Trade and the Environment: the Future of Extraterritorial Unilateral Measures after the Shrimp Appellate Body

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Summary

It is nearly ten years since the first Tuna-Dolphin report found that unilateral trade measures for the protection of dolphins were in violation of GATT rules, thereby signalling the beginning of the modern trade-environment debate. Since that time the debate has developed and become more complex and subtle. The WTO Appellate Body has recently been called upon to decide a dispute which raises very similar issues to the Tuna-Dolphin case. The Appellate Body used language that was more open to the concerns of contemporary environmental problems than the Tuna-Dolphin reports. However, an analysis of its reasoning suggests that the acceptability of unilateral, and even multilateral, measures to protect the environment under the GATT rules may not be any greater than before. In addition, the Appellate Body’s reliance on multilateral environmental agreements and the principle of sustainable development, although broadly welcomed by environmentalists, poses significant problems as an interpretative technique.

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It is almost ten years since the *Tuna-Dolphin I* GATT panel report (*US - Restrictions on the Import of Tuna*, BISD 39S/155) was leaked to the public. It caused a furore among environmental activists and policy-makers because it suggested that GATT parties could not use trade restrictions to promote environmental protection. That report can be seen as the beginning of the modern trade-environment debate, since when the protagonists’ understanding of the complex relationship between their policy areas has become more detailed and more subtle (see, for example, Esty, 1994; Sands, 2000; Schoenbaum 1997). However, as the recent Seattle demonstrations against globalisation would suggest, the trade-environment debate is a long way from being settled and, if anything, has become more problematic (Chen 2000).

The WTO Appellate Body was recently called upon to consider trade-environment issues in *US - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 [hereinafter 'Shrimp']. The *Shrimp* dispute raised very similar issues to those in the *Tuna-Dolphin* case and gave the Appellate Body an opportunity to resolve many of the uncertainties that had lingered since that earlier dispute. Given the hostility with which environmentalists received the *Tuna-Dolphin I* report and the subsequent *Tuna-Dolphin II* report (*US - Restrictions on Imports of Tuna*, DS29/R, 33 I.L.M. 839 (1994)), it was also a chance for the Appellate Body to readjust the balance between the strict application of GATT rules and the need to address contemporary environmental concerns. In the event, some of the Appellate Body’s reasoning was comparatively generous to environmental interests, but it also contained potentially important qualifications.

It is the purpose of this article to examine some of the institutional and legal background to the *Shrimp* Appellate Body report, to explore the meaning of the Appellate Body’s qualifications to its apparent acceptance of the use of unilateral environmental measures, and to consider the significance of these qualifications for trade-environment disputes in the future.

Institutional Background
One of the biggest changes to have occurred since the *Tuna-Dolphin* reports is the establishment of the World Trade Organisation in 1994 (WTO 1994), and the ‘juridification’ of dispute settlement under the Dispute Settlement Understanding (ibid, Annex 2; hereinafter ‘DSU’). The WTO Agreement attempts, to a limited extent, to soften the impact of trade rules on environmental protective measures, such as subsidies and standards (Kennedy 1998, pp 394-419). More generally, the preamble of the Agreement recognises the need to conduct trade in the light of sustainable development. The WTO also established the Committee for Trade and Environment, in which regular discussions take place on a number of trade-environment issues. However, the Committee has been criticised for achieving little in the way of concrete results, and complaints against environmental measures have almost always been upheld in dispute settlement hearings (Hansen 1999, pp. 1036-8; Kennedy 1998, pp 422-61).

The limited success of the WTO in addressing the trade-environment conflict through negotiated compromise has placed its dispute settlement bodies in a central role. The nature of the WTO dispute settlement procedures therefore has a particular significance. Under GATT 1947, both parties had to agree to the establishment of a panel and the purpose of panel reports was essentially advisory. Reports could only be adopted by consensus and could therefore be blocked by the losing party (Davey 1987). The DSU, on the other hand, allows either party to initiate a panel investigation and applies strict time limits (Articles 6 and 12). The reports are still recommendatory but failure to implement the recommendations can lead to withdrawal of concessions authorised by the Dispute Settlement Body (Articles 19 and 22). Adoption of reports is almost automatic, since they can only be rejected by consensus (Article 16). Finally, the DSU establishes an appeal procedure to the Appellate Body (Article 17). The Appellate Body has already developed and clarified GATT jurisprudence in a more consistent and ‘legalistic’ manner than was possible in the original ad hoc panel procedure. As the senior adjudicatory body, the Appellate Body’s concerns are unlikely to be limited to the specific rights and obligations of the case before it and may be expected to encompass a wider view of the implications of its interpretation and application of the WTO Agreement’s provisions (Cone 1999, p 60; Vermulst, Mavroidis and Waer, 1999, pp 32-33).

It is often said that the above elements of the DSU represent a shift from the previous ‘power-oriented’ system to a rule-oriented system (Davey 1987; Jackson 1997). The latter might be expected to impose its obligations more clearly, firmly and consistently. From this point of view, the imbalance between the institutional and obligational power of the WTO on the one hand and the scattered, relatively uninstitutionalised and unevenly strong environmental treaties becomes more significant (Esty 1994, pp 77-8). In addition, a rule-oriented system appears to strengthen the position of developing countries because their rights can be more objectively protected against economically powerful Members who might be tempted to pursue environmental policies through unilateral measures (Jackson 1998; Wisthoff-Ito 1999). Indeed, the experience of the WTO has been that developing countries have brought many more complaints under the DSU than under the more informal power-based system of GATT 1947 (Dixon 2000, pp 11-2; Mota 1999, pp 80-1).
Legal Background

Trade lawyers have increasingly turned their attention to the problem of non-tariff barriers, such as product standards and subsidies (Jackson 1997, pp 73-8). WTO Members are entitled to challenge non-tariff barriers under Articles I, III, and XI, which prohibit discrimination between importing countries, discrimination between importing and domestic producers, and restrictions on imports respectively. These types of measures are often the instrument of choice for implementing national environmental policies. Import bans and standards are also attractive means to enforce environmental measures internationally.

In some cases, using trade-related environmental measures (TREMIs) is part of a multilaterally agreed strategy. For example, the Montreal Protocol on Substances That Deplete the Ozone Layer, 1987 provides for import bans against the importation of CFCs manufactured by third parties, not only to reduce or eliminate the use of these substances by ensuring lack of supply but also to discourage free-riding by non-parties (Article 4). The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES) requires import restrictions to be imposed on trade in listed species, on the grounds that trade itself is a significant cause of their endangerment (Article III). The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 also places import restrictions on the import and export of dangerous waste, to reduce the risks attached to excessive movement of waste and to prevent dumping of toxic substances in countries where no appropriate disposal facilities exist (Article 4). No complaints have yet been made under the GATT rules against TREMs in multilateral environmental agreements and they appear, therefore, to have achieved a level of acceptance within the trade system.

It is seldom denied that multilateral solutions are the best answer to problems arising from the use of internationally shared resources. However, it is also clear that multilateral solutions can only be found where there is shared will and common understanding between the States involved. In cases where international consensus is difficult or impossible to reach, environmentalists have argued that States with economic power are entitled to impose unilateral measures as the only way to achieve high levels of protection, and particularly in urgent cases such as the potential extinction of a species (Bernazani 2000, pp 210-2). On the other hand, governments of developing countries who wish to develop their economies through international trade are deeply suspicious that ‘environmental’ trade barriers are a form of ‘eco-imperialism’ at best, and disguised protectionism at worst (Kittichaisaree, 1993; Wishoff-Ito 1999). This opposition is echoed in Principle 12 of the 1992 Rio Declaration on Environment and Development which acknowledges that unilateral TREMs should be avoided in favour of multilateral agreements.

However, unilateral measures remain an attractive option for governments which are driven towards a particular environmental goal and are unwilling to enter into lengthy and potentially unsuccessful negotiations, or have already been frustrated in their efforts to find multilateral agreement. As a result, unilateral TREMs have not been eliminated in practice and have been the subject of several GATT complaints. The two most important complaints, because they involve unilateral TREMs affecting the
activities of other States beyond the limits of national jurisdiction, are the *Tuna-Dolphin* and *Shrimp* disputes.

In the *Tuna-Dolphin* dispute, the US had imposed import bans on tuna caught by the use of dolphin setting with purse seine nets. This method is peculiar to the Eastern Tropical Pacific Ocean and involves chasing and netting schools of dolphins in order to catch the tuna often found swimming below (Buck 1997). The purpose behind the import bans was to protect dolphins which would otherwise be killed or injured in the process of catching the tuna. Bans were introduced on tuna from countries where tuna fishers failed to achieve a level of dolphin mortality comparable with the US tuna industry, or who might be exporting such tuna as an intermediary nation. The dolphins in question were not endangered. Two separate complaints were brought before GATT panels in *Tuna-Dolphin I* and *Tuna-Dolphin II*. Both panels found that the US measures constituted quantitative restrictions on imports in violation of Article XI. The reasoning of the *Tuna-Dolphin II* Panel is more explicit than in *Tuna-Dolphin I*, and will therefore be the focus in the following discussion.

In *Shrimp*, the US had placed import bans on shrimp which had been caught without the use of turtle excluding devices (TEDs) or shortened towing times. TEDs are designed to prevent sea turtles from being caught and drowned in shrimp nets, and short tow times likewise give trapped turtles a chance of survival (Sam 1999, pp 192, 202). Shrimp could be imported from countries that had been certified as having a turtle protection programme comparable to that of the US or from countries where the threat of incidental taking to sea turtles did not exist (Section 609 of Public Law 101-162, 1989; Bernazani 2000, pp 216-8; Sam 1999, pp 192-3). The key differences between the situation in *Shrimp* and that in the *Tuna-Dolphin* dispute were that the species of sea turtles in question were migratory through and in US waters, and that they were all threatened with extinction. Even so, the US import bans, as in the *Tuna-Dolphin* reports, were found to be an import restriction in violation of Article XI.

The key issue in both disputes was whether the bans could be justified under the general exceptions of Article XX. In *Tuna-Dolphin II*, the US claimed that their measures were justified under two of the substantive paragraphs of Article XX, paragraphs (b) and (g). In *Shrimp*, its main defence was paragraph (g). Only paragraph (g) will therefore be examined in detail here. The relevant parts of the Article read:

**Article XX**

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; . . . .
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Conceptually, Article XX consists of two parts. The first part is the chapeau which limits the application of the Article to measures which do not constitute unjustified or arbitrary discrimination or disguised restrictions on trade. The second part consists of a number of substantive paragraphs. These paragraphs define the policies under which violations of other GATT provisions may be justified and place conditions on how those policies may be pursued. The chapeau, as written, could fulfil two different functions. First, it could impose a set of additional substantive restrictions on measures which have already satisfied the conditions of one of the paragraphs. Second, it could be read in conjunction with the substantive content of the paragraphs in order to qualify their meaning and effect.

The Tuna-Dolphin and Shrimp reports were both concerned with the substantive interpretation of the chapeau and paragraph (g), and the need to find an appropriate balance between them. The difference between the reasoning in the two disputes has illuminated some of the fundamental tensions between liberal trade rules and environmental policy implementation. Analysis of the dispute settlement bodies’ reasoning in each case can be divided into three parts: the general approach to interpreting Article XX, the meaning of paragraph (g), and the function and meaning of the chapeau.

(a) The general approach to interpreting Article XX

The Tuna-Dolphin II Panel decided that the application of Article XX should be executed in three steps. First, it must be established whether the policy behind the measure fell within one of the substantive paragraphs. Second, any conditions contained in that paragraph must be satisfied. Third, the measure must not be caught by the substantive limitations contained in the chapeau (para 5.12). The Panel therefore took the view that the chapeau conditions should be kept distinct from the conditions of the substantive paragraphs and applied only if the measure had satisfied one of the paragraphs.

In the event, the Tuna Dolphin II Panel found that the US measure did not satisfy paragraph (g) and, since it also failed under paragraph (b), the Panel did not need to consider the meaning or possible effect of the chapeau. In Shrimp, however, the Panel proceeded directly to the chapeau and reasoned that unilateral acts could never be acceptable because they would threaten the stability and predictability of the international trading system. The chapeau was designed to prevent abuse of the exceptions contained in the rest of Article XX and, interpreting it particularly in the light of the objective and purpose of the Agreement as a whole, the Panel found that unilateral measures constituted unjustifiable discrimination (paras 7.45, 7.48-9). As a result, the Shrimp Panel did not consider the application of paragraph (g) at all.

The Shrimp Appellate Body overturned this line of reasoning. It pointed out that the Panel’s reasoning was fundamentally flawed because it used the chapeau to evaluate the design of the measure. The question of design was a matter for examination under
the conditions of paragraph (g), whereas the chapeau was explicitly limited to the manner in which the measure was applied. The fact that a policy was legitimate under a paragraph did not eliminate the need to examine whether the application of the measure satisfied the conditions of the chapeau (paras 115-7). The latter task was necessary in order to avoid abuse of the exceptions contained in the substantive paragraphs (para 116). Overall, therefore, the Appellate Body adopted a similar view to the Tuna-Dolphin panels, that is, that a measure should first satisfy one of the substantive paragraphs, and only then should the chapeau be applied (Neuling 1999, p 44).

(b) The meaning of paragraph (g)

The Tuna-Dolphin II Panel accepted that the policy behind the US measure was legitimate under paragraph (g). It considered that dolphins, even though not endangered, could fall within the category of "exhaustible natural resources" (para 5.13). It also accepted that Article XX did not as a whole preclude measures with extraterritorial application, and that contracting parties were permitted as a matter of international law to exercise jurisdiction over their own nationals acting extraterritorially. It therefore explicitly accepted that the resources to be protected could lie outside the territorial jurisdiction of the contracting parties (paras 5.15-7).

However, the fact that the policy behind the measure fell within the scope of a paragraph of Article XX did not necessarily mean that it would satisfy the conditions contained within that paragraph. Specifically, paragraph (g) only permits measures "relating to" conservation of the resource in question, and which are "in conjunction with" restrictions on domestic production or consumption. The Panel agreed with previous panel findings that "relating to" meant "primarily aimed at" (para 5.22). It argued, however, that the US measures could only have effect if other countries changed their policies in response to them. Any increased protection of dolphins would be an indirect consequence of the measures and therefore they could not be considered to be primarily aimed at conservation (paras 5.23-4). In addition, the Panel did not consider that measures which were essentially coercive in nature could be "primarily aimed at" conservation or rendering domestic measures effective because such measures would allow one contracting party to force others to choose between their existing national policies or the loss of their rights under the GATT (paras 5.25-5.27).

There are several criticisms that can be made of the Panel's analysis, of which two are of particular relevance to the later developments in Shrimp. First, the Panel had applied similar arguments to paragraph (b) and to paragraph (g), thereby confusing the two. The condition in paragraph (b) is that the measure must be "necessary" to protect animal life. By bringing both under the heading of indirectness and coercion, the Panel conflated the meaning of "relating to" and "necessary". Such an approach is not easily defended on a textual level. It does not reflect the ordinary meaning of the words which would suggest that "relating to" should impose a less onerous test than "necessary". Neither was it entirely consistent with previous GATT jurisprudence (GATT 1987, para 4.6). Second, the Panel’s concern about the use of unilateral measures to coerce other contracting parties into changing their policies was focused on the substantive provisions contained in paragraph (g), with no reference to the
chapeau. Arguably the result of this reasoning distorted the function of Article XX by unbalancing the different elements contained in it. It made paragraph (g) so strict that no unilateral measure could satisfy it, and excluded the chapeau from its intended role of safeguarding the GATT system and the rights of other contracting parties (Cheyne 1995, pp 462-3).

The Appellate Body has now given an apparently radical re-interpretation of paragraph (g) and the chapeau, but whether it has effectively reimposed the same restrictions as the panels in the Tuna-Dolphin dispute is a question which requires careful consideration. The Appellate Body's interpretation of the chapeau has received the most interest and attention but, as will be discussed below, its reading of paragraph (g) is in some ways more significant.

In Shrimp, the Appellate Body considered the question of whether the sea turtles involved constituted "exhaustible natural resources" under paragraph (g). Like the Tuna-Dolphin panels, the Appellate Body took the view that "renewable" and "exhaustible" were not mutually exclusive terms (para 128). This in itself was not surprising in light of previous jurisprudence, but what was particularly encouraging to environmentalists was the Appellate Body's acceptance that the language of Article XX should be interpreted in the light of present environmental concerns. It was able to do this, not because Article XX itself had been redrafted in the Uruguay Round, but because the preamble of the WTO Agreement identified sustainable development as an objective of the Organisation and demonstrated that the signatories were aware of contemporary environmental concerns (para 129). Furthermore, the Appellate Body took a deliberately modern view of the term "resources", noting that it should be interpreted in an "evolutionary" fashion in the light of modern developments (para 130). The exhaustibility of sea turtles was recognised at least partly because all the species concerned were registered as endangered under CITES (para 132). At this stage, therefore, the Appellate Body indicated a willingness to balance environmental concerns with the restraints of the GATT rules by interpreting the latter in the light of relevant international environmental law.

When it came to the controversial Tuna-Dolphin finding that paragraph (g) did not allow Members to impose measures extrajurisdictionally, however, the Appellate Body's vagueness was significant. It noted that the sea turtles in question were migratory and could be found within waters under US jurisdiction, but explicitly refused to explore the question of whether paragraph (g) imposed any jurisdictional limits or the extent to which such limits, if they existed, restricted the right of Members to take environmental protection measures. However, the Appellate Body apparently deemed that some connection was necessary, since it introduced a new test: it recognised that the migratory patterns of the sea turtles gave rise to a "sufficient nexus" between the sea turtles and the US for the measures in question to fall under the policy described in paragraph (g) (para 133).

The Appellate Body went on to take a relatively liberal view of the conditions which the US measures were required to satisfy. It recalled that the test it had applied in Gasoline to determine whether a measure was "primarily aimed at" a policy objective was whether there was a "substantial relationship" between the two (para 136; WTO 1996, p 19). Even the fact that the US measure was designed "to influence" other countries towards adopting specific technology when shrimp fishing (a view which
echoed the characterisation of similar measures by the *Tuna-Dolphin* panels as "coercive") was not enough to exclude it from the protection of Article XX (para 138; Ahn 1999, pp 845-50). The Appellate Body found that the measure was "not a simple, blanket prohibition" on imports unrelated to the possible effects it might have on the protection of turtles during shrimp fishing. This was because there were two conditions inherent in the scheme which suggested a genuine and practical focus on the protection of turtles: the import ban did not affect shrimp caught without threat to turtles, nor did it exclude shrimp caught within waters of countries that had been certified as using the appropriate technology. As a whole, the Appellate Body considered that the US measure was "not disproportionately wide in scope and reach in relation to" its policy objectives. In addition, the means were "reasonably related to the ends" ( paras 138-41). Thus the Appellate Body evidently applied a reasonableness or proportionality test in order to assess whether a measure satisfied the "primarily aimed at" condition.

This line of reasoning was considerably more liberal in its interpretation of paragraph (g) than in the *Tuna-Dolphin* reports. However, the Appellate Body had also signalled in *Gasoline* that the chapeau should be employed more actively than had previously been the case, and therefore it was not surprising that it proceeded to use it as a counterbalance to its broad interpretation of paragraph (g).

(c) The chapeau

As noted above, the *Tuna-Dolphin* panels did not need to consider the application of the chapeau because they had resolved the question of unilateral measures entirely under paragraph (g). The most detailed jurisprudence on the chapeau has therefore been developed more recently by the Appellate Body. In *Shrimp*, the Appellate Body's view of the chapeau was that it constituted the Members' recognition for the need "to maintain a balance of rights and obligations" between the right to invoke Article XX and the substantive rights protected by other GATT provisions (para 156). This approach was very similar to the idea that the chapeau was there to prevent abuse of the substantive exceptions contained in Article XX. The Appellate Body put it yet another way: the chapeau embodied the principle of good faith (para 158). The line of equilibrium between the party invoking Article XX and other Members invoking their rights under other provisions must be drawn so that the competing rights do "not cancel out the other" nor "distort and nullify or impair" the balance of rights contained in the WTO Agreement (paras 158). At this stage, the Appellate Body had effectively restated the same idea several times, and in very general terms. To complete the picture, it warned that the line of equilibrium was "not fixed and unchanging", and that it moved according to the "kind and shape" of the measures in question and the specific facts of each case (ibid).

In the case of environmental measures, the chapeau should be interpreted in the light of the concept of sustainable development as contained in the WTO Agreement preamble. This added "colour, texture and shading" to the interpretation of the WTO Agreement and its annexes, including GATT 1994 (para 153). In further support of the need to interpret the GATT provisions in the light of environmental concerns, the Appellate Body also referred to the Decision of Ministers at Marrakesh to establish
the Committee on Trade and Environment, the reference in that Decision to the Rio Declaration and Agenda 21, and the Committee’s terms of reference (paras 154-5).

The only conditions of the chapeau examined by the Appellate Body concerned unjustifiable discrimination and arbitrary discrimination. The Appellate Body had previously noted that the wording of the chapeau was “not without ambiguity” and, in particular, the separate terms “arbitrary discrimination, “unjustifiable discrimination”, and “disguised restriction” should be read together because “they impart meaning to one another” (WTO 1996, pp 21-2). Thus unjustifiable discrimination could include restrictions, and disguised restrictions could include discrimination. Ultimately, however, the overriding policy was “avoiding abuse or illegitimate use of the exceptions to substantive rules” (ibid).

In considering the application of "unjustifiable discrimination", the Shrimp Appellate Body returned to the issue of coercion. As noted above, it had accepted for the purposes of paragraph (g) that it was acceptable for a measure to "influence" other countries, provided that the measure was not disproportionate in its impact and was designed so that there was a reasonable relationship between the means and the ends. However, under the chapeau, the actual and intended coercive effect of the US measure was re-characterised by the Appellate Body as "[p]erhaps the most conspicuous flaw" (para 161).

It appeared from this statement that after all the Appellate Body was going to reach the same result as the Tuna-Dolphin and Shrimp panels. However, the Appellate Body qualified its point. The reason why the US measure was unacceptably coercive in Shrimp was that it required other countries to adopt essentially the same policies and practices as the US. It was applied through the relevant guidelines and certification practice in a "rigid and unbending" manner (para 163). The conditions under which certification would be granted, for example, were exclusive. No account was taken of other practices that might be carried out, even if they were comparable in effect. Therefore the requirement was that other countries should follow effectively identical policies and practices to those of the US, rather than comparable ones (paras 161-2). The Appellate Body found that importation of shrimp might be banned simply because of a procedural problem, as opposed to a substantive finding of failure to reach the standards of the US measure, and that this constituted unjustifiable discrimination (para 165). In other words, the intention behind the measure appeared to be more a desire to persuade other countries to adopt essentially the same regime as the US than a wish to achieve the same level of turtle protection.

In addition, the Appellate Body noted that the US had negotiated with some but not all shrimp-fishing countries, had imposed procedural requirements for certification which differed between countries, and had made greater efforts to transfer TED technology to some countries than others (paras 172-5). All these factors could be characterised as discrimination which, in the absence of evidence to the contrary, was unjustifiable.

These two arguments sat comfortably with the Appellate Body’s stated test, namely the ordinary meaning of "unjustifiable discrimination" in the application of a measure. They also suggested that the problems that disqualified the measure could be overcome - all that would be necessary would be to ensure greater flexibility in the
certification process and in the investigation of the facts when deciding whether to impose an import prohibition (Grosko 1999). The possibility of curing discriminatory defects was also present in the Appellate Body’s finding of arbitrary discrimination which arose, inter alia, from lack of transparency and fairness in the US certification process (paras 177-84).

However, the Appellate Body added another issue which was not merely procedural and which struck fundamentally at any attempt to protect unilateral actions within the WTO regime, namely the importance of seeking multilateral solutions. The Appellate Body decried the failure of the US to involve other shrimping countries in "serious, across-the-board negotiations" with a view to finding a cooperative solution to their concerns (para 166). By accepting that an attempt to find a multilateral solution would be sufficient, it partially met the argument that it is sometimes not possible to achieve multilateral consensus. However, the Appellate Body's approach did not fully meet the argument that some environmental problems are so urgent that there is no time even to attempt multilateral agreement.

The test the Appellate Body imposed was simply that an international agreement should have been "reached or seriously attempted" (para 167). In support of this, it pointed out that the US Congress had directed that multilateral solutions should be sought, that protection of migratory species such as sea turtles demanded cooperative efforts on the part of all countries involved in shrimp fishing, and that the desirability of multilateral agreements in the management of international environmental problems had been recognised by the WTO itself and in the Rio Declaration and other international instruments (paras 167-8). More specifically, the Appellate Body referred to the Inter-American Convention for the Protection and Conservation of Sea Turtles 1996 (para 169-70). It should be noted, however, that not only is this convention not in force but, at the time of the Appellate Body’s findings, had been ratified by only one of its signatories (Venezuela). Nonetheless, the Appellate Body seized upon the consensual nature of its provisions and, in particular, Article XV of the Convention which provided that the parties would, in relation to the Convention’s subject matter, comply with the WTO Agreement on Technical Barriers to Trade and Article XI of GATT 1994. All of these instruments were found to mark the line of equilibrium that the parties themselves had determined as appropriate for the purposes of justifiable discrimination.

The Appellate Body was sufficiently aware of the likely reaction by environmentalists to its finding that the US measures constituted unjustifiable discrimination that it put in an unusual rider. It emphasised that it had not decided that environmental protection was of no interest to the WTO, nor that Members could not adopt effective measures to protect sea turtles or to enter into bilateral or multilateral agreements to do so (para 185). However, there are many questions about what it did decide, some of which will be examined in the next section.

Some Areas of Uncertainty

The Shrimp Appellate Body report raises important questions of interpretation and intriguing issues about the constitutional role of the Appellate Body (Hansen 1999,
pp.1042-7). The balancing test it identified for assessing whether discrimination is unjustifiable under the chapeau gives it considerable discretion in determining the rights and obligations of WTO Members. Although the thrust of its reasoning was in favour of negotiation between the Members and the achievement of consensual solutions to common problems, ultimately the application of the ‘balancing’ test rests in the adjudicatory forum - a result which may be surprising to Member governments. The use of Members’ own acts to identify their intentions and understandings may give the colour of objectivity, but it should not distract attention from the fact that the Appellate Body’s analysis has rendered future adjudications on the effect of Article XX less predictable and more politically problematic.

This is essentially a constitutional problem. Space does not permit detailed examination of this issue, but the Shrimp case should not be considered without acknowledging the significant shift it represents towards the Appellate Body’s power to determine, purely on a case-by-case basis, whether a Member’s acts constitute unjustifiable discrimination within the terms of GATT 1994. Although it is probably too early to consider the need for a non-justiciability principle within the WTO system, the role of the Appellate Body could profitably be reconsidered and reassessed (Jackson 2000, pp 305-7; Trachtman 1999).

More specifically, the Appellate Body’s reasoning leaves considerable uncertainties, in particular about the meaning of "serious attempt", the use of external sources such as multilateral agreements and the principle of sustainable development, and the implications of the "sufficient nexus" test introduced under paragraph (g).

(a) The meaning of "serious attempt"

The Appellate Body suggested that a WTO Member proposing to introduce unilateral TREMs must be able to show that it had first made a "serious attempt" to achieve international consensus. It found on the evidence that the US had not discharged this burden, but did not offer a principled basis on which such a test could be applied in other cases.

On a quantitative level, it should not be too difficult to assess evidence of negotiation, such as detailed proposals, responses to objections and time spent. However, the qualitative aspects of the test would be more difficult. It would involve an understanding of how much a Member would be expected to sacrifice or compromise before being entitled to move from multilateral negotiations to unilateral action (Neuling 1999, pp 46-7). If, for example, there was failure to reach multilateral agreement because the opposing points of view were philosophically irreconcilable, to say that the frustrated State was then entitled to impose unilateral measures would be to accept that one WTO Member had the right to impose its own values on others. This would go much further than would have been possible under the Tuna-Dolphin analysis and would therefore grant new legitimacy to unilateral TREMs under Article XX. But the Appellate Body did require that the attempt be "serious", which would surely not be the case for negotiations which were begun on the basis that only one outcome was acceptable. Neither would it fit easily with the ethos of protecting substantive legal rights contained in the other provisions of the WTO Agreement. In other words, this sort of case raises the question of whether the line of equilibrium
which the Appellate Body seeks to identify from the intentions of the Members as a whole can effectively be drawn by only one.

In a case where the reason for failure to achieve compromise was disagreement not about values but rather about cost, it may also be questioned whether one Member should have the power to impose heavy costs on others in order to achieve its own value-objectives. In such a case, would "serious" have to include an offer of technical or financial assistance? In the Tuna-Dolphin and Shrimp disputes, for example, there was no apparent disagreement about the desirability of protecting dolphins and sea turtles. The fundamental disagreement was about whether the costs of that protection were too great to make it worthwhile and who should bear them.

Another question would concern the urgency of an environmental problem. Would the fact that a species was in danger of extinction, for example, affect the acceptable length of time for negotiations or alter the level of compromise that a State negotiating in good faith ought to offer? For example, the Shrimp dispute concerned an endangered species, whereas the Tuna-Dolphin dispute was concerned with avoiding needless deaths and cruelty but not with the threat of extinction. Would this have meant that different levels of effort would have been required in each case?

Another puzzling aspect of the Appellate Body’s reasoning was its view that the protection of migratory species by definition required international cooperation. It stated this in strong language:

“. . . the protection and conservation of highly migratory species of sea turtles . . .
. . demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migration”

(Para 168).

Expressed in this form, it is a finding of fact which excludes any alternative solution. If this view were to be applied to any transboundary conflict, then any attempt at multilateral agreement which failed would not be sufficient in practice to satisfy the chapeau. But this would suggest that the Appellate Body’s apparent acceptance of unilateral action consequent on the failure of a "serious attempt" at negotiation is meaningless.

(b) Use of external sources

The Appellate Body invoked two types of external sources as an aid to interpretation of Article XX: multilateral agreements, and the principle of sustainable development. The use of these external sources partially answers criticisms that the panels in the Tuna-Dolphin dispute took a ‘blinded’ view of the issues. It has often been argued that the terms of reference of a GATT or WTO dispute settlement body are by definition too narrow to be an appropriate forum for dealing with environmental policies. In addition, it has been claimed that a trade body would not in any case have the required expertise to understand and evaluate environmental issues. As one might expect, therefore, the Appellate Body’s attempt to introduce and employ environmental treaties and concepts has been largely welcomed by environmentalists. At the same time, it raises several intriguing questions.
(i) Multilateral agreements

The first question that should be asked about the Appellate Body’s use of multilateral agreements is why such agreements should be considered relevant at all and, if relevant, the extent to which they affect the substantive obligations contained in the WTO Agreement. The Appellate Body’s argument was as follows. Article XX was designed to permit a certain level of discrimination within the confines of the relevant paragraphs, subject to the need to ensure that any such discrimination did not constitute an abuse. Whether discrimination constituted an abuse or not depended on whether it was "unjustifiable". Since that term could not be defined by reference to other GATT provisions (because Article XX as a whole was intended as an exception to them), and the wording of the chapeau was ambiguous, it was necessary to look elsewhere for guidance. It was therefore legitimate to explore external sources in order to discover the intentions of the Members, not to define their precise obligations, but to draw the “line of equilibrium” between the exercise of substantive rights and the appropriate application of the exceptions under Article XX. It should be noted that this is significantly different to the argument that external agreements should be treated as overriding later treaties (Vienna Convention 1969, Article 30), or taken into account as a subsequent agreement on the interpretation of the WTO Agreement or as subsequent practice in its application (ibid, Article 31). The Appellate Body’s approach to the effect of external instruments is considerably more vague than these provisions, and gives it far more discretion as to their selection and legal effect.

However, there are problems about which external instruments should be chosen for examination, and how much weight they should be given according to their subject-matter, clarity and legal effect. The Appellate Body referred, for example, to CITES and the Rio Declaration. One of the reasons given for finding that the US had not seriously attempted to find a multilateral solution to the problem of shrimp fishing was that it had not raised the issue under the aegis of CITES. It is notable, however, that CITES is concerned with trade in sea turtles, not shrimp. It is not a generalised treaty but one which deals with a very specific aspect of conservation. One might question, therefore, how significant it was that the US did not raise its concerns about shrimp fishing in that forum. The Rio Declaration is ‘soft’ law, and is intended to be implemented through the programme laid down in Agenda 21. Although Principle 12 of the Declaration states that transboundary environmental problems should be tackled through consensus “as far as possible”, it is an interesting development that a non-binding provision could be translated into something which had direct legal effects within the WTO Agreement (Sands 2000, pp 300-1). The Appellate Body also gave particular weight to the Inter-American Convention which the US had signed but not at that time ratified. Indeed, only one of the signatories had ratified it, although the Appellate Body referred to all the signatories misleadingly as "parties" (para 170). It would have been equally possible to conclude from the lack of ratification that the signatories might be reconsidering their views as expressed in the negotiating draft.

Even if it is accepted that the Appellate Body was entitled to use these external sources in order to define the intentions of the Members towards the chapeau, its analysis would have had more authority if it had indicated its understanding of the
different legal effects carried by these instruments in international law and had explained how those different legal effects might affect their influence on the interpretation of the WTO Agreement.

Another aspect of applying international agreements is the question whether individual WTO Members, or groups of Members, should be able to affect the interpretation of Article XX by their activities outside the organisation. In Shrimp, the parties to the dispute had all participated in, or had a connection with, the external instruments referred to by the Appellate Body. Its interpretation of Article XX for those particular WTO Members would therefore be relevant, but how would the Appellate Body tackle the problem of other Members who had a different pattern of international commitments and activity (Neuling 1999, pp 44-5)? One possibility is that it could pursue consistency by applying exactly the same interpretation as determined in a previous dispute, but this would mean that Article XX’s meaning might depend on which parties brought which type of dispute first. Alternatively, the Appellate Body could give a different interpretation of the chapeau according to the identity of the parties and their acceptance of external policy and legal instruments. This would mean that it would be relevant, say, to refer to what the relevant individual Members had said in the Committee on Trade and Environment or in other public statements, both inside and outside the WTO. This would fit with the Appellate Body’s view that the chapeau should be interpreted on a case-by-case basis, but at the risk of allowing individual Members to alter the balance of their rights and obligations under the WTO Agreement by external acts, and of sacrificing internal consistency.

Furthermore, how would the Appellate Body apply its reasoning to Members who were parties to the same external instruments but disagreed about their application? How, for example, would the Appellate Body deal with a comparable dispute in the context of whaling between the US and Japan where both are members of the International Whaling Commission but disagree about the application of the ‘scientific research’ exception to the whaling moratorium (McLaughlin 1999, pp 928-34; Rueda 2000, p 662)?

(ii) Sustainable development

Unlike multilateral agreements, sustainable development has been explicitly drawn into the WTO Agreement by way of the preamble. The wording shows that efforts "both to protect and preserve the environment and to enhance the means for doing so" must be "in a manner consistent with [the parties’] respective needs and concerns at different levels of economic development." There is no substantive provision defining or implementing the concept of sustainable development in the WTO Agreement, unless one includes the limited environmental provisions which soften the impact of some trade rules. Even outside the WTO, there is no precise and universally accepted definition of the concept and, without some concrete scheme of implementation to particular facts, some would say that it is not amenable to judicial application at all (Lowe 1999). It is a principle which guides the making of political, social, environmental and economic choices, but the complexity of issues and the incommensurability of values involved would normally exclude any adjudicatory application.
The Appellate Body gave a reasonably vague role to the principle of sustainable development in the interpretation and application of Article XX. It merely suggested that it could be used to give "colour, texture and shading". It used the idea of sustainable development to support the finding that turtles constituted "exhaustible natural resources". It avoided making a finding on whether paragraph (g) contained jurisdictional limitations, but it is reasonable to ask whether the concept of sustainable development would equally apply to that question. It would also be interesting to know, for example, whether the concept of sustainable development could affect the interpretation of substantive rights under the Agreement. For example, it might have a significant impact on the question of whether Article III permits the sale of imported products to be restricted on the basis of process and production methods that take place in the importing country. (Ahn 1999, pp 852-5; Neuling 1999, p 46).

(c) The test of "sufficient nexus" in paragraph (g)

Although there are difficult questions arising from the Appellate Body’s development of the chapeau, arguably the most problematic as far as environmentalists are concerned lie in its interpretation of paragraph (g). Although it apparently applied that provision more liberally than the Tuna-Dolphin panels, it also imposed a new and ill-defined test of "sufficient nexus".

The Appellate Body deliberately avoided the question of whether paragraph (g) contained any jurisdictional limits. It did, however, introduce a condition not explicit in the wording, namely the necessity for a linkage between the policy behind the measure and the interests of the implementing country. On the facts of the case, the Appellate Body did no more than state that there was "sufficient nexus" between the sea turtles and the US for the policy in question to be acceptable. As a result, of course, it did not offer a principle on which such questions might be decided in the future, although the policy-interest linkage is likely to be a crucial issue in the future.

In Shrimp, the nexus appeared to be jurisdictional, in that the Appellate Body made reference to the fact that the sea turtles at issue were migratory and had populations which traversed or lived in US waters (para 133). The first conclusion one could draw from such a limitation is that the dolphins in the Tuna-Dolphin dispute would have been excluded from consideration because they were not connected to US-controlled waters. If this were the case, then the scope of paragraph (g) would exclude the possibility of taking action to protect animals or plants living beyond national jurisdiction where no migration or other transboundary movement took place (Neuling 1999, pp 45-6). This would be true even under a multilateral agreement, unless the Appellate Body were prepared to treat the design of a measure under paragraph (g) the same way as it did the application of a measure under the chapeau. Since the task of interpreting the substantive paragraphs is one of textual interpretation, as opposed to determining the ‘line of equilibrium’ inherent in avoiding the abuse of the exceptions contained in Article XX, it is difficult to see how the same reasoning could be applied.

One possibility is that the Appellate Body could accept that the existence of a multilateral agreement protecting species living entirely beyond national jurisdiction would create a sufficient nexus in its own right. This would obviously raise problems
of applying consistent WTO law if only some Members were party to that agreement. In addition, it would work differently from the nexus created by the jurisdictional connection since it would require the existence of a multilateral agreement, rather than accepting that a unilateral measure could be introduced in the case of failure to reach international consensus.

Another possible nexus might be defined by reference to the term "resource". The mere fact that sea turtles migrated through US waters was considered to be sufficient, and this suggests that the Appellate Body was taking into account an aspect of control, ownership or exploitability. This could, logically, be extended further to species that were exploited by a country outside its territorial limits. Such an extension could be supported by the fact that the exploiting State would have a reason for protecting that species which is akin to the domestic interests which are clearly protected by Article XX. However, exploitability (or instrumental value) is potentially a very wide category.

Instrumental value may consist of the ability to use a species for commercial purposes. Safeguarding the viability of tuna or shrimp populations would fall under that heading, but not dolphins or sea turtles. A wider version of instrumental value would include existence value and enlightened anthropocentrism (Passmore 1980). Existence value would place a value on a species whether or not it was commercially exploitable - the desire of sections of the American public to protect dolphins would be a good example of such a value (Cheyne 2000). To accept the existence of this type of value as grounds for unilateral TREMs (at least after multilateral negotiations had failed) would raise the same questions as posed above about whether individual Members should be able to impose their environmental values on other Members. Enlightened anthropocentrism would apply to the potential extinction of a species, and represents a precautionary approach to the possible implications of that extinction on the survival of the human race. This would be an easier ground for finding a sufficient nexus because it could be brought under the colour, texture and shading of sustainable development, if the Appellate Body were willing to introduce that argument into the interpretation of substantive provisions of the WTO Agreement. Prevention of extinction might also be an attractive goal to allow WTO Members to pursue, even unilaterally, if it helped to prevent the kind of criticism that has been levelled at the GATT and WTO since the Tuna-Dolphin reports and most vociferously in Seattle.

The "sufficient nexus" problem affects even very well established treaties, including some that were cited by the Appellate Body in support of its argument that multilateralism is the appropriate means to tackle international environmental problems. Trade measures introduced to promote protection of the ozone layer or to slow climate change, or to restrict trade under CITES, may be challenged by WTO Members who are not party to the relevant multilateral agreements. For example, the Montreal Protocol is designed to reduce the threat of damage to the ozone layer. It cannot work unless all parties work together to control trade in ozone-depleting substances, and yet the above analysis suggests that only those States directly threatened by ozone depletion might be entitled to use Article XX(g) in order to defend their actions under the GATT. The Basel Convention would also be affected in so far as parties restrict or prohibit the export of hazardous wastes to other countries unless they are satisfied that proper waste disposal facilities are available. This is not
based on a resource connection with the exporting State, but is an altruistic concern with the protection of health and environment in other countries. Likewise, CITES requires its parties to restrict trade in listed species, regardless of whether any members of those species live in their territories.

Other global issues may arise which are not covered by substantive international obligations. Although the Appellate Body has accepted the specific role of sustainable development, and therefore the need to accommodate environmental policies, it is likely to be asked in the future to accommodate other types of non-trade issues such as labour rights and human rights (Charnovitz 1999, Garcia 1999). The question of what constitutes sufficient nexus where one Member wishes to restrict imports on the basis of social policies implemented in the importing country will be a crucial part of resolving these types of conflicts by panels and the Appellate Body.

Conclusions

The Shrimp Appellate Body report is not easy to categorise from a trade-environment point of view. On the one hand, the Appellate Body employed language and references that suggest that it is more in tune with contemporary environmental concerns than earlier dispute settlement bodies. On the other, its interpretation of the scope of paragraph (g) may place barriers in the way of unilateral, and perhaps multilateral, TREMs, and throws into doubt its apparently liberal stance on the balance between trade and environmental issues.

The Appellate Body's employment of a ‘balancing line’ in the application of the chapeau has the virtue that the underlying arguments and conflicting values inherent in the trade-environment conflict must be presented in a public and reasoned manner. However, a case-by-case approach, drawing from sometimes conflicting and partial evidence of Members’ intentions, and the inherently mobile nature of the line itself, all place the Appellate Body in a central role which blurs the division between law and politics, adjudication and policy-making.

The Appellate Body's legal reasoning in Shrimp is sufficiently ambiguous and flexible in its interpretation of both the chapeau and paragraph (g) that it is nearly impossible to predict how trade-environment disputes may be resolved in the future. The anti-globalisation demonstrations in Seattle were just one sign of frustration with the slow progress made in negotiating forums such as the Committee on Trade and Environment and the difficulty in satisfying the requirements of Article XX before dispute settlement bodies. If the Appellate Body is not to contribute to this frustration, it must strengthen its environmentally sympathetic language with transparent and workable principles.

This is not to say that trade rules should always be sacrificed to environmental values, nor that developing countries' concerns about protectionism and 'eco-imperialism' should be dismissed. But it does mean that the Appellate Body will have to tackle the types of values behind environmental policies much more explicitly and much more selectively. It needs to recognise the significance of policies which are concerned, for example, with the threat of irreversible harm or with protecting the global commons.
against free-riders, as opposed to policies which represent essentially cultural or species bias. Relying on jurisdictional or exploitation connections or on the ability of countries to reach a level of consensus is not a sufficiently sophisticated approach in the light of contemporary environmental concerns.

As Jackson has pointed out, the problem with a slippery slope is not that one starts down it, but that one needs to know how one's descent can be stopped before reaching the bottom (Jackson 2000, p 304). The Appellate Body has shown some ambiguity about whether it is ready to allow Members to start down the slippery slope and, if necessary, what mechanisms might be used in order to prevent a headlong descent. In principle, its willingness to accept unilateral TREMs under Article XX has opened up the possibility of moving away from the old exclusive certainties of the Tuna-Dolphin jurisprudence. It must now complete the task by clarifying and refining the conditions under which unilateral extraterritorial measures may play an appropriate role under the WTO Agreement.

Bibliography


