WTO members do not dispute that they have retained the right to set their own domestic levels of protection to the extent that they have not agreed to limit the right through the disciplines of agreements such as the SPS Agreement. On the contrary, the right to set such levels is an important element of their sovereignty. By emphasizing its continuing existence and importance, the Appellate Body reassured governments that it will impose no limits on the right beyond those clearly established by the agreements themselves and, at the same time, made the interpretation of otherwise ambiguous provisions more politically palatable.

b. The Scope of Exhaustible Natural Resources

Another issue that led the Appellate Body to look beyond the language of the text is whether the term "exhaustible natural resources" in Article XX(g) includes living resources, such as endangered species of sea turtles. One can argue, as the U.S. government did in *Shrimp-Turtle I*, that endangered turtles fit within the plain meaning of the text: they are indisputably natural resources and, at least when on the brink of extinction, they are obviously exhaustible.[224] On the other hand, the complaining parties argued that a reasonable interpretation would be that the provision refers only to finite resources, such as minerals. They pointed out that reading "exhaustible natural resources" to include living resources appears to make "exhaustible" redundant.[225]

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[221] *Asbestos* Appellate Body Report, *supra* note 119, ¶ 168; *Asbestos* Panel Report, *supra* note 117, ¶ 8.179.

[222] *Asbestos* Appellate Body Report, *supra* note 119, ¶ 172.

[223] *Id.* ¶ 168; *Asbestos* Panel Report, *supra* note 117, ¶ 8.179; *see also Symposium: The Greening of the World Trade Organization*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 147, 157 (2002) (including Steve Charnovitz's statement that "as far as I can tell, this is a new pronouncement of WTO law unsupported by any text in the GATT"). In *Salmon*, the Appellate Body reached a similar interpretation of Article 5.6 of the SPS Agreement, but it had the benefit of some text on which to draw. *See Salmon* Appellate Body Report, *supra* note 180, ¶¶ 194, 199.

[224] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 25.

[225] *Id.* ¶ 127.

Looking first to the words of the provision, the Appellate Body agreed with the United States that they are not limited to non-living natural resources and that living resources are susceptible to exhaustion or extinction.[226] But, again, it then went beyond the language in search of agreed principles outside the text. It found them in two treaties—the 1982 UN Convention on the Law of the Sea and the 1992 Convention on Biological Diversity—and two non-binding documents—Agenda 21, adopted by the UN Conference on Environment and Development in 1992, and a resolution adopted in conjunction with the signature of the Convention on the Conservation of Migratory Species of Wild Animals in 1979. All of these documents had been signed or adopted by a very wide range of governments, and each refers to natural resources as including living resources.[227]

How did the Appellate Body tie these indicia of agreement to the text of the provision being interpreted? It said that the WTO Agreement recognizes the goal of sustainable development in its preamble, and, based on that "perspective," it stated that "the generic term 'natural resources' . . . is not 'static' in its content or reference but is rather 'by definition, evolutionary.'"[228] It then cited the environmental instruments as evidence of what the term had evolved to mean. It also referred to the principle of effectiveness in treaty interpretation in concluding that measures to conserve living, as well as non-living, exhaustible natural resources may fall within Article XX(g).[229] Although it has cited the principle of effectiveness in other cases for the uncontroversial proposition that interpretations should be avoided that reduce "whole clauses or paragraphs of a treaty . . . to redundancy or inutility,"[230] that proposition could not support the Appellate Body's decision here, since the interpretation of "exhaustible natural resources" urged by the complaining parties could not reduce Article XX(g) to redundancy or inutility. Instead, the Appellate Body seemed to be referring to the principle in a broader, teleological sense, as a method of reading the text to make effective the goal of sustainable development.

c. Multilateral Approaches to Protecting the Extraterritorial Environment

In the two preceding examples, the Appellate Body used the evidence of external agreement to support an interpretation it had already based on the language of the text itself. But in interpreting the chapeau of Article XX in

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[226] *Id.* ¶ 128.

[227] *Id.* ¶ 130.

[228] *Id.* ¶¶ 129–130.

[229] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 131.

[230] WTO Appellate Body Report on United States—Continued Dumping and Subsidy Offset Act of 2000, WTO Doc. WT/DS217/AB/R, ¶ 271 (Jan. 16, 2003); *see also Gasoline* Appellate Body Report, *supra* note 130, at 20–21.

Shrimp-Turtle I, the Appellate Body appeared to rely primarily on an extratextual principle.

Although the Appellate Body rejected the *Shrimp-Turtle I* panel decision as not supported by the language of the text, the Appellate Body's own interpretation of the chapeau made little or no effort to find the ordinary meaning of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade." Instead, as described above, it read the chapeau as giving it broad powers to strike a balance, or find a "line of equilibrium," between trade and environmental interests. As Sanford Gaines has argued, this interpretation seems far removed from the language of the chapeau.[231] Indeed, the Appellate Body appeared to be doing exactly what the panel had done—looking first to general objects and purposes, rather than specific language, for guidance as to how to resolve particular cases. The chief difference was that, unlike the panel, the Appellate Body gave substantial weight to environmental concerns as well as trade goals.[232]

Construing language in light of its object and purpose is, of course, an approved method of interpretation under the Vienna Convention, although not one that the Appellate Body normally favors. But by finding equal and opposing teleological interests, the Appellate Body's reading of the chapeau gave it broad, if not limitless, room to locate the line of equilibrium between trade and environmental concerns wherever it saw fit.

As the previous Part describes, the Appellate Body used the freedom of interpretation it had given itself to condemn unilateral and praise multilateral approaches to protection of common environmental resources. To support this approach, it reached beyond the text of the agreement to the chief agreed principle to emerge from the political efforts to resolve trade/environment legal conflicts: that actions to protect the transboundary or global environment should normally be based on multilateral agreement rather than be taken unilaterally. The Rio Declaration expresses the principle most clearly, but it also runs throughout the 1996 report of the WTO CTE.[233]

To achieve widespread political acceptance, any judicial resolution of trade/environment conflicts involving protection of the regional or global environment had to incorporate this principle. The difficulty for the Appellate Body was that Article XX—the obvious locus of resolution of such conflicts—provides no apparent link to it. By converting the chapeau into a mechanism to balance opposing teleological interests, the Appellate Body

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[231] Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739 (2001).

[232] *See Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 153 (concluding that the preambular language of the WTO Agreement on using the world's resources in accordance with the objective of sustainable development "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement," including GATT 1994).

[233] Rio Declaration Princ. 12, *supra* note 54; 1996 CTE Report, *supra* note 107, ¶ 171 (endorsing "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature").

gave itself an opening to incorporate the principle of multilateralism as the fulcrum on which the balance would be struck.

Although superficially similar to the concerns of the *Tuna-Dolphin* and *Shrimp-Turtle I* panels, the use of multilateralism by the Appellate Body is quite different, and more politically (if not legally) persuasive. The fears of the earlier panels that allowing parties to condition access to their markets on the adoption of certain environmental policies by their trading partners might lead to the disintegration of the multilateral trading regime never seemed very realistic. As a practical matter, few WTO members have the ability to influence other states by conditioning access in this way. The Appellate Body focused its attention instead on what may be a more deeply felt political objection to unilateral trade restrictions aimed at protecting a common resource: their disregard of the conditions in and views of less powerful states with respect to the resource.

Thus, criticism of the U.S. shrimp/turtle law as having a coercive effect on foreign governments by requiring them to adopt "a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels"[234] looks very similar to the previous panels' criticisms of U.S. unilateralism. But rather than warn of damage to the multilateral trading system, the Appellate Body said that it was the unilateral requirement of rigid uniformity itself that was unacceptable. Specifically, it said that problematic discrimination results when an import restriction "does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in [the] exporting countries."[235] The Appellate Body did not explain how its interpretation follows from the language of the chapeau more naturally than the panel's interpretation did,[236] but it may better reflect the nature of the fundamental political objection to unilateral measures: not that everyone will take them and thus bring down the WTO regime, but that the United States (and perhaps the EU) will continue to take them in disregard of other states.

Similarly, criticizing the United States for not pursuing a multilateral agreement on turtle conservation with other WTO members seems to echo the conclusions of the earlier panels,[237] but the Appellate Body situated the criticism differently in its analysis. It did not say that multilateralism is preferable because it avoids the threat unilateralism poses to the WTO trading system. Instead, it stressed that multilateral cooperation to protect sea turtles

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[234] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 163 (emphasis in original).

[235] *Id.* ¶ 165.

[236] Gaines, *supra* note 231, at 784 (suggesting that the Appellate Body found the inflexible approach of the U.S. law "impermissible under the chapeau of Article XX, not because it discriminated between countries where the *same* conditions prevail, but because it *refused to discriminate* in trade treatment between countries where *different* conditions may prevail. This is the exact converse of the chapeau language.").

[237] *See, e.g.*, *Shrimp-Turtle I* Panel Report, *supra* note 137, ¶ 7.55 (noting that a way to avoid the problems of unilateralism is "[t]he negotiation of a multilateral agreement or action under multilaterally defined criteria").

is necessary from an *environmental* point of view. In support, it cited not only Principle 12 of the Rio Declaration and the 1996 CTE report, but also the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals.[238] And it used the Inter-American Convention between the United States and several Latin American and Caribbean countries to show that MEAs are important not because they avoid damage to the trading regime, and not just because they are environmentally preferable, but because they provide evidence of how an acceptable balance between trade and environmental measures may be reached cooperatively rather than on the basis of the unilateral decisions of one powerful country.

In the same way, the Appellate Body's criticisms of the U.S. certification process were not persuasively based on the language in the chapeau concerning arbitrary or unjustifiable discrimination. As Gaines argues, it is hard to see how these procedures necessarily discriminated among applicant countries if, whatever their inadequacies, they were applied to all countries equally.[239] But, again, the Appellate Body did not appear primarily concerned with tying its resolution to the specific language of the chapeau; instead, it based its resolution on the general political opposition to unilateral disregard of the views of other states with respect to treatment of a common resource.[240]

It may be surprising that in *Shrimp-Turtle II* the Appellate Body said that the importing country need only make serious, good-faith efforts to negotiate (rather than actually conclude) an agreement, and that the revised, more flexible U.S. guidelines were acceptable because they no longer required uniformity in the policies of trading partners even though they did still require those policies to be comparable in effectiveness to those of the United States.[241] Obviously, this resolution limits the potential unilateralists—in particular, the United States—less than many WTO members preferred. Many governments undoubtedly wanted the Appellate Body to require conclusion of an agreement justifying trade restrictions in order to meet the requirements of the chapeau, even though, as the Appellate Body pointed out, that outcome would

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[238] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 168.

[239] Gaines, *supra* note 231, at 824:

> However legitimate the criticism of the "informal and casual" procedures for making Section 609 certification decisions, *Shrimp-Turtle*'s blanket conclusion that those who are denied certification have been "discriminated against" is a complete *non sequitur*. Those who received certification were, after all, subject to the same non-transparent process as the others. There is no claim of discrimination in the procedures followed or decision criteria applied; the only difference is the result.

[240] The need of the Appellate Body to show that this opposition was shared even by the United States may explain its emphasis on the statement in Section 609 directing the Secretary of State to initiate negotiations of international agreements for the protection of sea turtles. *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 167. Like much of the rest of its analysis, the emphasis has no basis in the text of the chapeau. Gaines, *supra* note 231, at 810–11.

[241] *Shrimp-Turtle II* Appellate Body Report, *supra* note 159, ¶¶ 123–124, 144.

give any country party to the negotiations a veto over whether the importing country could fulfill its WTO obligations.[242]

But drawing the line of equilibrium at negotiation rather than conclusion of an agreement is consistent with the nature of the political concern underlying the decisions: the importing country must show respect for, not complete deference to, the opinions of other states. A flat prohibition on the use of Article XX in the absence of multilateral agreement would have called into question the application of long-standing MEAs to non-parties, ignored the ways that unilateral action may be necessary to spur multilateral agreement,[243] and been unacceptable to the United States, the single most powerful member of the WTO. Requiring unilateral flexibility and multilateral negotiation avoids these problems. At the same time, it draws on the political principle that multilateral approaches to common environmental problems are preferred and addresses the underlying concern that the United States will simply ignore the interests of other states.

The Appellate Body's resolution of trade/environment conflicts concerning the transboundary or global environment is not only clever politically. It is also probably the optimal solution from an environmental point of view, since it furthers multilateral cooperation, the best long-term approach to environmental protection; at the same time it does not unduly restrict unilateral action, which may be the only feasible short-term approach.

B. An Appropriate Role for the Appellate Body?

In this Section, I defend the Appellate Body's goal of finding extratextual political agreement in the absence of clear textual language as an appropriate way to compensate for the lack of a strong legislative arm in the WTO. Its *ad hoc* use of interpretive tools as a means to that end, however, has been incoherent and unpredictable. I suggest that it use a better method to identify relevant extratextual agreements based on Article 31(3) of the Vienna Convention on the Law of Treaties.

1. Defending Its Aim

Courts are commonly seen as legitimate and authoritative only to the extent that they are independent of political influence, except as distilled into law. For a tribunal to look for extratextual indicia of political agreement may therefore seem questionable.

But the role of a tribunal in an international organization gives rise to different considerations than the role of a court in a domestic legal system. The

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[242] *Id.* ¶ 123.

[243] *See generally* Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999); Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

legislative body of the WTO is the General Council, composed of all WTO member governments. Although the WTO Agreement allows decisions to be taken by a super-majority,[244] the WTO members have been unwilling to depart from their strong tradition that all decisions are made by consensus. Since unanimous agreement is often impossible to reach, as a practical matter the WTO members generally cannot overturn an interpretation by the Appellate Body in the way domestic legislative bodies typically can overturn an interpretation by a domestic court.[245] In the words of Claus-Dieter Ehlermann, this inability "reveals not only a serious institutional weakness, but also a flaw with respect to the fundamental principle of democracy which requires that judges are subject to the law, and that the law can be changed by the legislator."[246]

Some scholars believe that governments in international bodies are not particularly representative of those whose interests are affected and that a liberal, or stakeholder, approach that allows direct participation in the WTO by interested private parties would be fairer and more efficient.[247] Others contest that view, arguing that governmental positions in the WTO already reflect the concerns of their domestic interest groups and that allowing private parties to participate in the WTO would merely increase the power of well-financed interests.[248] But whether one views governmental positions as the only positions that count in international relations, as poor proxies for the real interests, or as fairly good representations of those interests, it seems self-evident that an international tribunal should not ignore evidence of widespread governmental agreement when that agreement is relevant to a dispute before it. Rule by judicial fiat is contrary to the goals of a state-centered regime and of a liberal international order.

The problems judicial supremacy could create appear obvious with respect to potential conflicts between trade requirements and social concerns such as environmental protection, since an inability to resolve the conflicts satisfactorily could call into question governmental and popular support for the entire multilateral trade regime.[249] Many scholars have argued that a po-

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[244] The WTO Agreement states that unless otherwise provided, "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." WTO Agreement, *supra* note 2, art. IX:1, 33 I.L.M. at 1148. Interpretations of agreements may be made by a three-fourths vote. *Id.* art. IX:2, 33 I.L.M. at 1148. The voting requirements for amendments defy brief summary, but many amendments would not require consensus. *Id.* art. X, 33 I.L.M. at 1149.

[245] Frieder Roessler, *Are the Judicial Organs of the World Trade Organization Overburdened?*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 203, at 324. Of course, constitutions may constrain the authority of domestic legislatures to overturn judicial interpretations, particularly of the constitution itself. But even the super-majorities required for amendments to the U.S. Constitution do not require unanimity among the legislators. U.S. CONST., art. V.

[246] Ehlermann, *supra* note 201, at 636.

[247] *See, e.g.*, Shell, *supra* note 197.

[248] *See, e.g.*, Shaffer, *supra* note 105, at 68; *see also* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221 (2003).

[249] *See* Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 757

litical resolution of such conflicts would provide more legitimacy and certainty than a judicial resolution.[250] Some have suggested that to facilitate such a resolution, the Appellate Body should refuse to decide difficult issues not conclusively resolved by the text of the trade agreement.[251] But expecting governments to produce a detailed resolution of these issues has proved unrealistic, as Part III shows. There is no reason to think that judicial refusal to decide a difficult case would lead to political agreement. And in any event, the Appellate Body believes that it has no choice but to decide the cases brought to it, no matter how difficult or controversial they may be.[252]

In deciding difficult cases, the Appellate Body often must face issues that are not clearly resolved by the ordinary meaning of the text. In those situations, it seems reasonable for the Appellate Body to look beyond the text for substantive principles on which there is agreement among WTO members. This approach is quite different from either legislating policies itself or developing multi-factor balancing tests that allow the Appellate Body to "struggle openly" with the conflicting values raised by these cases.[253] Finding additional ways to draw on political agreement, however reached, helps to compensate for the relative weakness of the WTO's legislative arm without turning the Appellate Body itself into a legislature. And looking for such principles beyond the trade context has additional benefits. As Robert Howse has argued, doing so may help to avoid undue emphasis on the goal of trade liberalization and avoid conflicts between trade law and other international legal regimes.[254]

2. *Criticizing the Method*

For a disproportionately powerful tribunal to look beyond the text before it for evidence of political agreement may be politically desirable, but the Appellate Body has not done so in a legally sound manner. As Ehlermann, a former jurist on the Appellate Body, has said, "[t]he choice of a certain interpretative method entails certain constraints. The interpreter has to follow the chosen method coherently and consistently. If he does not do so, his credibility, and therefore his authority and legitimacy, will suffer."[255]

To that end, the Appellate Body has regularly said that it relies on the interpretive rules in Articles 31 and 32 of the Vienna Convention on the Law

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(1999); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 464 (1996).

[250] *See* GARY P. SAMPSON, TRADE, ENVIRONMENT, AND THE WTO 111 (2000); Charnovitz, *supra* note 120, at 101; Gaines, *supra* note 231, at 855–60; Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 935–36 (1999).

[251] Dunoff, *supra* note 249, at 757–61; *see also* Shell, *supra* note 197, at 871–72.

[252] Ehlermann, *supra* note 201, at 633; Bacchus, *supra* note 201, at 1028.

[253] Jeffrey Dunoff persuasively warns against both approaches. Dunoff, *supra* note 249, at 754–56.

[254] Howse, *supra* note 202, at 55, 58.

[255] Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 J. INT'L ECON. L. 695, 701 (2003).

of Treaties.[256] Moreover, the Appellate Body has made clear that it will consistently apply the most fundamental of those rules—that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose[257]—by looking first to the text of the treaty, rather than to its context or its object and purpose.[258]

It has thus selected an interpretive method and has generally followed it "coherently and consistently." But it has abandoned this method when it has looked for evidence of extratextual political agreement in the trade/environment cases. Instead, it has used an ad hoc assortment of interpretive tools, including in dubio mitius, the principle of effectiveness, and "evolutionary" terms (as well as, occasionally, no clear interpretive rule at all). These rules are not found in the Vienna Convention. Alone, that would not be enough to disqualify them, since the Vienna Convention does not purport to codify every customary norm of interpretation.[259] Their more fundamental flaw is that none of them is suited to coherent, consistent application.

In dubio mitius, or the principle of "restrictive interpretation," has long been criticized. One of its chief critics, Hersch Lauterpacht, said that it

> does not follow—it is often opposed to—the paramount principle of interpretation in good faith which requires that both parties to the contract should be treated on an equal footing and that the party upon which the treaty has conferred benefits in return for valuable consideration should not have its rights whittled away as the result of restrictive interpretation of the obligations of the party which obtained the consideration.[260]

Although the Permanent Court of International Justice regularly cited the rule, it made clear that it would use it only as a last resort, and in practice almost never used it at all.[261] Lauterpacht predicted in 1958 that the rule was

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[256] The Appellate Body has read the Dispute Settlement Understanding as instructing it to apply interpretive rules found in customary international law, and has held that Articles 31 and 32 contain such rules. *See* DSU, *supra* note 99, art. 3.2; *Gasoline* Appellate Body Report, *supra* note 130, at 17 (Article 31); WTO Appellate Body Report on *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, Nov. 1, 1996, at 11 (Article 32).

[257] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[258] *See supra* note 205.

[259] SINCLAIR, *supra* note 61, at 117–18.

[260] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 305–06 (1958); *see also* LORD MCNAIR, THE LAW OF TREATIES 365, 765 (1961); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 636 (5th ed. 1998) (criticizing the principle of restrictive interpretation as question-begging).

[261] *Territorial Jurisdiction of the International Commission of the River Oder*, 1929 P.C.I.J. (Ser. A), No. 23, at 26:

> This argument . . . must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to

dying out, and he appears to have been right. The only decision by the International Court of Justice (and the only post-1963 decision of any kind) the Appellate Body cited in *Hormones* in favor of the rule was *Nuclear Tests*, in which the ICJ said that it would apply a restrictive interpretation to unilateral statements limiting a state's freedom of action, a situation that does not raise Lauterpacht's concern regarding the loss of reciprocal benefits.[262]

In *Shrimp-Turtle I*, the Appellate Body referred to the principle of effectiveness in treaty interpretation to support its conclusion that Article XX(g) applies to living as well as non-living exhaustible natural resources.[263] The principle of effectiveness has two versions: interpretations that reduce parts of the text to redundancy should be avoided, and an interpretation should be adopted that gives effect to the purpose of the text or instrument as a whole.[264] As noted above, the Appellate Body has often relied on the former, uncontroversial version.[265] But in *Shrimp-Turtle I*, the Appellate Body seemed to refer to the principle in the latter sense, as a method of reading the text to make effective the goal of sustainable development. Read in this way, the principle pursues the teleological approach to interpretation, and it suffers from the problems of that approach: when an agreement has multiple objects and purposes that point in different directions, as the WTO Agreement and GATT do, the principle gives the interpreter no basis to choose between them.[266]

Similarly, by treating the phrase "natural resources" as "by definition, evolutionary" in *Shrimp-Turtle I*, and then looking to several multilateral environmental instruments to inform its meaning, the Appellate Body gave itself interpretive freedom at the price of using an unpredictable and potentially incoherent interpretive rule.[267] Evolutionary terms are usually treated as exceptions to a general presumption that parties intend their treaty obligations

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> definite results; there are many other methods of interpretation . . . it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.

Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 61–62 (1949).

[262] *Hormones* Appellate Body Report, *supra* note 169, ¶ 165 n.154; Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267.

[263] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 131.

[264] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)*, 62 BRIT. Y.B. INT'L L. 1, 44 (1991).

[265] *See supra* note 230.

[266] *See* Myres S. McDougal, et al., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 170 (1967) ("[S]ituations may occur in which both parties involved may contend that the acceptance of their claim would maximize the effectiveness of an agreement, and it is in fact difficult to choose between them on this ground."). Moreover, when the principle of effectiveness is used together with the principle of restrictive interpretation, they may be contradictory. LAUTERPACHT, *supra* note 260, at 67 ("The greater effectiveness of a provision can be secured, by dint of liberal interpretation, only at the expense of the freedom of action of the state bound by it.").

[267] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 130.

to be interpreted in light of the law as it existed at the time the treaty was concluded, on the ground that parties sometimes intend the meaning of terms to evolve together with the development of international law.[268] But the Appellate Body did not clearly explain where it found the basis for its conclusion that the parties intended the meaning of this term to evolve.[269] Moreover, it suggested that the need to interpret texts "in the light of contemporary concerns of the community of nations" is not limited to "evolutionary" texts, but rather extends to the treaty as a whole.[270] It may well be that a general presumption in favor of evolutionary interpretation is appropriate with respect to international organizations with broad, ongoing purposes such as the WTO.[271] If so, however, the Appellate Body's emphasis on whether a particular phrase is evolutionary seems unnecessary and misleading. The result of its selective identification of an evolutionary text is that WTO members are left with no clear guidance on when they may or must look to "contemporary" agreements outside the WTO umbrella to elucidate the meaning of disputed texts within it.

Each of these rules might acquire more predictability were the Appellate Body to use it regularly and consistently. But the Appellate Body has not done so. Other than the instances discussed, it has never relied on *in dubio mitius*, the teleological principle of effectiveness, or the "evolutionary" rule. One is left with an impression of *ad hoc*-ism, feeling that the Appellate Body will use whatever tool comes to hand in a particular context to tie the text under review to a multilaterally agreed position.

3. An Alternative Approach

The Appellate Body could find evidence of political agreement without using such problematic interpretive tools. In some cases, the Appellate Body could simply rely more heavily on the ordinary meaning of the text in its context. It did look first to the ordinary meaning in concluding that the SPS Agreement does not require states to adopt international standards and that

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[268] 1 OPPENHEIM'S INTERNATIONAL LAW 1281–82 (Robert Jennings & Arthur Watts eds., 1992); Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Part One)*, 60 BRIT. Y.B. INT'L L. 1, 128–29 (1989).

[269] The Appellate Body thus ran the risk of using the interpretive principle in just the way that Hugh Thirlway cautions against, as a means of "reading back into the intentions of the States concerned at the time they adopted this text considerations which, however firmly established they may be in present-day law, and however desirable it might have been had they been foreseen at the time, were not in fact present to the minds of those concerned." THIRLWAY, *supra* note 268, at 143.

[270] *See Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶¶ 129, 130 n.109 ("[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation") (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 [hereinafter *Legal Consequences*]).

[271] *See* Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 377, 439 (1976).

"natural resources" in GATT Article XX(g) are not limited to non-living resources. It might have interpreted even the more ambiguous language of the chapeau of Article XX to support its result: relying on rigid unilateral measures in the absence of attempts to find a multilateral solution to regional or global environmental problems could be seen as unjustifiable discrimination against other countries in favor of the country applying the trade restriction. Specifically, the failure to take into account the views and interests of other affected countries could lead to a presumption that the resulting unilateralism will unjustifiably discriminate against those interests. Although that concern runs throughout its decision in *Shrimp-Turtle I*, the Appellate Body did not spell out a connection between its desire for multilateralism and the language of the chapeau.[272]

When the ordinary meaning is not clear and indicia of extratextual political agreement could help to support or supply a potential interpretation, there are better interpretive tools available to the Appellate Body than those it has used in the trade/environment cases to find such agreement. Those tools are located in Article 31(3) of the Vienna Convention on the Law of Treaties, which instructs the interpreter to take into account, together with the context of the terms of the treaty:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[273]

Like the interpretive tools described above, Article 31(3) would allow the Appellate Body (and WTO panels) to connect a text under review with political agreement outside the text and would provide a way for non-trade agreements to inform interpretation of the WTO treaties.[274]

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[272] In contrast, the panel in *Shrimp-Turtle II* did seem to reach this conclusion. *Shrimp-Turtle II* Panel Report, *supra* note 153, ¶ 5.69:

> [W]hat is at issue at this stage is the existence of "unjustifiable discrimination" as a result of: (i) an absence of or insufficient negotiation with some Members compared with others and . . . (ii) the unilateral nature of the design and application of the original measure which did not allow for the particular situation of each exporting country to be taken into account.

[273] Vienna Convention, *supra* note 257, art. 31(3).

[274] Howse argues that Article 31(3)(c), in particular, mandates the consideration of non-WTO international law. In addition, he points out that Article 31(3) helps to provide a basis for a dynamic interpretation of WTO texts, which he believes better reflects the views of the "broader community affected by interpretive decisions" than would reliance on an "originalist" approach to interpretation. Howse, *supra* note 202, at 56–58. But the community whose views

It has several advantages over those tools, however:

- drawing on political points of agreement through a method of interpretation that itself reflects a broad consensus and that the Appellate Body has already pledged to use regularly would increase the political acceptability of its resolution;[275]
- Article 31(3) is an accepted way of avoiding the limitations some believe the DSU places on WTO tribunals' authority to refer to international law outside the WTO agreements;[276] and
- Article 31(3) would more predictably identify agreements that are clearly relevant to the interpretive issue before the tribunal.

The first two of these advantages appear self-evident, but the third may require elaboration. Each of the three categories in Article 31(3) requires not only evidence of agreement outside the treaty text under review, but also a specific connection between the extratextual agreement and the treaty text. If the connection between the agreement and the treaty text is direct—if the

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are taken into account through Article 31(3) is still composed of the states that are parties to the treaties under review or that can participate in the creation of international law applicable between such parties. Article 31(3) provides no avenue for non-governmental actors to participate directly in the shaping of interpretive decisions.

For arguments that WTO tribunals should take Article 31(3) into account in interpreting the TRIPS Agreement, *supra* note 113, see Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 426 (1998); Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 465–70 (1997).

[275] *See* Howse, *supra* note 202, at 54 :

> In some senses, the very decision to follow these general public international law interpretative norms enhances the legitimacy of the dispute settlement organs in adjudicating competing values—because these norms are common to international law generally, including regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.

But see Hudec, *supra* note 201, at 635:

> [T]he eventual political acceptability of the WTO's policing function over domestic regulatory measures will continue to depend, as in the past, not on the persuasiveness of the legal standards being applied, but on the ability of WTO tribunals to find the right answers in these cases—i.e., their ability to know when to prohibit those regulatory measures viewed as illegitimate by the larger community, and when to let pass those measures that the community views as bona fide regulation.

[276] Some scholars read DSU Article 3.2, which states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements," as generally preventing the Appellate Body as well as the DSB from applying non-WTO law. *E.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 342 (1999). They recognize, however, that Article 3.2 also provides that the dispute settlement system of the WTO serves to "clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law," and that as a result, tribunals may take non-WTO law into account pursuant to Article 31(3), which is generally considered to codify a customary rule of interpretation. *Id.* at 343.

agreement is "regarding" the interpretation of the treaty—then the agreement need not itself be legally binding in order to qualify under Articles 31(3)(a) or 31(3)(b). Conversely, if the extratextual agreement is so strong that it rises to the level of customary or conventional international law, then the connection to the text can be much weaker: the agreement need only be "relevant" to be taken into account under Article 31(3)(c).[277]

Either way, Article 31(3) requires some indication of assent to, or at least acquiescence to, the agreement by all of the parties to the treaty. Although it has been suggested that the article uses the term "parties" to mean the parties to a particular dispute,[278] that reading is foreclosed by the Vienna Convention itself, which defines "party" to mean a state bound by a treaty.[279] And by referring to "the parties," each of the sections of Article 31(3) necessarily refers to all rather than only some of the parties.[280]

Some commentators have resisted this straightforward interpretation of Article 31(3) because they believe that too few extratextual agreements will be able to satisfy it.[281] But it is easier than it may first appear for such agreements to be considered. First, Article 31(3) does not prevent the parties from jointly deciding that subsequent agreements may be relevant to interpretation even if not all of the parties have adopted them. For example, the WTO Agreement allows the General Council to make interpretive decisions on the basis of a three-fourths majority.[282] Second, subsequent agreements, whether reached expressly or through practice, may establish an interpretation of a treaty that is not subject to challenge by states ratifying the treaty later. In other words, new parties have to take the treaty as it is when they join it, including any interpretations of it already established under Article 31(3). Third, rules of customary international law potentially relevant under Article 31(3)(c) may bind nations that have not specifically agreed to them,

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[277] To be relevant, a rule of international law need not be specifically regarding the treaty under interpretation, much less rising to the level of potential conflict with it. Rather, it must only be "related in some way to the treaty norm being interpreted." Philippe Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 102 (1998).

[278] David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 411 (1998).

[279] Vienna Convention, *supra* note 257, art. 2(1)(g) ("'[P]arty' means a State which has consented to be bound by the treaty and for which the treaty is in force").

[280] *See* ILC Final Draft Articles and Commentary [on the Law of Treaties], *reprinted in* 2 ARTHUR WATTS, THE INTERNATIONAL LAW COMMISSION 1949–1998, at 689 (1999):

> The text provisionally adopted in 1964 [which eventually became Article 31(3)(b)] spoke of a practice which "establishes the understanding of all the parties." By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties' necessarily means 'the parties as a whole."

[281] *E.g.*, Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 781 (2002) (addressing Article 31(3)(c)).

[282] *See supra* note 244.

at least as long as the nations have not persistently objected to their formation.[283]

Fourth, subsequent practice establishing the agreement of the parties under Article 31(3)(b) need not be by every party; the practice need only be accepted by all, and the acceptance can be tacit.[284] MEAs containing trade restrictions provide an example of such subsequent practice. From the early 1970s, when CITES was drafted and adopted, to the present, when it and other major MEAs with trade restrictions have attained close to universal membership,[285] the vast majority of GATT parties have negotiated, signed, and ratified the MEAs without contemporary claims by other GATT parties that the trade restrictions violate GATT.[286] While "negative practice"—i.e., "the absence of action which would have been expected had a certain interpretation of a treaty been the correct one"—should be carefully employed,[287] when coupled with such a long-standing positive practice, there can be little doubt that GATT parties have accepted the MEAs as consistent with GATT.[288]

This practice has specific implications for Article XX, as the only GATT provision whose interpretation can avoid conflicts with the MEAs. Because

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[283] Brownlie, *supra* note 260, at 4–11.

[284] T. O. ELIAS, THE MODERN LAW OF TREATIES 76 (1974); *see also* ILC Final Draft Articles and Commentary, *supra* note 280, at 689 (stating that the word "all" was omitted from Article 31(3)(b) "merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.").

[285] As of late 2003, CITES had 164 parties, Basel had 158, and the Montreal Protocol had 184, while the WTO had 146 members. See their respective Web sites: http://www.cites.org/eng/parties/index.shtml (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review); http://www.basel.int/ratif/ratif.html (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review); http://www.unep.org/ozone/ratif.shtml (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review); http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review).

[286] In fact, the level of participation by WTO members in the MEAs is so high that all recognized sovereign states that belong to the WTO are also party to at least one MEA with trade restrictions. In particular, every WTO member but Hong Kong, Macao, and Taipei belongs to the Montreal Protocol. Any MEA whose membership includes every state member of the WTO must be taken into account under Article 31(3)(c) to the extent that its provisions are "relevant."

[287] Thirlway, *supra* note 264, at 50.

[288] Joost Pauwelyn would limit subsequent practice to "agreements in the specific WTO context," because of the "strict requirement" of agreement between the parties. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 574 (2001). But under Article 31(3)(b) of the Vienna Convention, the agreement is to be established *by the practice itself.* If an agreement under WTO auspices were necessary under Article 31(3)(b), that provision would be indistinguishable from Article 31(3)(a). Moreover, there is no reason why MEAs restricting trade for environmental reasons could not be considered practice "in the application of" Article XX of GATT. Pauwelyn also argues that under Article 31(3)(c), a rule that has been "at least implicitly accepted or tolerated by all WTO members" could be considered to express a "common understanding" of all members relevant to interpretation of a WTO agreement. *Id.* at 575–76. This reading overlooks the requirement that the rule of international law be not just a common understanding, but actually "applicable" between the parties, which requires something more than just tacit toleration, at least for conventional law. In both respects, I think he strains to place a burden on Article 31(3)(c) that Article 31(3)(b) is better suited to bear.

Basel and CITES can only be consistent with GATT if Articles XX(b) and/or XX(g) are not limited to protecting humans, animals, and natural resources within the jurisdiction of the party imposing the trade restriction, the *Tuna-Dolphin* view of extrajurisdictionality cannot be correct. Subsequent practice therefore should have led to a decision in *Shrimp-Turtle I* that measures taken to protect sea turtles outside the jurisdiction of the nation taking the measures are within the scope of Article XX.[289]

Nevertheless, applying Article 31(3) would narrow the range of extratextual agreements that the Appellate Body could take into account. In particular, even widely adopted political declarations such as Rio Principle 12, which the Appellate Body cited in *Shrimp-Turtle I* as evidence of the preference of the international community for multilateral approaches to environmental protection,[290] could be taken into account only if they were "regarding" the text under review (in that case, GATT Article XX), or if they reflected relevant customary international law. Principle 12 would not meet either requirement. Political declarations are far more likely to meet the first criterion if they are made in the WTO context. The WTO members' consensus statement in the 1996 CTE Report that they support and endorse "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" probably does qualify as a subsequent agreement under Article 31(3)(a), especially since the following sentence of the report specifically refers to the need to ensure a "mutually supportive relationship" between WTO agreements and MEAs.[291]

A greater reliance upon Article 31(3) instead of an ad hoc assortment of interpretive tools would not provide indisputable answers to every issue. No interpretive method can. But Article 31(3) would provide a way to consider whether particular extratextual agreements may be taken into account in interpreting WTO texts that is more predictable, more faithful to the most generally accepted interpretive rules, and more likely to identify relevant agreements.

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[289] Doing so would have required the Appellate Body to overturn yet another mistaken element of the *Tuna-Dolphin* decisions. *See Tuna-Dolphin II*, *supra* note 50, ¶ 5.19 (rejecting U.S. argument that MEAs with trade restrictions should be taken into account in deciding whether Article XX was limited jurisdictionally). Instead, it ducked the issue of whether Article XX has an implied jurisdictional limitation. *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 133.

[290] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 168.

[291] 1996 CTE Report, *supra* note 107, ¶ 171. Shaffer reports that delegations to the CTE paid vigilant attention to the negotiation of the report, even though it was not legally binding, because they expected that it would be used by litigants and tribunals in future cases. Shaffer, *supra* note 105, at 37–39.

C. The Emerging Political Acceptance of the Judicial Resolution

Since governments have been unable to reach a detailed political resolution of trade/environment conflicts, the judicial effort to devise a politically acceptable resolution of such conflicts may have seemed doubtful, or even quixotic. But in fact, as measured by the statements of government representatives at meetings of the WTO Dispute Settlement Body ("DSB"), governments have accepted most elements of the judicial resolution.[292]

At the DSB meeting on the *Hormones* decision, for example, every speaker, including the representative of the EC, supported the decision.[293] In fact, the EC said that it "accepted and welcomed" the report, which provided "much needed guidelines for Members and panels to deal with future cases where trade obligations would have to be reconciled with other legitimate interests such as human, animal or plant life or health protection or environmental protection. This would help to increase Members' confidence in the ability of the dispute settlement system to deliver fair, workable and prudent rulings."[294] The statements also testified implicitly to the Appellate Body's skill at giving something to each side: while the United States and other exporting countries emphasized that the right to vary from international standards was limited by the need to comply with the requirements of the SPS Agreement, the EC and Norway stressed the Appellate Body's treatment of the burden of proof, its statement that domestic standards need not conform to international standards, and its conclusion that each country has the autonomous right to establish its own level of protection.

In the DSB discussion of *Asbestos*, Canada, the losing party, disagreed with the Appellate Body's decision to overrule the panel's treatment of "likeness," but said that it "did not question Members' right to adopt regulations in the public interest or to establish appropriate levels of protection."[295] Japan, the United States, and the EC, probably the three most important mem-

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[292] The DSB, composed of all WTO members, has the authority to oversee the dispute resolution process, including through adoption of panel and Appellate Body reports. DSU, *supra* note 99, art. 2.1. Although governments may be unable to block adoption of the reports as a practical matter (since doing so would require a consensus, including those of the victorious parties, *id.* art. 2.4), their review does provide them an opportunity to express their agreement or disagreement with the decisions.

Another measure of acceptance, compliance by losing parties, is mixed: the United States changed its laws as a result of the decisions in *Gasoline* and *Shrimp-Turtle I*, but the EC has not done so with respect to *Hormones*. However, compliance by a losing party is not a very good measure of acceptance by the WTO members as a whole of the terms of the judicial resolution. The great majority of members were not required to comply with any of these decisions, and even a government that is unwilling to comply with a decision against it may be in general agreement with the overall resolution.

[293] WTO Dispute Settlement Body, Minutes of Meeting of Feb. 13, 1998, WTO Doc. WT/DSB/M/42 (Mar. 16, 1998).

[294] *Id.* at 11.

[295] WTO Dispute Settlement Body, Minutes of Meeting of Apr. 5, 2001, WTO Doc. WT/DSB/M/103, ¶ 38 (June 6, 2001).

bers of the WTO, expressed support for it.[296] While far from a consensus, the level of support is clearly enough to protect this aspect of the Appellate Body's judicial resolution from political revision. Moreover, it is possible that over time, even governments now opposed to this decision may move toward acceptance of it.

The history of governments' positions on unilateral measures directed at the extrajurisdictional environment shows how such an evolution can occur. Recall that thirty-nine of forty governments to take a position on the *Tuna-Dolphin* cases in 1991 and 1994 disagreed with the U.S. view.[297] Before the panel in *Shrimp-Turtle I* in 1997, the four complaining parties and virtually all of the third parties to take a position condemned the U.S. law in language implicitly or explicitly echoing the *Tuna-Dolphin* decisions.[298] Only the U.S. government defended its measure. The EC, however, did make a statement that prefigured the eventual Appellate Body position. While it criticized the U.S. measure largely on *Tuna-Dolphin* lines, the EC also said that "in order to justify unilateral measures outside the jurisdiction of a Member in pursuit of commonly shared environmental concerns, a Member had to demonstrate that it had made genuine efforts to reach a multilateral solution."[299]

In the November 1998 DSB discussion of the Appellate Body decision in *Shrimp-Turtle I*, the complaining parties criticized its interpretation of Article XX(g) and other governments echoed their concerns, though less forcefully.[300] The EC statement, however, "strongly supported the Appellate Body's reasoning that encouraged Members to make genuine efforts to reach negotiated solutions."[301]

The 2000-01 panel proceedings in *Shrimp-Turtle II* showed more movement toward the Appellate Body position. Of the four original complainants, only Malaysia brought the second claim.[302] While several intervenors continued to question whether the U.S. measure was consistent with GATT, only India and Mexico directly supported Malaysia's argument that the U.S. measure was invalid simply because it was unilateral, regardless of any efforts to negotiate a multilateral agreement.[303]

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[296] *Id.* ¶¶ 36, 40–41.

[297] *See* Hudec, *supra* note 52; Bhagwati & Hudec, *supra* note 40, at 117.

[298] For the third parties' views, see *Shrimp-Turtle I* Panel Report, *supra* note 137, ¶¶ 4.13 (Australia), 4.23 (Ecuador), 4.25 (El Salvador), 4.27 (EC), 4.36 (Guatemala), 4.46 (Hong Kong), ¶ 4.48 (Japan), 4.64 (Singapore), 4.73 (Venezuela).

[299] *Id.* ¶ 4.32. Before the Appellate Body, the EU added two more requirements for such unilateral measures: that they be consistent with general principles of international law on "prescriptive jurisdiction" and no more trade restrictive than required to protect the common resource. *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶ 73.

[300] WTO Dispute Settlement Body, Minutes of Meeting of Nov. 6, 1998, WTO Doc. WT/DSB/M/50, at 1–11, 13–18 (Dec. 14, 1998) [hereinafter DSB Meeting on *Shrimp-Turtle I*] (statements of Thailand, Pakistan, India, Mexico, Philippines, Hong Kong, Japan). Malaysia (one of the complainants) and Brazil limited their criticism to the Appellate Body's treatment of amicus briefs. *Id.* at 6–7, 12–13.

[301] *Id.* at 12.

[302] India and Thailand did file third-party submissions supporting Malaysia, however.

[303] *Shrimp-Turtle II* Panel Report, *supra* note 153, ¶¶ 4.64 (India), 4.85 (Mexico). Several

The evolution in positions became even more pronounced on the appeal in *Shrimp-Turtle II*, when Australia and Japan, long-standing critics of unilateral U.S. restrictions on trade, stated that GATT does not prohibit them. Japan expressly agreed with the panel's conclusion that the United States was not under an obligation to conclude an agreement before taking its unilateral action, and Australia acknowledged that "Article XX does not proscribe unilateral trade restrictions," although it said "a reasonable degree of limitation must be imposed on their use—in line with the wording of the chapeau—if the balance of rights and obligations is to be preserved."[304] The developing countries (Hong Kong, India, Mexico, and Thailand, as well as Malaysia) did not go so far, but their criticisms were not as sweeping as they had been in *Shrimp-Turtle I*. India, for example, confined its intervention before the Appellate Body to arguing that the panel should have paid more attention to a domestic court proceeding in the United States that could affect its ability to implement the panel recommendations.[305]

In the December 2001 DSB discussion of *Shrimp-Turtle II*, support from developed countries continued, with Canada, the EC, and the United States all praising the Appellate Body's analysis.[306] The developing countries did not support the outcome, but their criticism was muted. Only three developing countries spoke at the meeting, compared to eight that had intervened three years earlier in the DSB discussion of *Shrimp-Turtle I*. Malaysia criticized the decision largely on procedural grounds, and emphasized that it would not stand in the way of a consensus adoption of the panel and appellate reports.[307] Only India explicitly objected to the crucial holding of the case that as long as the U.S. government took ongoing good faith efforts to reach a multilateral agreement, its measure was justified under Article XX.[308] The change in positions from *Tuna-Dolphin* is unmistakable. It is particularly striking with respect to countries such as Australia, Canada, and Japan, which had all argued in *Tuna-Dolphin II* that the U.S. action could not possibly be justified because Articles XX(b) and XX(g) do not allow unilateral actions designed to protect the environment beyond the jurisdiction of the importing country.[309]

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others refrained from taking a definitive position on the question. *Id.* ¶¶ 4.32 (Ecuador), 4.62 (Hong Kong), 4.67 (Japan). Other governments that had intervened in *Shrimp-Turtle I*, such as El Salvador, Guatemala, Nigeria, Philippines, Singapore, and Venezuela, did not take a position at all in *Shrimp-Turtle II*.

[304] *Shrimp-Turtle II* Appellate Body Report, *supra* note 159, ¶¶ 48, 67.

[305] *Id.* ¶ 64.

[306] WTO Dispute Settlement Body, Minutes of Meeting of Nov. 21, 2001, WTO Doc. WT/DSB/M/113, ¶¶ 5, 7, 14 (Dec. 17, 2001) (Canadian, EC, and U.S. statements). Australia extended its previous criticism of the panel report to that of the Appellate Body, but again noted that "unilateral measures were not ruled out in all instances." *Id.* ¶ 13.

[307] *Id.* ¶ 6.

[308] *Id.* ¶ 15.

[309] *Tuna-Dolphin II*, *supra* note 50, ¶¶ 4.12, 4.15–.16 (Australia); 4.20–.21 (Canada); 4.34–.35 (Japan).

Of course, *post hoc* is not *propter hoc*, and it is not clear that the Appellate Body's decisions were the only or even the primary cause of the shift in positions. Gregory Shaffer suggests that the key event was the EC's statement in *Shrimp-Turtle I* that unilateral measures might be acceptable as long as genuine efforts were made to negotiate a multilateral agreement.[310] The change in governments' positions could have led to as well as responded to the Appellate Body's judicial resolution. One need not believe that the Appellate Body has single-handedly forged a political consensus or that all WTO members are happy with its resolution. The important point is rather that the Appellate Body has crafted a resolution to which most governments can give their agreement or acquiescence.

One might argue that other countries have little choice but to acquiesce in an outcome agreeable to the United States and the EC. But it is interesting to contrast governments' reaction to most aspects of the Appellate Body's judicial resolution of trade/environment conflicts with their response to its attempt to resolve the debate over public participation, which was also first announced in *Shrimp-Turtle I*. While the reaction to the Appellate Body's analysis of Article XX in that case was mixed, the reaction against its decision to allow amicus briefs was unequivocal. Virtually every intervention in the DSB by a developing country was strongly against it.[311] Malaysia and Brazil spoke only on that issue, and even the countries that had other serious criticisms of the decision typically began their remarks by criticizing its treatment of amicus briefs. They argued that the Appellate Body had exceeded its authority and that its decision was contrary to the terms of the DSU in language generally much stronger than that which they applied to its Article XX analysis. Moreover, no developed country defended the Appellate Body's decision on this point, and Japan criticized it along the same lines as the developing countries.[312]

Nor is there any sign of agreement coalescing around the Appellate Body's treatment of amicus briefs. As noted above, WTO members held a special session in November 2000 devoted to criticizing the Appellate Body's position. And in the current round of negotiations, developing countries have refused to accept an EC proposal to authorize panels and the Appellate Body to receive amicus briefs.

Various reasons for the nearly uniform opposition to the Appellate Body resolution of this issue are conceivable, but two factors stand out. First, this is the part of the Appellate Body trade/environment resolution that has the least support in the language of the relevant agreement. The Appellate Body

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[310] Gregory Shaffer, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT'L L. 507, 509 (1999) ("In effect, the two most powerful members of the WTO were calling for an 'evolution' in the GATT jurisprudence, one that the Appellate Body would soon provide.").

[311] DSB Meeting on *Shrimp-Turtle I*, *supra* note 300, at 2–3 (Thailand), 4–5 (Pakistan), 6–7 (Malaysia), 7–8 (India), 12–13 (Brazil), 13–14 (Mexico).

[312] *Id.* at 13 (Australia), 11–12 (EC), 16 (Japan), 14 (Switzerland), 11 (the United States).

stitched together authority for panels to receive amicus briefs from Article 13 of the DSU, which provides only that a panel may "seek" information, and Article 12, which gives panels general power to develop their own working procedures.[313] It based its own authority to receive amicus briefs solely on its power to develop working procedures.[314] Second, there is no unifying principle on which the Appellate Body can draw here; the gap between the two sides is too wide.[315] The Appellate Body's response to the criticism of its approach to amicus briefs has been consistent with both its deference to political agreement and its failure to use reliable legal instruments with which to find that agreement. It has backed down from its initial position by refusing to accept amicus briefs unless they are attached to the brief of a party, but it has failed to base its decision on any legal ground, instead denying the briefs without explanation.[316]

V. CONCLUSION: BEYOND TRADE AND THE ENVIRONMENT

The judicial resolution of legal conflicts between trade and the environment is likely to have three effects on the broader trade and environment debate.

First, calls from environmental critics for a political agreement that either codifies or improves on the judicial resolution are likely to decrease. Many critics, especially those who have proposed reforms to rather than dismantlement of the trade regime, will recognize that WTO members are not going to be able to reach a political agreement that is better than the judicial resolution, and are very unlikely to reach one as good. The clearest indication of the degree to which the political debate among governments is lagging behind the judicial resolution is the November 2001 Doha Declaration setting

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[313] *Shrimp-Turtle I* Appellate Body Report, *supra* note 139, ¶¶ 104–108; *see supra* Part III.C.

[314] *Hot-Rolled Lead* Appellate Body Report, *supra* note 189, ¶ 39 (citing DSU, *supra* note 99, art. 17.9).

[315] *Compare* Jeffrey L. Dunoff, *Border Patrol at the World Trade Organization*, 9 Y.B. INT'L ENVTL. L. 20, 22–23 (1999) ("[C]onditioning NGO participation on the sufferance of the parties to the dispute significantly undermines the primary benefit of non-governmental participation, which is the presentation of independent ideas, information, and perspectives that differ from those of governments"), *with* B. K. Zutshi (former ambassador of India to the WTO), *Comment*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 203, at 387, 390 ("Claims that [NGOs] are more representative than the elected governments of democratic nations are, to put it mildly, a travesty. NGOs must work through their governments. There is, in my view, no workable alternative."). *But see* Weiler, *supra* note 203, at 344:

> The modus operandi established by the Appellate Body seems a perfect example of the interplay between external and internal legitimacy. Allowing *amici* briefs in principle (external legitimacy) will be counterbalanced, at least at first, by a prudence and conservatism in implementing the principle (internal legitimacy) . . . . One should allow an appropriate amount of time to pass before judgment is made as to the success of the "World Trade Court" in finding the appropriate balance.

[316] *See supra* Part III.C.

the agenda for the next round of WTO talks, which commits the members to negotiations on the relationship between WTO rules and MEAs, but limits the scope of the negotiations to conflicts among MEA parties. As discussed above, this is perhaps the most obviously resolved issue in the entire spectrum of conflicts between trade and the environment.

Pressure for a political resolution will grow only if trade/environment legal conflicts emerge that the Appellate Body does not resolve to governmental or popular satisfaction. Such conflicts might arise from future efforts to restrict trade in products whose production contributes to climate change, for example,[317] or as a result of the U.S. complaint against the EU for its restrictions on genetically modified organisms.[318] On the other hand, it seems possible, at least, that the Appellate Body could craft another decision that gives enough to both sides to defuse the conflict.[319]

A second likely effect of the judicial resolution is that it will lead environmental critics to shift their attention to potential conflicts between environmental laws and other aspects of the legal framework for economic integration, such as international investment agreements.[320] That shift is already well underway with respect to Chapter 11 of NAFTA, which provides certain protections to foreign investors, including the right to take claims of expropriation and discrimination to an arbitral tribunal.[321] Several of the first claims to be taken to arbitration under Chapter 11 have been directed at environmental laws and have attracted enormous attention from environmentalists who fear that the procedure will undermine domestic environmental protection.[322] Although the merits of the decisions are beyond the scope of this Article, two important differences from the WTO procedure may be noted.

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[317] SAMPSON, *supra* note 250, at 84–93; James Cameron & Zen Makuch, *Implementation of the United Nations Framework Convention on Climate Change: International Trade Law Implications*, *in* TRADE AND THE ENVIRONMENT: THE SEARCH FOR BALANCE 116 (James Cameron et al. eds., 1994).

[318] Gary G. Yerkey & Daniel Pruzin, *U.S. Opens Legal Proceedings Against EU At WTO Over Moratorium on Biotech Products*, 20 INT'L TRADE REP. 824 (May 15, 2003).

[319] For example, it might conclude that scientific evidence does not support a ban on GM products, but that less onerous requirements, such as segregation and labeling, are acceptable. This outcome might even be politically acceptable to the EU. *See* Victor, *supra* note 169, at 922:

> It is plausible that [as a result of *Hormones*] the EC has learned the lesson that [arguing that a ban is necessary to allay consumer fears and then fanning those fears] is bad strategy because it makes the eventual fall longer and harder. Today in the handling of the import bans on GM foods . . . the EC has consistently taken a stance that is more favorable to international trade. More specifically, it has been favorable to schemes that require segregation of GM foods from non-GM products as well as to labeling of GM foods—rather than complete bans.

[320] Increasing attention is also being paid to potential environmental conflicts involving TRIPS, *supra* note 113.

[321] NAFTA, *supra* note 56, arts. 1116–17.

[322] For a description of the cases, *see generally* Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 173 (David L. Markell & John H. Knox eds., 2003).

First, the Chapter 11 tribunals are not overseen by a standing permanent appellate tribunal and therefore have greater difficulty in reaching consistent positions. Second, the NAFTA "legislature," the Free Trade Commission composed of the three parties' trade ministers, has been far more active than the WTO General Council or DSB in providing guidance to the tribunals.[323] The result may be to decrease both the likelihood of and the need for a judicial, rather than a political, resolution of conflicts between Chapter 11 and environmental laws.

A third possible effect is that the judicial resolution of trade/environment legal conflicts may help to refocus attention on the general relationship between economic integration and environmental protection. One concern that has received a great deal of attention in this strand of the trade/environment debate is that lower barriers to trade and investment may lead countries to lower their environmental standards (to become "pollution havens") in order to attract or retain companies interested in minimizing their costs of environmental compliance. This fear may be receding as economic studies fail to show evidence of a significant pollution haven effect,[324] but more fundamental questions about how to reconcile trade-led economic growth with environmental protection are not disappearing.

They are, however, fading into a much larger debate over how to reconcile *all* economic growth with environmental protection. That debate pervades all environmental policy. Internationally, governments have adopted the goal of sustainable development as the way to resolve it. They have been able to agree on many of the steps necessary to attain that goal, but have often been unable or unwilling to provide the institutional, financial, and technical support necessary to carry out those steps.[325]

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[323] In July 2001, the Free Trade Commission issued an interpretive statement clarifying that NAFTA does not impose confidentiality on the parties to a Chapter 11 proceeding. This committed the governments to publish non-confidential material they submit to the tribunals and provided guidance to tribunals on a requirement in Chapter 11 that foreign investments receive "treatment in accordance with international law, including fair and equitable treatment and full protection and security." Tribunals had reached conflicting interpretations concerning that language. Free Trade Commission, *Clarifications Related to NAFTA Chapter 11*, July 31, 2001, *at* http://www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review). In October 2003, the Free Trade Commission recommended that Chapter 11 tribunals adopt specific procedures for considering whether to accept amicus briefs, which it refers to as "non-disputing party submissions." Free Trade Commission, *at* http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf (last visited Nov. 22, 2003) (on file with the Harvard Environmental Law Review). Political agreement may be easier to reach in this context not only because of the small size of the Free Trade Commission, but also because the governments' positions may be relatively more aligned with one another. Unlike trade disputes, in which governments bring as well as defend claims, governments are always defendants in investment disputes under Chapter 11.

[324] *See* Jeffrey A. Frankel, *Assessing the Efficiency Gains from Further Liberalization*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 203, at 81, 90 ("[R]esearch suggests that environmental regulation is not a major determinant of firms' ability to compete internationally."). *See generally* HAKAN NORDSTROM AND SCOTT VAUGHAN, WTO SPECIAL STUDIES 4 (TRADE AND ENVIRONMENT) 35–47 (1999).

[325] Nations adopted detailed action plans at the 1992 Rio Conference on Environment and

There is agreement within and around the WTO that the trade and environment debate should be folded into the broader debate about how to achieve sustainable development. Trade officials have long argued that liberalizing trade benefits sustainable development because it increases wealth, which in turn leads, eventually, to higher levels of environmental protection.[326] But they are now beginning to think about more specific ways that the WTO could help reach that end. For example, WTO members have paid increasing attention to reducing subsidies to unsustainable industries, which could promote sustainable development at the same time it reduces trade barriers.[327] This attitudinal change is obviously appropriate and desirable. But there are limits to what the WTO can do to further sustainable development. In particular, it cannot improve domestic environmental standards and ensure that they are effectively enforced.[328]

The trade and environment debate has produced—as virtually its only concrete political achievements—international institutions that could be models for how to promote such sustainable development. To make NAFTA more palatable to environmental critics, the North American governments created the CEC, the Mexico-U.S. Border Environment Cooperation Commission ("BECC"), and the North American Development Bank ("NADBank").[329] Despite the fact that they are the only institutions to result from the trade and environment debate, that debate has paid little attention to them. The disregard is understandable. The BECC and NADBank, sister organizations designed to work together, have legal, geographic, and financial constraints that limit their effectiveness. The CEC, which has much broader mandates, has disappointed many environmentalists because it is ill-suited to address most trade/environment concerns. It has no charge to reconcile conflicts between trade agreements and environmental laws, for example. It does have a strong focus on discouraging pollution havens, but its most notorious tool to

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Development and the 2002 Johannesburg Conference on Sustainable Development, but they are far from successfully implementing those plans. *See* A. Dan Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 35, 39 (2001). For a comprehensive review of U.S. progress towards sustainable development, see generally STUMBLING TOWARD SUSTAINABILITY (John Dernbach ed., 2002).

[326] Gene Grossman and Alan Krueger have made the best-known argument for the environmental Kuznets curve, which suggests that economic growth initially increases and then, past a certain level of per capita income, decreases levels of pollution. Gene H. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q. J. ECON. 353 (1995).

[327] Shaffer, *supra* note 105, at 30.

[328] *See* Frankel, *supra* note 324, at 90 ("It is important to note that government intervention is the primary channel whereby people enact their desire for a cleaner environment as they grow richer. There is no reason to think that the market can take care of it by itself."). In principle, the WTO could promote improved domestic environmental protection by sanctioning countries that do not take specified steps to strengthen and enforce their laws. This approach was tried half-heartedly in Part V of NAAEC, *supra* note 104. But apart from the serious questions as to the effectiveness of such an approach, it faces insurmountable political obstacles.

[329] NAAEC, *supra* note 104; Mexico-United States: Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 18, 1993, 32 I.L.M. 1545 (1993).

that end, a dispute resolution mechanism with the power to impose sanctions, has proved to be toothless.

In the trade and environment debate, then, the NAFTA environmental institutions appear to be unsuccessful. But they have been viewed in the wrong context. Their ties to NAFTA obscure their true importance. Rather than failed trade-and-environment organizations, they should be seen as the first regional organization and development bank wholly committed to promoting sustainable development. The BECC/NADBank's efforts to incorporate local input and sustainable criteria offer lessons for other development banks, and the CEC's broad scope, cooperative programs, objective reporting, and reliance on public participation all provide important precedents for other national and international institutions devoted to sustainable development.[330] The importance of such institutions will become clearer as environmental critics and government officials turn their attention from the increasingly sterile debate over legal conflicts, and as broader trade/environment issues are subsumed into the search for sustainable development—in short, as the debate moves beyond trade and the environment.

[330] For an analysis of how successfully the CEC has carried out its mandates to date, see GREENING NAFTA, *supra* note 322.