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Trade and the environment: the legality of unilateral measures with extraterritorial effect to protect the environment under the WTO/GATT

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I. INTRODUCTION

The relationship between trade liberalisation and environmental protection has always been a prominent issue in the World Trade Organization (WTO).[1]

On the one hand, the WTO aims at eliminating barriers to trade. On the other hand, it intends to promote international trade with due regard to protection and preservation of the environment.

The preamble of the Agreement establishing the WTO, the so called Marrakesh Agreement,[2] points out the general significance of environmental protection and sustainable development. The WTO law contains several provisions concerning the environment.[3] However, it is not yet finally clarified in how far WTO Members can adopt measures to protect the environment where those measures have trade-restricting effects.

This question is particularly problematic where a Member implements such a measure unilaterally and the measure affects other countries' policies. The question at stake is to what extent Member States can unilaterally adopt measures to protect the environment where those measures have extraterritorial effect, i.e. where those measures require other states to change their policies in order to gain access to the importing country's market.

The GATT[4]/WTO adjudicating body had to deal with two disputes addressing this issue, namely the *Tuna-Dolphin* dispute[5] and the *Shrimp-Turtle* case.[6] These two disputes are of outstanding importance for the issue of unilateral measures with extraterritorial effect to protect the environment.

Both disputes dealt with the question whether import embargoes, that were inconsistent with Article XI of the GATT for they imposed quantitative import restrictions, could be justified under Article XX (g) of the GATT as measures to con-

[1] Sabrina Shaw, Risa Schwartz 'Trade and environment in the WTO' (2002) 36 *Journal of World Trade* 129.
[2] Agreement establishing the World Trade Organisation 1994 (Marrakesh Agreement).
[3] See II. 3. a).
[4] General Agreement on Tariffs and Trade (GATT) 1994.
[5] Panel Report on *United States – Restrictions on Imports of Tuna* (1991) DS21/R (*Tuna-Dolphin I*); Panel Report on *United States – Restrictions on Imports of Tuna* (1994) DS29/R (*Tuna-Dolphin II*).
[6] Appellate Body on *United States – Import prohibition of certain shrimp and shrimp products* (1998) WT/DS58/AB/R (*Shrimp-Turtle*).

serve exhaustible natural resources. The two decisions interpreted Article XX of the GATT, particularly paragraph g of that provision, differently.

According to the panel in *Tuna-Dolphin*, a unilateral measure that forced other countries to change their policies within their own jurisdiction and that could only become effective if those changes occurred, did not fall under paragraph g of Article XX of the GATT. [7]

In contrast to that, pursuant to the Appellate Body (AB) in *Shrimp-Turtle*, a unilateral measure forcing other countries to change their policies was within the terms of paragraph g of Article XX of the GATT but could not be justified if its application led to an arbitrary and unjustifiable discrimination between countries.[8] According to the AB, the country implementing the measure at stake should have entered into negotiations with all other countries concerned before adopting the measure.

The decisions have been much discussed and criticised by legal scholars and environmentalists. Critics were unsatisfied with the weight that had been given to the importance of either environmental protection or international cooperation.[9]

Despite all discussions, the WTO still has not implemented a provision solving the particular issue of unilateral measures dealing with extraterritorial environmental concerns. In fact, it is highly unlikely that particularly such a provision will be adopted, even if the current trade negation round of the WTO leads to new provisions dealing with environmental protection.[10] That shows how controversial this issue is.

The question whether countries can unilaterally adopt measures to protect the environment where those measures have extraterritorial effect must be analysed against the backdrop of both WTO jurisprudence and general principles of international law.

Although this paper supports the *Shrimp-Turtle* AB report in terms of its approach to balance conflicting values inherent in the trade-environment conflict,[11] the decision needs to be clarified in some points. For example, according to the AB, countries could implement an extraterritorial measure where the protected object and

[7] *Tuna-Dolphin I* para. 5.27-5.29, 5.32; *Tuna-Dolphin II* para. 5.26, 5.38.
[8] *Shrimp-Turtle* para. 186.
[9] See Robert Howse 'The Turtles Panel, Another Environmental Disaster in Geneva' (1998) 32 *Journal of World Trade* 73 at 74, calling the *Shrimp-Turtle* report an environmental disaster and the *Tuna-Dolphin* reports 'perhaps the most widely criticised rulings of any panels in the GATT's history.'
[10] See an example of a possible provision on environmental protection in Steve Charnovitz 'The WTO's Environmental Progress' (2007) 10 *Journal of International Economic Law* 685 at 692, 693.
[11] *Shrimp-Turtle* para. 151 et seq.

the country adopting the measure had a 'sufficient nexus'.[12] However, the AB did not elaborate on the nature or requirements of the term 'sufficient nexus'. Moreover, the decision left it unclear when a country has 'seriously attempted' to achieve consensus with other countries concerned.[13] Certain standards are necessary to define this term. Also, the AB's use of multilateral agreements other than the GATT to interpret Article XX of the GATT is controversial and has to be analysed.

Apart from that, the principles of state sovereignty and non-intervention need to be considered when analysing unilateral measures with extraterritorial effect. These principles can pose obstacles to extraterritorial measures. For an analysis, it first needs to be clarified what the terms 'unilateral' and 'extraterritorial' mean in the trade-environment context. Afterwards, one must examine whether unilateral and extraterritorial measures conflict with the principles of state sovereignty and non-intervention.

In addition to that, the approach of balancing conflicting interests in connection with trade restricting measures to protect the environment has to be discussed. The balancing of interests is used so that none of the countries concerned by a measure gets deprived of its rights. That means, in terms of the WTO/GATT, Member States must generally be able to invoke their rights under the GATT and, at the same time, a Member implementing a trade-restricting measure to protect the environment must have the opportunity to make use of the exceptions set out in Article XX of the GATT. The approach of balancing conflicting interests shows distinct affinities to the principle of proportionality. One must determine the notion of proportionality first before discussing the impact of this principle on Article XX of the GATT.

Furthermore, the legality of unilateral measures with extraterritorial effect to protect the environment must be examined against the backdrop of the principle of international cooperation. It needs to be clarified under what circumstances a state can unilaterally adopt extraterritorial measures and when it has to enter into negotiations with other states first. Two provisions dealing with international cooperation are particularly relevant in this context, namely, Article 1 of the Charter of the United Nations (UN Charter) laying down a general obligation to cooperate and Principle 12 of

[12] *Shrimp-Turtle* para. 133.
[13] *Shrimp-Turtle* para. 167.

the Rio Declaration[14] addressing international cooperation in terms of environmental concerns.

In conclusion, this paper will show that both WTO jurisprudence and general principles of international law allow unilateral measures with extraterritorial effect to protect the environment under certain circumstances.

Although unilateral measures are not the most desirable solution, they constitute an effective means to promote environmental protection as long as the WTO cannot come to a negotiated compromise in terms of the trade-environment conflict. In this situation, the WTO's adjudicating body plays a central role since it has to examine and judge unilateral measures to protect the environment that have trade-restricting effects on a case-by-case basis. The WTO adjudicating body can draw on the *Shrimp-Turtle* decision and particularly on the AB's approach to balance the conflicting rights at issue. However, it needs to clarify some points of uncertainty and set up certain guidelines to guarantee a consistent jurisprudence and legal certainty.

[14] Rio Declaration on Environment and Development (Rio Declaration) 1992.

II. HISTORY OF THE TRADE-ENVIRONMENT RELATIONSHIP UNDER THE WTO/GATT

To begin with, the history of the trade-environment relation needs to be outlined in order to explain the on-going tensions within the WTO.

1. THE BEGINNING OF MODERN INTERNATIONAL ENVIRONMENTAL LAW

The relationship between trade liberalisation and environmental protection has been an issue ever since the development of modern international environmental law.

Modern international environmental law started to develop with the United Nations Conference on the Human Environment in Stockholm in 1972 (Stockholm Conference) that aimed at encouraging actions to protect the environment by means of international cooperation.[15]

The Stockholm Conference drafted the Stockholm Action Plan that contained recommendations for international action regarding, inter alia, natural resources management and the integration of environment and development.[16] Thus, international cooperation to improve environmental protection has been promoted already more than 25 years before the establishment of the WTO.

In addition to that, the conference led to the Stockholm Declaration.[17] Principles 4, 8 and 18 of the Stockholm Declaration deal with balancing the environment and economic development. According to Principle 4, nature conservation must be taken into account in planning for economic development. Principle 8 says that economic development is necessary for the improvement of conditions on earth leading to a better quality of life. Moreover, economic development must lead to the control of environmental risks and the solution of environmental problems, pursuant to Principle 18. Hence, the idea that economic development and measures to protect the environment need to be combined and balanced, has been written down in an international declaration prior to the Marrakesh Agreement.

[15] Daniel Bodansky (ed) et al *The Oxford Handbook of International Environmental Law* (2008) page 33; David Hunter et. al. *International Environmental Law and Policy* (2011) page 143.
[16] David Hunter et. al. (footnote 15) page 143.
[17] Declaration of the United Nations Conference on the Human Environment.

Moreover, the Stockholm Conference led to the establishment of the United Nations Environment Programme (UNEP) in the same year. To this day, it is the primary UN organ being concerned with the environment.[18] The UNEP promotes international cooperation leading to major international environmental treaties.[19]

In conclusion, the Stockholm Conference encouraged international cooperation to promote environmental protection in the course of economic development.

However, during the preliminary stages of the Stockholm Conference, environmental protection had to face certain obstacles arising out of trade related concerns. In preparation of the conference, the Secretariat of the GATT set up a study on 'Industrial Pollution Control and International Trade' that dealt with the effects of environmental protection measures on trade. The study expressed concern that environmental protection policies could form obstacles to trade and cause 'green protectionism'.[20] Thus, the interaction between trade and environmental concerns had not yet been well developed.

2. DEVELOPMENTS FROM 1971 TO 1994

Between 1971 and 1994, several international conferences and committees dealt with environmental concerns at the trade-environment interface. However, environmental protection had not yet become an interest of the international community as important as economic development.

a) The Group on Environmental Measures and International Trade

In 1971, the GATT Council of Representatives established the Group on Environmental Measures and International Trade (EMIT).[21]

The group should, however, only convene if a party to the GATT requested so. A request was not made until 1991 when Austria, on behalf of the EFTA countries, [22] proposed the convening of the EMIT group for, according to the proposal, it was

[18] David Hunter (footnote 15) page 144.
[19] Ibid.
[20] See the historical overview at The World Trade Organisation 'Environment: History' available at *http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm*, accessed on 18 January 2012.
[21] Ibid.
[22] European Free Trade Association.

necessary to examine potential conflicts between the GATT and recent trade related international agreements to protect the environment. [23]

The fact that the group only convened 20 years after its establishment shows that environmental protection still had not been effective but merely a subordinate concern in relation to economic development.

b) The Tokyo Round

From 1973 to 1979, the Tokyo Round of trade negotiations took place.

Amongst other things, it worked out the Agreement on Technical Barriers to Trade (TBT). The TBT Agreement was the first agreement within the GATT that dealt with technical regulations and standards in the trade-environment context. [24]

The agreement includes, inter alia, technical regulations that have trade restricting effects to protect animal or plant life or health, or the environment.[25] Moreover, it promotes international cooperation by encouraging countries to adopt international standards whenever possible.[26]

Hence, the TBT Agreement includes both the approach to combine trade promotion and environmental protection polices and the principle to cooperate internationally.

c) The Uruguay Round

During the Uruguay Round (1986 –1994) that led to the establishment of the WTO, the trade-environment relationship became more and more important.

At the beginning of the round, the environment was not even on the agenda.[27] In 1992, the GATT Report on Trade and the Environment stated that trade-restricting measures to protect the environment were counterproductive since they affected eco-

[23] GATT Council Overview of the Developments in International Trade and the Trading System, Annual Report by the Director General (1991) 3 *World Trade Materials* 5 at 12.
[24] Christian Tietje 'Die völkerrechtliche Kooperationspflicht im Spannungsverhältnis Welthandel/Umweltschutz und ihre Bedeutung für die europäische Umweltblume' (2000) *Europarecht* 285 at 286.
[25] Article 2.2 of the TBT Agreement.
[26] Article 2.4 and 2.6 of the TBT Agreement.
[27] Kevin C. Kennedy 'The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes' (1998) 22 *William and Mary Environmental Law and Policy Review* 375 at 394.

nomic growth negatively.[28] However, in the late stages of the round, environmental protection was promoted. This change occurred partly because the Rio Conference had been prepared and held during that time. [29] The conference promoted international environmental protection (see below under II. 2. d). Besides that, environmental protection became an important issue of the Uruguay Round because of the criticism of the *Tuna-Dolphin* panel reports (see below under II. 2. e).[30]

In the end, the preamble of the Marrakesh Agreement made environmental protection and sustainable development a high priority for the WTO and several WTO Agreements contain provisions addressing environmental issues.[31]

d) The Rio Conference

The United Nations Conference on Environment and Development in Rio took place in 1992. It addressed environmental issues in the development context.[32]

The Rio Conference adopted Agenda 21 which, inter alia, states that trade and the environment should be made mutually supportive.[33] Moreover, the preamble of Agenda 21 promotes 'a global partnership for sustainable development'.[34]

Besides that, the conference led to the Rio Declaration. According to Principle 12 of the Rio Declaration, states should cooperate to promote economic growth and sustainable development. Further, '[t]rade policy measures for environmental purposes should not constitute a means of arbitrary and unjustifiable discrimination or a disguised restriction on international trade'.[35] Moreover, importing countries should avoid unilateral actions to protect the environment outside of their jurisdiction. Rather, international environmental concerns should be addressed by internationally agreed measures.

Thus, Agenda 21 and Principle 12 of the Rio Declaration promote international cooperation in terms of environmental protection. In addition to that, the wording of sentence 2 of Principle 12 corresponds with the chapeau of Article XX of the GATT

[28] Ibid.
[29] Christian Tietje (footnote 24) at 286.
[30] Kevin C. Kennedy (footnote 27) at 394.
[31] See below under II. 3. a).
[32] David Hunter (footnote 15) page 154 et seq.
[33] See for example paragraph 2.3 (b) and paragraph 2.9 (d) of Agenda 21.
[34] See 1.1 of the preamble of Agenda 21.
[35] Principle 12 sentence 2 of the Rio Declaration.

that provides the basis for the approach to balance conflicting rights of concerned countries.

e) The Tuna-Dolphin dispute

In the early 1990s, while the Uruguay Round was still proceeding, the *Tuna-Dolphin* dispute arose.

The reports by the two GATT panels in 1991[36] and 1994[37] were highly criticised not only by environmentalists[38] but also by legal scholars[39] for they suggested that economic sanctions could not be used in order to promote international environmental goals under the GATT. According to the panels, an importing country could not unilaterally force exporting countries to change their policies.[40] The panel reports did, however, not discuss the balancing of rights of the countries concerned.

The decisions led to the 'widespread public concern that the GATT was a significant obstacle to achieving environmental protection'.[41] Hence, environmental protection suffered a setback whereas liberalisation of trade was reinforced.

3. THE ESTABLISHMENT OF THE WTO

The development of the trade-environment relationship was pushed forward by the establishment of the WTO in 1994.

Negotiations during the Uruguay Round showed the need for new institutional mechanisms and an improved dispute settlement system.[42] As a result, the WTO was founded as an international organisation with legal personality, and a Dispute Settlement Body (DSB) was introduced. Moreover, the WTO created the Committee for Trade and Environment (CTE).

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[36] *Tuna-Dolphin I*.
[37] *Tuna-Dolphin II*.
[38] The World Trade Organisation 'Environment: History' (footnote 20); Ilona Cheyne 'Trade and he Environment: the Future of Extraterritorial Unilateral Measures after the *Shrimp* Appellate Body' (2000) 5 *Web Journal of Current Legal Issues* Introduction, available at http://webjcli.ncl.ac.uk/2000/issue5/cheyne5.html, 18 January 2012.
[39] See Robert Howse (footnote 9): The *Tuna-Dolphin* reports 'were perhaps the most widely criticised rulings of any panels in the GATT's history.'
[40] *Tuna-Dolphin I* para. 5.27-5.29, 5.32; *Tuna-Dolphin II* para. 5.26, 5.38.
[41] Richard G. Tarasofsky 'The WTO Committee on Trade and Environment: Is it making a Difference?' in Armin von Bogdandy et al (ed) *Max Planck Yearbook of United Nations Law* (1999) page 471 at 472.
[42] Mitsuo Matsushita *The World Trade Organisation* (2006) 2ed, page 6.

a) The WTO Agreements

Whereas the GATT was only concerned with tariff reductions and concessions, the WTO also addresses other important trade-related issues such as the environment, agriculture, services, intellectual property and an effective dispute settlement.[43]

The WTO was established by the Marrakesh Agreement. According to Article II (2) of the Marrakesh Agreement, the Members accept the Marrakesh Agreement together with all Multilateral Trade Agreements attached to it as single packge. [44] Thereby, all agreements become binding on each WTO Member.

The WTO Agreements contain attempts to balance the trade-environment relation.[45]

Article XX of the GATT, for example, provides general exceptions through which Members can justify trade-restricting measures.[46] In terms of environmental protection, Members can implement measures necessary to protect animal or plant life, pursuant to Article XX (b) of the GATT. In addition to that, Article XX (g) of the GATT allows measures relating to the conservation of exhaustible natural resources.

Other WTO Agreements also contain several provisions concerning environmental issues, including the General Agreement on Trade in Services (GATS), the TBT Agreement, the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures (SPS), the Agreement on Subsidies and Countervailing Measures (SCM), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[47]

Besides that, the preamble of the Marrakesh Agreement points out the general significance of environmental protection and sustainable development. According to the preamble, Members must allow for

> 'the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent

[43] Mitsuo Matsushita (footnote 42) page 3, 7, 8.
[44] Ibid page 7.
[45] Ilona Cheyne (footnote 38) 'Institutional Background'; Kevin C. Kennedy (footnote 27) at 394.
[46] Petros C. Mavroidis et. al. *The Law of the World Trade Organisation (WTO)* (2010) page 684.
[47] The World Trade Organisation 'Environment: History' (footnote 20).

with their respective needs and concerns at different levels of economic development.'[48]

The wording of the preamble resembles Principles 11, 12 and 16 of the Rio Declaration. It recognises that environmental issues and sustainable development must be taken adequately into account in the context of international trade.[49]

b) The dispute settlement system

In addition to that, the WTO dispute settlement system encourages the balancing of trade promotion and environmental protection

(i) The WTO DSB is much more powerful and effective than the GATT dispute settlement system was.

Under the GATT, a panel could be established,[50] but its rulings were not binding unless each party agreed to the panel report, also the party that lost the dispute. If the panel report had not been adopted by consensus, the decision had no binding legal effects and the party in violation of a GATT provision could not be forced to bring its measures into compliance with its obligations.[51]

In contrast to that, WTO panel and Appellate Body reports are binding according to the principle of 'reverse consensus', that means the rulings are binding on all Members unless the DSB decides by consensus not to adopt the report.[52] In addition to that, the DSU provides for the enforcement of the rulings by the WTO adjudicating body.[53] If a Member in violation of its obligations does not comply with the recommendations and rulings of the DSB, any party that has invoked the dispute settlement procedure can negotiate compensation or suspend concessions or other obligations.[54]

[48] Paragraph 1 of the preamble of the Marrakesh Agreement.
[49] Ilona Cheyne (footnote 38) 'Institutional Background'.
[50] See Petros C. Mavroidis (footnote 46) page 886: Disputes could be submitted to a panel of experts who then issued a report to the contracting parties.
[51] Petros C. Mavroidis (footnote 46) page 888.
[52] Articles 16 (4) and 17 (14) of the Understanding on rules and procedures governing the settlement of disputes (Dispute Settlement Understanding – DSU); Mitsuo Matsushita (footnote 30) pages 116, 117.
[53] Articles 21 and 22 of the DSU.
[54] Article 22 (1) and (2) of the DSU; Petros C. Mavroidis (footnote 42) pages 1073 and 1074.

Moreover, the rulings by the Appellate Body (AB) are clearer and more consistent since the AB is a standing body composed of seven permanent judges with respective expertise.[55] Although its rulings are no binding interpretations or precedents, subsequent panels or the AB usually refer to previous decisions and try to rule in line with the interpretation established beforehand.[56] Thereby, the WTO adjudicating body interprets WTO law and guarantees legal certainty.[57]

Thus, the WTO dispute settlement system is crucial for further developments of WTO law. Since trade negations have become more and more difficult and complex, particularly in terms of the trade-environment relationship, the dispute settlement system plays a central role in the law-making process of the WTO.[58]

(ii) Since the establishment of the WTO dispute settlement system, two important disputes concerning trade-restricting measures to protect the environment under the GATT have been decided: the *Gasoline* case[59] and the *Shrimp-Turtle* case.[60] Each decision deals with the justification of an environmental protection measure with trade restricting effects under Article XX (g) of the GATT.

The AB in the *Gasoline* case in 1996 ruled in favour of the complainants stating that the measure at stake was inconsistent with the GATT. The AB found, after having examined the rights of the US (the defendant) and the rights of other countries concerned,[61] that the US applied rules to reduce air pollution in a way that discriminated against countries exporting gasoline to the US.[62] Thus, the US measure violated Article III of the GATT and, although the measure was within the terms of paragraph g, it could not be justified as it did not meet the requirements of the chapeau of Article XX of the GATT.[63]

Two years later, in the *Shrimp-Turtle* case, the AB also found that the measure at stake was inconsistent with the GATT due to a violation of Article III of the GATT

[55] Article 17 (1) and (3) of the DSU; Ilona Cheyne (footnote 38) 'Institutional Background'.
[56] Mitsuo Matsushita (footnote 42) pages 111, 112.
[57] Petros C. Mavroidis (footnote 46) pages 905, 910.
[58] Ilona Cheyne (footnote 38) 'Institutional Background'.
[59] Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R (*Gasoline*).
[60] *Shrimp-Turtle*.
[61] *Gasoline* pages 22 et seq.
[62] *Gasoline* pages 28, 29.
[63] *Gasoline* pages 28, 29.

that could not be justified under the chapeau of Article XX of the GATT. Pursuant to the AB, the import ban on shrimp to protect sea turtles posed an unjustifiable and arbitrary discrimination.[64]

However, in both decisions the AB made clear that environmental protection was an important interest of the WTO Members.[65] It recognised that Article XX of the GATT contained exceptions to other GATT rules and that neither of the Members' rights under the GATT should be ruled out.[66] Moreover, the *Gasoline* AB report highlighted that policies on trade and on the environment had to be coordinated.[67] *Shrimp-Turtle* emphasised that countries should cooperated to achieve environmental protection.[68]

Hence, the AB recognised the principles of both the balancing of rights and international cooperation in terms of the trade-environment relationship.

c) The WTO Committee for Trade and Environment

The WTO Committee for Trade and Environment is the successor of the EMIT.[69]

The CTE examines trade-environment conflicts. It is supposed to recommend solutions to issues listed in its work program.[70] However, it has been criticised since it has not reached much progress and concrete results yet.[71] In the CTE's 1996 progress report,[72] for example, it merely supported multilateral solutions to trade concerns with a view to Principle 12 of the Rio Declaration. In terms of the relationship between environmental protection measures with trade-restricting effects and provisions of the multilateral trading system, the CTE could not come to a conclusion at all.[73]

[64] *Shrimp-Turtle* para. 176, 184.
[65] *Gasoline* pages 29, 30; *Shrimp-Turtle* para. 185.
[66] *Gasoline* pages 22 et seq; *Shrimp-Turtle* paras. 156 et seq.
[67] *Gasoline* page 30.
[68] *Shrimp-Turtle* para. 185.
[69] Ilona Cheyne (footnote 38) 'Institutional Background'; Kevin C. Kennedy (footnote 27) at 422.
[70] Kevin C. Kennedy (footnote 27) at 422.
[71] Ilona Cheyne (footnote 38) 'Institutional Background'.
[72] *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1.
[73] Kevin C. Kennedy (footnote 27) at 427.

Recent discussions in the CTE focus on environmental requirements and market access issues with particular respect to developing countries.[74]

4. CURRENT STATUS

At the present, the relationship between international trade and measures to protect the environment plays a central role within the WTO.

The trade-environment relation is one of the main areas of negotiation of the current Doha Round that has been on-going since 2001. It is said that if the Doha Round can be brought to a conclusion, it will lead to new provisions dealing with environmental protection.[75] However, a conclusion is not yet in sight.

As long as negotiations do not result in binding solutions, the WTO adjudicatory body has to decide disputes regarding measures to protect the environment on a case-by-case basis.[76]

5. CONCLUSION

In conclusion, although environmental protection on the interface to international trade has been promoted since the early 1970s, efficient mechanisms to combine policies on trade and on environmental protection have only been introduced with the establishment of the WTO in 1995.

Since the WTO Members do not seem to be able to reach consensus in this regard, it is the role of the WTO adjudicating body to assess trade-restricting measures to protect the environment.

[74] The World Trade Organisation 'Environment: CTE Work' available at *http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm*, accessed on 18 January 2012; The World Trade Organisation 'Environment: Regular work' available at *http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm*, accessed on 18 January 2012.
[75] Steve Charnovitz (footnote 15) at 692, 693.
[76] Ilona Cheyne (footnote 38) 'Institutional Background'.

III. WTO/GATT JURISPRUDENCE: THE *TUNA-DOLPHIN* AND *SHRIMP-TURTLE* DISPUTES

Several cases dealing with environmental concerns have been brought before the WTO/GATT adjudicating body. The two most important disputes in terms of unilateral measures with extraterritorial effect to protect the environment are the *Tuna-Dolphin* and *Shrimp-Turtle* disputes that are outlined and compared herein. The outline concentrates on the arguments and findings regarding the unilateral implementation of measures with extraterritorial effect in connection with Article XX (g) of the GATT.

1. THE TUNA-DOLPHIN DISPUTE

The *Tuna-Dolphin* dispute was dealt with under the old GATT dispute settlement procedure.[77]

In 1991, Mexico requested a panel in response to a tuna import embargo by the United States pursuant to the US Marine Mammal Protection Act (MMPA) which intended to protect and conserve marine mammals.[78] The panel report (*Tuna-Dolphin I*) was circulated but not adopted. Therefore, it was not legally binding.[79] In 1994, a second panel report (*Tuna-Dolphin II*) was circulated due to a panel request by the European Union (EU) and the Netherlands regarding import embargoes in connection with the same act. However, that report was not adopted and binding, either. *Tuna-Dolphin II* upheld some of the findings of *Tuna-Dolphin I* and modified others. Therefore, the following outline concentrates on *Tuna-Dolphin II*.

a) Factual aspects

In the eastern tropical Pacific Ocean, schools of yellowfin tuna could regularly be found swimming below schools of dolphins. Catching the tuna with purse seine nets often resulted in incidental killing and injury of many dolphins.[80]

[77] See II. 3. b).
[78] Marine Mammal Protection Act of 1972, PL 92-522, 86 Stat 1027.
[79] See II. 3. b).
[80] *Tuna-Dolphin II* para. 2.1, 2.2.

The MMPA prohibited the taking of marine mammals, whether directly or incidentally, by any person or vessel within the jurisdiction of the US or within any area over which the US had jurisdiction.[81] However, the MMPA provided for a permit to take marine mammals incidentally to commercial fishing operations.[82] The American Tunaboat Association was the only recipient of such a permit.[83]

Moreover, according to the MMPA, the US government had to impose an import ban regarding tuna caught by a method that led to the incidental killing or serious injury of dolphins in excess of US standards (primary nation embargo).[84] In other words, exporting countries had to meet the dolphin protection standards of the US in terms of both fishing technology and the rate of incidental takings. In terms of yellowfin tuna from the eastern tropical pacific, Section 101 (a)(2)(B) of the MMPA set out specific requirements. An exception to the primary nation embargo applied where a country entered into an agreement with the US that had to include certain commitments.[85]

Further, a country that exported yellowfin tuna or tuna products to the US and had imported yellowfin tuna or tuna products that were subject to a direct import ban had to certify that it had not had imported such tuna or tuna products in the previous six months (intermediary nation embargo).[86] The respective provision had been amended in October 1992. Due to the changed provision, France, the Netherlands Antilles and the United Kingdom were removed from the list of intermediary nations, while Costa Rica, Italy, Japan and Spain remained on it.[87]

b) Legal issues

The EU and the Netherlands (hereinafter: the complainants) argued that both the intermediary and the primary nation embargoes were inconsistent with Article XI of the GATT, which prohibited quantitative import restrictions.[88] Moreover, according

[81] *Tuna-Dolphin II* paras. 2.4, 2.5.
[82] Ibid 2.7; Section 101 (a) (2) of the MMPA.
[83] Ibid 2.8.
[84] Ibid 2.9, 2.10.
[85] Ibid 2.11.
[86] Ibid 2.12; Section 101 (a) (2) (C), 3 (5) of the MMPA.
[87] *Tuna-Dolphin II* para 2.13-2.15.
[88] Ibid 3.1.

to the complainants, the embargoes violated the national treatment principle contained in Article III and Note ad Article III of the GATT.[89]

Neither would the embargoes be justified under Article XX of the GATT which contained general exceptions.[90]

According to the US, on the other hand, the intermediary nation embargo was justified under Article XX (g), (b), and (d) of the GATT.[91]

Moreover, the US argued that the primary nation embargo did not apply to the complainants. The primary nation embargo would further be justified under Article XX (b) and (g) of the GATT.[92]

c) The panel's findings

(i) The panel first found that the import embargoes violated the national treatment principle contained in Article III of the GATT.

According to the panel, Article III of the GATT applied to domestic measures in case of a law 'which applie[d] to an imported product and to the like domestic product and [was] […] enforced in the case of the imported product at the time or point of importation'.[93] Moreover, pursuant to Article III:4 of the GATT, a country could not treat an imported product less favourable than a like domestic product.[94]

The panel proceeded by stating that Note ad Article III of the GATT justified the enforcement of an internal law that was applied equally to the imported product and the like domestic product. However, according to the panel, the provision did not apply if the enforcement related to policies that did not refer to the product as such and that led to a less favourable treatment of 'like products not produced in conformity with the domestic policies of the importing country'.[95]

The panel concluded that Note ad Article III of the GATT did not apply in the present case since the measures at stake did not refer to the product as such: The import embargoes distinguished between methods of catching tuna and import policies.

[89] *Tuna-Dolphin II* para. 3.1.
[90] Ibid.
[91] Ibid 3.2.
[92] Ibid para. 3.2.
[93] Ibid para. 5.8.
[94] Ibid.
[95] Ibid.

The measures in terms of domestic tuna likewise distinguished between catching methods. These methods and policies did not affect the product itself.[96]

(ii) Secondly, the panel found that the import embargoes violated Article XI:1 of the GATT since the ban of tuna imports imposed quantitative restrictions.[97]

(iii) The panel proceeded with its main point stating that the import embargoes could not be justified under paragraph g and the chapeau of Article XX of the GATT.

The panel applied a three-step analysis determining first whether the policy at stake fell within the scope of policies to conserve exhaustible natural resources, second whether the particular measure related to the conservation of exhaustible natural resources and whether it was made effective in conjunction with restrictions on domestic production or consumption, and third whether the measure was not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.

According to the panel, a policy to conserve dolphins fell within the scope of policies to conserve exhaustible natural resources since dolphins could potentially be exhausted. The panel stated that dolphin stocks did not have to be depleted at the time of the policy.[98] Moreover, the exhaustible resources did not have to be located within the jurisdiction of the country implementing the measure: The panel found that the text of paragraph g and the chapeau of Article XX of the GATT did not require the policy to be limited to a certain area.[99] Further, two previous panels had applied the provision to policies that had an impact on resources within and outside of the respective country's jurisdiction.[100] In addition to that, according to the panel, the GATT did not, in principle, prohibit measures relating to things or conduct outside of the jurisdiction of the country implementing the measure.[101] Also, the panel held that general international law did not, in principle, proscribe measures regulating conduct

[96] Ibid 5.9.
[97] *Tuna-Dolphin II* para. 3.1.
[98] Ibid 5.13.
[99] Ibid 5.15.
[100] Ibid.
[101] Ibid 5.16.

of a country's nationals or vessels, including any persons on these vessels, with respect to persons or things outside of their territory.[102] Lastly, the panel explained that environmental and trade treaties other than the GATT could be used as supplementary means to interpret Article XX (g) of the GATT pursuant to Article 32 of the VCLT.[103] However, these treaties were only of limited assistance in the present case since the GATT did not include any direct reference to these treaties. Moreover, the material presented to the panel did not provide a clear answer to the question whether the resources in Article XX (g) of the GATT had to be located within the jurisdiction of the respective country.[104]

In terms of the second step of the panel's three-step analysis, the panel found that the primary and intermediary nation embargoes were neither related to the conservation of dolphins nor made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX (g) of the GATT.[105]

According to the panel's reference to a previous panel, the term 'relating to' meant 'primarily aimed' at the conservation and the term 'in conjunction with' meant 'primarily aimed' at rendering effective the restrictions on domestic production or consumption.[106]

The panel proceeded by stating that neither the intermediary nor the primary nation embargo could, by itself, promote the US goal of dolphin conservation:[107] In terms of the intermediary nation embargo, imports were banned regardless of an actual harm to dolphins and regardless of the intermediary nation's harvesting policies and methods. The import ban was triggered by the fact alone that the intermediary nation imported tuna from a country with fishing policies and methods different from the US' policies.[108] In terms of the primary nation embargo, the panel found that tuna imports were banned regardless of an actual harm for dolphins, due to the mere fact that the exporting country had different policies and methods than the US.[109]

According to the panel, the intermediary and primary nation embargoes could only promote dolphin protection in case the embargoes led to a change of other coun-

[102] Ibid 5.17.
[103] Vienna Convention on the Law of Treaties.
[104] *Tuna-Dolphin II* para. 5.20.
[105] Ibid 5.21, 5.27.
[106] Ibid 5.22.
[107] Ibid 5.23, 5.24.
[108] Ibid 5.23.
[109] Ibid 5.24.

tries' policies with regard to persons and things within their own jurisdiction.[110] The panel then examined whether Article XX (g) of the GATT included measures implemented to force exporting countries to change their policies with regard to persons or things within their own jurisdiction and that demanded such changes to be effective.[111] According to the panel, the wording of Article XX (g) of the GATT did not provide a solution to that problem.[112] Considering the object and purpose of the GATT, the panel stated that Article XX of the GATT had to be interpreted narrowly since it contained exceptions to the obligations under the GATT.[113] According to the panel, the balance of the rights and obligations would be afflicted if Article XX of the GATT permitted measures implemented to force exporting countries to change their policies within their own jurisdiction.[114] In conclusion, the panel found that measures which had been implemented to force other countries to change their policies and which would only be effective if such changes occurred, were not primarily aimed at the conservation of an exhaustible natural resource or at rendering effective the restrictions on domestic production or consumption.[115] In other words, a measure that required other countries to change their policies and that's protective goal could only be achieved if the other country actually changed its policy, did not fall under the term 'primarily aimed at'. Thus, the requirements of Article XX (g) of the GATT were not fulfilled.

Since the second step requirements were not fulfilled, the panel refrained from examining the third step, namely the conditions of the chapeau of Article XX of the GATT.[116] In conclusion, according to the panel, the import bans violated Article XI of the GATT and could not be justified under Article XX (g) of the GATT.

(iv) The panel proceeded by examining whether the import bans could be justified under Article XX (b) of the GATT. Again, the panel applied a three step analysis.[117]

[110] *Tuna-Dolphin II* para. 5.24.
[111] *Tuna-Dolphin II* para. 5.25.
[112] Ibid 5.25.
[113] Ibid 5.25, 5.26.
[114] Ibid 5.26.
[115] Ibid 5.27.
[116] Ibid.
[117] Ibid 5.29.

First, it determined whether the policy at stake fell within the scope of policies referred to in Article XX (b) of the GATT. As with Article XX (g) of the GATT, the text of Article XX (b) did not require that the protected animals had to be located within the jurisdiction of the country implementing the measure at stake.[118] Moreover, the panel recalled its arguments that neither the GATT nor general international law prohibited measures relating to things located outside of a country's territory.[119] Further, the panel held that environmental and trade treaties other than the GATT were irrelevant and that the materials provided by the parties did not give a clear answer to the question whether the protected dolphins had to be situated within the respective country's territory.[120] Thus, according to the panel, the policy at stake fell within the scope of Article XX (b) of the GATT.

Secondly, the panel examined whether the import embargoes were necessary to protect the dolphins. It found that the term 'necessary' meant that no measure consistent with other GATT provision was reasonably available and that the measure chosen out of all measures reasonably available was least inconsistent with other GATT provisions.[121] As with its argumentation under Article XX (g) of the GATT, the panel stated that neither the primary nor the intermediary nation embargoes by themselves could lead to dolphin conservation.[122] The panel proceeded by examining whether Article XX (b) of the GATT included measures implemented to force other countries to change their policies within their own jurisdictions and that demanded such changes to be effective.[123] It concluded, recalling its reasoning under Article XX (g) of the GATT, that the objectives of the GATT would be seriously damaged if such measures fell under the provision containing exceptions.[124] Hence, the measure could not be considered necessary to protect dolphins.[125]

As with Article XX (g) of the GATT, the panel refrained from examining the requirements of the chapeau of Article XX of the GATT for the second-step conditions were not fulfilled.[126]

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[118] Ibid 5.31.
[119] *Tuna-Dolphin II* para. 5.32.
[120] Ibid 5.33.
[121] Ibid 5.35.
[122] Ibid 5.36, 5.37.
[123] Ibid 5.38.
[124] Ibid.
[125] Ibid 5.39.
[126] Ibid.

(v) The panel then examined whether the intermediary nation embargo was justified under Article XX (d) of the GATT. It found, however, that there was no basis for a justification of the intermediary nation embargo since the primary nation embargo was inconsistent with Article XI of the GATT.[127]

(vi) Lastly, the panel made clear that the parties to the GATT had widely recognised the objective of sustainable development but that the parties had not agreed to entitle each other to impose trade embargoes to further this objective.[128]

(vii) The panel concluded by stating that the import bans under the MMPA were inconsistent with the GATT.[129]

2. THE SHRIMP-TURTLE DISPUTE

The *Shrimp-Turtle* dispute was decided by the WTO Appellate Body in 1998, four years after *Tuna-Dolphin II*.

India, Malaysia, Pakistan and Thailand requested a panel in response to an import ban by the United States pursuant to Section 609 of Public Law 101-162[130] (Section 609), a provision to protect sea turtles in the course of harvesting shrimp. After the panel report had been circulated, the US appealed. The report by the AB was binding on all Members.[131]

The AB's interpretation of paragraph g and the chapeau of Article XX of the GATT differed in substantive points from *Tuna-Dolphin II*. The following outline focuses on these points.

[127] Ibid 5.40, 5.41.
[128] *Tuna-Dolphin II* para. 5.42.
[129] Ibid 6.1.
[130] 16 United States Code (U.S.C.) § 1537.
[131] See II. 3. b).

a) Factual aspects

Under the Endangered Species Act (ESA),[132] US shrimp trawl vessels were required to use approved Turtle Excluder Devices (TEDs) when harvesting shrimp in areas with a significant mortality of sea turtles related to shrimp fishing.[133] That rule was subject to limited exceptions.

Section 609 dealt with the importation of shrimp into the US. According to this provision, the US should, inter alia, enter into negotiations with other shrimp harvesting countries in order to conclude bilateral or multilateral agreements concerning the protection and conservation of sea turtles.[134] Moreover, Section 609 prohibited the import of shrimp that was caught with a technology that might adversely affect sea turtles unless the exporting country was certified.[135] A country could get a certification if its fishing environment did not threaten sea turtles, e.g. because sea turtles did not occur in the country's waters, or if the country had a regulatory program and its average rate of incidental sea turtle takings was comparable to that of the US.[136] The regulatory program had to include the mandatory use of TEDs 'comparable in effectiveness to those used in the United States'[137] and an effective enforcement effort.[138]

According to the 1996 Guidelines,[139] shrimp caught in all foreign countries[140] could only be imported to the US if it had been caught either in the waters of a certified country or 'under conditions that [did] not adversely affect sea turtles'.[141] In practice, however, the US only allowed shrimp imports from countries that had received a certification.[142]

The panel report stated that the import ban was inconsistent with Article XI:1 of the GATT and could not be justified under Article XX of the GATT.[143]

[132] Endangered Species Act (ESA) of 1973, Public Law 93-205, 16 U.S.C. § 1531 et seq.
[133] *Shrimp-Turtle* para. 2.
[134] *Shrimp-Turtle* para. 3.
[135] Ibid.
[136] Ibid 3, 4.
[137] Ibid 4.
[138] Ibid.
[139] 1996 Guidelines, p. 17343.
[140] *Shrimp-Turtle* para. 6.
[141] *Shrimp-Turtle* para. 5.
[142] Ibid.
[143] Ibid 7.

b) Legal issues

According to the US, Section 609 was justified under Article XX (g) and (b) of the GATT, particularly since it did not pose an unjustifiable discrimination between countries where the same conditions prevailed.[144]

The appellees, on the other hand, argued that Section 609 violated Article XI:1 of the GATT and was not justified under Article XX (g) or (b) of the GATT, especially since the US had applied Section 609 in a manner that would constitute an unjustifiable discrimination.[145]

The panel found that Section 609 was not within the scope of measures permitted by the chapeau of Article XX of the GATT since it constituted an unjustifiable discrimination.[146] According to the panel, the measure would undermine the WTO multilateral trading system by conditioning access to the US market upon the implementation of certain conservation policies by exporting countries.[147]

c) The Appellate Body's findings

(i) First of all, the AB reversed the panel's finding that Section 609 was not within the scope of measures permitted under the chapeau of Article XX of the GATT.[148]

According to the AB, which referred to the *Gasoline* case, the justification under Article XX of the GATT had to be examined in two steps. First, the measure itself had to fall within the scope of one of the paragraphs of Article XX of the GATT. Secondly, the measure had to be applied in a manner consistent with the chapeau of Article XX of the GATT.[149]

The AB found that a measure, which unilaterally conditioned access to the importing country's market upon the implementation of certain policies by exporting countries, could fall within the scope of one of the paragraphs of Article XX of the GATT.[150] A measure that required a change of policies of foreign countries did not necessarily drop out of the scope of Article XX of the GATT since the policies un-

[144] Ibid 10 et seq.
[145] Ibid 34 et seq.
[146] *Shrimp-Turtle* para. 112.
[147] Ibid.
[148] Ibid 122.
[149] Ibid 118-120.
[150] Ibid 121.

derlying such measures had been recognised as important and legitimate by the paragraphs of Article XX of the GATT.[151]

(ii) The AB proceeded by examining the requirements of paragraph g of Article XX of the GATT.

First, the AB clarified that sea turtles were exhaustible natural resources. The text of paragraph g did not limit the provision to the conservation of mineral or non-living natural resources.[152] Also, according to the AB, the fact that a resource was renewable, or in terms of living resources reproductive, did not preclude that this resource could become exhausted.[153] In addition to that, the term natural resource had to be interpreted in the light of the Marrakesh Agreement which, in its preamble, recognised the objective of sustainable development.[154] Further, the AB considered other current international conventions and declarations that included living resources as natural resources.[155] Therefore, in the light of recent international frameworks, the term natural resources in Article XX (g) of the GATT included both living and non-living natural resources.[156] Moreover, the AB stated that sea turtles were listed as species threatened with extinction in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and were therefore exhaustible.[157] Furthermore, the AB found that sea turtles could be exhaustible natural resources within the meaning of paragraph g of Article XX of the GATT although they were highly migratory passing through the waters of several countries and the high sea.[158] According to the AB, there was a 'sufficient nexus' between the endangered sea turtles and the US since the sea turtle species at stake could be found in waters over which the US had jurisdiction.[159] However, the AB explicitly did not decide the issue whether paragraph g of Article XX of the GATT contained any jurisdictional limitations.[160]

[151] Ibid.
[152] Ibid 128.
[153] Ibid.
[154] *Shrimp-Turtle* paras. 129, 130.
[155] Ibid 130.
[156] Ibid 131.
[157] Ibid 132.
[158] Ibid para 133.
[159] Ibid.
[160] *Shrimp-Turtle* para. 133.

Secondly, the AB examined if the measure at stake related to, i.e. was primarily aimed at, the conservation of sea turtles.[161] Analysing the relationship between the general structure and design of Section 609 and its objective to conserve sea turtles, which was a legitimate policy goal,[162] the AB found that Section 609 was fairly narrowly focused.[163] According to the AB, the provision influenced exporting countries to implement sea turtle friendly policies.[164] Section 609 did not prohibit the importation of shrimp absolutely but contained exceptions where shrimp fishing did not pose an actual threat to sea turtles.[165] Thus, according to the AB, considering the general design and structure, the measure was not disproportionately wide in its scope and was reasonable related to the policy goal.[166] Hence, the AB found that Section 609 related to the conservation of sea turtles within the meaning of paragraph g of Article XX of the GATT.

Thirdly, the AB found that the measure at stake also was made effective in conjunction with restrictions on domestic production or consumption:[167] US shrimp trawl vessels had to use TEDs when harvesting shrimp in areas with a significant mortality of sea turtles subject to limited exceptions. This obligation could be enforced by civil and criminal sanctions. Hence, according to the AB, the Section 609 was even-handed in the imposition of restrictions.[168]

Since the AB found that the measure at stake was within the scope of paragraph g, it did not have to examine the requirements of paragraph b of Article XX of the GATT.[169]

(iii) The AB then examined whether Section 609 fell under the chapeau of Article XX of the GATT.

First, the AB made clear that a measure that fell within the scope of paragraph g could still be unjustifiable due to a violation of the chapeau.[170] The AB continued

[161] Ibid 135, 136.
[162] Ibid 137.
[163] Ibid 138.
[164] Ibid 138.
[165] Ibid 138-141.
[166] Ibid 141.
[167] *Shrimp-Turtle* para. 145.
[168] Ibid 143, 144.
[169] Ibid 146.

with remarks on the objective of the chapeau of Article XX of the GATT which was to prevent an abuse of the exceptions. The relevant measure had to be applied in a reasonable way taking into account both the obligations of the country implementing the measure and the rights of the other countries concerned.[171] The right of a country to invoke an exception and the obligation of that country to respect the rights of other countries needed to be balanced.[172] In this regard, the AB outlined the role of the environment in international trade. On the one hand, the preamble of the Marrakesh Agreement mentioned sustainable development as one of the objectives of the WTO. According to the AB, the GATT provisions had to be interpreted against the backdrop of this objective.[173] On the other hand, the AB took into account that the Decision of Ministers in Marrakesh voted in to establish the CTE and took notice of the Rio Declaration and Agenda 21.[174] The AB then found that the chapeau of Article XX of the GATT incorporated the principle of good faith which, inter alia, prohibited the abuse of rights by states.[175] According to the AB, states had to exercise their rights in a reasonable way.[176] The AB concluded its general considerations by stating that the chapeau needed to be interpreted and applied in a way that balanced the right of one state to invoke an exception and the rights of the other states under the GATT so that neither of the competing rights would be nullified.[177]

The AB then examined whether Section 609 was applied in a manner constituting an unjustifiable discrimination.

The AB began by noticing that the way in which Section 609 was applied in conjunction with the 1996 Guidelines and the practice of administrators had a coercive effect on exporting countries requiring them to implement essentially the same policy as the US:[178] Other than the text of Section 609 suggested, exporting countries, in practice, only received a certification to export shrimp to the US if they applied not

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[170] *Shrimp-Turtle* para. 149.
[171] *Shrimp-Turtle* para. 151.
[172] Ibid 156.
[173] Ibid 153, 155.
[174] *Shrimp-Turtle* para. 154.
[175] Ibid 158.
[176] Ibid.
[177] *Shrimp-Turtle* para. 159.
[178] Ibid 161.

merely a comparable but rather essentially the same policy.[179] Thereby, according to the AB, the US imposed a rigid standard disregarding other comparable protective policies by exporting countries. The AB found that, although a country might apply a single standard throughout its territory, it could not do so with regard to other countries. In international trade relations, a country had to consider different conditions occurring on other countries' territory.[180] Moreover, the US imposed an import ban even where countries used the same fishing methods as those required in the US just because the shrimp had been harvested in waters of non-certified countries.[181] In that situation, according to the AB, Section 609 was not applied to further the protection and conservation of sea turtles but rather to influence foreign countries policies. The AB found that a measure resulted in discrimination where its application did not permit to examine whether a policy was appropriate considering the prevailing conditions in foreign countries.[182]

In addition to that, the AB ruled that Section 609 was applied in a discriminatory way since the US failed to enter into serious negotiations with several exporting countries before imposing the import ban although the text of Section 609 provided for such negotiations.[183] According to the AB, the US would have been obliged to reach international agreements with exporting countries or at least to seriously attempt reaching such agreements.[184] Furthermore, the AB found that international cooperation was necessary in the present case since the sea turtles were highly migratory.[185]

According to the AB, cooperative efforts were necessary and appropriate and this had been recognised by the WTO and other international institutions. The AB referred to, inter alia, Principle 12 of the Rio Declaration and paragraph 2.22(i) of Agenda 21 stating that transborder environmental issues should, as far as possible, be addressed by internationally agreed measures.[186] Further, the CTE found in one of its reports that multilaterally solutions arising out of international cooperation and consensus constituted the best and most effective means to address transboundary or

[179] Ibid 163.
[180] Ibid 164.
[181] Ibid 165.
[182] *Shrimp-Turtle* para. 165.
[183] Ibid 166, 167.
[184] Ibid 167.
[185] Ibid 168.
[186] Ibid.

global environmental issues.[187] Also, the AB found that the US itself acknowledged the availability and feasibility of consensual and multilateral solutions to further the conservation of sea turtles by signing the Inter-American Convention for the Protection and Conservation of Sea Turtles (Inter-American Convention).[188] The parties to the convention agreed upon implementing appropriate and necessary measures to protect and conserve sea turtles. Moreover, they reaffirmed their obligations under the WTO, particularly under Article XI of the GATT.[189] Thus, the Inter-American Convention balanced the parties' rights and obligations arising out of the WTO Agreement.[190] The AB held that, although the US could further its legitimate policy goal by way of multilateral and consensual measures, it chose an import ban which was the most restricting trade measure.[191] The US did not make any serious efforts to negotiate agreements with countries other than the parties to the Inter-American Convention, neither before enforcing Section 609 nor before imposing the import ban. The AB found that negotiating with some but not all exporting countries constituted an unjustifiable discrimination.[192] The failure to negotiate bilateral or multilateral agreements, although Section 609 provided for such negotiations, led to unilaterism excluding participation by exporting countries.[193] According to the AB, 'the unilateral character of the application of Section 609 heighten[ed] the disruptive and discriminatory influence of the import prohibition und underscore[d] its unjustifiability'.[194]

The application of Section 609 was further discriminatory since, due to a change of guidelines, some countries in the wider Caribbean/western Atlantic region had three years to implement the requirement of the use of TEDs whereas all other exporting countries only had four months for doing so to receive a certification.[195] The AB found that the shorter the implementation period was, the heavier the influence of the import ban weighed.[196]

[187] Ibid.
[188] Ibid 169, 170.
[189] Ibid 169.
[190] *Shrimp-Turtle* para. 170.
[191] *Shrimp-Turtle* para. 171.
[192] Ibid 172.
[193] Ibid.
[194] Ibid.
[195] Ibid 173.
[196] Ibid 174.

Lastly, the AB observed that the US put far greater effort in the transfer of the required TED technology to the wider Caribbean/western Atlantic countries than to other exporting countries.[197] Less effort in TED technology transfer led to fewer countries meeting the certification requirements set out in Section 609.

Hence, the AB held, the cumulative effect of the different treatments of various exporting countries constituted an unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT.[198]

In addition to that, according to the AB, Section 609 had been applied in a way leading to an arbitrary discrimination: Section 609 was applied in a single, rigid and unbending way. Further, the AB found that the determination for certification was inflexible.[199] Moreover, according to the AB, the certification process of the US was intransparent and unpredictable without any formal opportunity for exporting countries to be heard or to appeal and without a formal written, reasoned decision.[200] There was no guarantee that Section 609 and the 1996 Guidelines were being applied in a fair and just way. The principles of basic fairness and due process were disregarded, and exporting countries that did not receive a certification were discriminated against in comparison to exporting countries that did receive a certification.[201] Thereby, the US also violated Article X:3 of the GATT setting out minimum requirements in terms of transparency and procedural fairness.[202] These circumstances led to an arbitrary discrimination under the chapeau of Article XX of the GATT.[203]

(iv) The AB made clear that it was important to WTO Members to protect and preserve the environment. Further, according to the AB, WTO Members as sovereign states had the power to implement measures to protect endangered species and should cooperate bilaterally or multilaterally to achieve this goal. [204]

[197] Ibid 175.
[198] *Shrimp-Turtle* para. 176.
[199] *Shrimp-Turtle* para. 177.
[200] Ibid 180.
[201] Ibid 181.
[202] Ibid 183.
[203] Ibid 184.
[204] Ibid 185.

(v) The AB concluded by stating that although Section 609 was legitimate under paragraph g of Article XX of the GATT, its application was inconsistent with the chapeau and could therefore not be justified.

3. *Comparison of the Tuna-Dolphin and Shrimp-Turtle disputes*

Although both decisions found that the measures at stake violated the GATT, their reasoning differed in substantive parts. In other parts, the AB report elaborated on points already made by the *Tuna-Dolphin* panel.

a) *The notion of 'exhaustible natural resources'*

Both decisions held that living natural resources and resources located outside of the country implementing the measure at stake fell under the term 'exhaustible natural resources' within the meaning of paragraph g of Article XX of the GATT.

The *Tuna-Dolphin* panel stated that dolphins could potentially become exhausted and that it was not necessary that their stocks had already been depleted at the time of the policy.[205] Moreover, according to the panel, the exhaustible natural resource at stake did not have to be within the jurisdiction of the country implementing the protective measure.[206]

The *Shrimp-Turtle* report clarified this point by interpreting the term 'exhaustible natural resource' pursuant to general rules of interpretation. In particular, the AB pointed out that the preamble of the Marrakesh Agreement recognized the objective of sustainable development and that also other recent international conventions protecting natural resources included living resources.[207]

In contrast to the situation in the *Tuna-Dolphin* dispute, the resources at stake in *Shrimp-Turtle* were threatened with extinction according to the CITES. The AB used this as another argument for its finding that sea turtles were exhaustible.[208]

Another difference between the two cases was that the sea turtles in *Shrimp-Turtle* were highly migratory. The AB found that there was a 'sufficient nexus' be-

[205] *Tuna-Dolphin II* para. 5.13.
[206] Ibid 5.20.
[207] *Shrimp-Turtle* para. 129, 130.
[208] Ibid 132.

tween the migratory sea turtles and the US.[209] However, it did not make any findings regarding the issue whether paragraph g of Article XX of the GATT contained any jurisdictional limitations.[210]

b) The notion of 'relating to' and 'in conjunction with'

The key difference between the two disputes lies in the interpretation of the terms 'relating to' and 'in conjunction with' in paragraph g of Article XX of the GATT.

Both decisions noticed that 'relating to' meant primarily aimed at the conservation of exhaustible natural resources.[211] However, they came to different conclusions.

Tuna-Dolphin found that the measures at stake could not, by themselves, further the policy goal.[212] According to the panel, paragraph g of Article XX of the GATT did not include measures which were implemented to force other countries to change their policies regarding resources within their own jurisdiction and which required such changes to be effective.[213] Therefore, the measures were neither primarily aimed at the conservation of exhaustible natural resources nor primarily aimed at rendering effective domestic restrictions on their production or consumption.

In contrast to that, *Shrimp-Turtle* held that although the measure at stake was designed to influence countries to change their own policies, it was fairly narrowly focused and thereby not disproportionately wide and reasonably related to the policy goal.[214] Thus, according to the AB, the measure was related to the conservation of exhaustible natural resources. Moreover, the AB found that the measure was made effective in conjunction with the restrictions on domestic production or consumption since the measure was even-handed in the imposition of restrictions.[215]

As a result, the panel in *Tuna-Dolphin* held that the measure at stake was inconsistent with paragraph g of Article XX of the GATT whereas the AB in *Shrimp-Turtle* stated that the requirements of paragraph g were fulfilled by the measure.

[209] *Shrimp-Turtle* para. 133.
[210] *Shrimp-Turtle* para. 133.
[211] *Tuna-Dolphin II* para. 5.22; *Shrimp-Turtle* para. 136.
[212] *Tuna-Dolphin II* para. 5.23, 5.24.
[213] *Tuna-Dolphin II* para. 5.27.
[214] *Shrimp-Turtle* para. 138, 141.
[215] Ibid 143, 144.

c) The chapeau of Article XX of the GATT

The *Tuna-Dolphin* panel did not have to examine the requirements of the chapeau of Article XX of the GATT since, according to its opinion, the measures at stake did not fall under any of the paragraphs of Article XX of the GATT.

In contrast to that, the AB in *Shrimp-Turtle* held that the measure at stake had been applied in a way inconsistent with the chapeau of Article XX of the GATT as it posed an unjustified and arbitrary discrimination.

In the end, both decisions found that the measures at stake could not be justified under Article XX of the GATT.

IV. THE INTERPRETATION OF ARTICLE XX (G) OF THE GATT IN *SHRIMP-TURTLE*

In order to assess the legality of unilateral measures with extraterritorial effect to protect the environment under the WTO/GATT, the *Shrimp-Turtle* decision must be discussed in the context of international law. What first needs to be analysed is the AB's interpretation of Article XX (g) of the GATT.

1. THE NOTION OF 'SUFFICIENT NEXUS'

The AB started by examining the requirements of paragraph g before it considered the chapeau of Article XX of the GATT.[216] When interpreting the term 'exhaustible natural resource' within the meaning of Article XX (g) of the GATT, the AB found that there was a 'sufficient nexus' between the endangered sea turtles and the US as the country implementing the protective measure. Thus, although not explicitly mentioned in paragraph g of Article XX of the GATT, the AB required a certain link between the policy to conserve exhaustible natural resources and the interests of the country implementing the protective measure.[217] Only if such a link or nexus was present, the measure at stake could fall within the scope of policies to conserve exhaustible natural resources.

The AB did not give any standards or guidelines for determining what a sufficient nexus was. Therefore, it needs to be analysed when there is a sufficient nexus and how this criterion should be handled by the WTO adjudicating body in the future.

a) The WTO jurisprudence

First of all, WTO jurisprudence has to be examined.

As can be inferred from the *Shrimp-Turtle* decision, the AB found a sufficient nexus because, although the sea turtles were highly migratory and the US could not claim exclusive ownership over them, all of the sea turtle species at stake occurred in

[216] *Shrimp-Turtle* para. 118.
[217] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(c) The test of "sufficient nexus" in paragraph (g)'.

waters over which the US had jurisdiction.[218] Hence, the US had a sufficient interest to protect the sea turtles. Apart from that, the AB deliberately avoided the question of whether paragraph g of Article XX of the GATT contained any jurisdictional limitations.[219] It only stated that there was a sufficient nexus between the migratory and endangered sea turtles and the country implementing the protective measure.

So far, there has been no other dispute before the WTO adjudicating body dealing with the trade-environment relationship and Article XX (g) of the GATT. Therefore, no other decision has drawn on the sufficient nexus requirement yet.[220]

b) The wording

To define the term 'sufficient nexus', one must determine its meaning in common parlance.

The AB required a sufficient nexus between the exhaustible natural resource and the country implementing the protective measure. 'Nexus' means that there has to be a certain type of connection, link or relationship between these two points.[221] However, it cannot be any connection, link or relationship. It has to be a 'sufficient' one.

The term 'sufficient' narrows the nexus requirement down only slightly though, since the AB did not state what kind of nexus had to be sufficient. Sufficient means substantial or reasonable,[222] but it is uncertain in which regard the nexus must be substantial or reasonable. The question is what the nature of the sufficient nexus is. This question cannot be answered by looking at the wording but by taking into account the object and purpose of the sufficient-nexus requirement.

c) The object and purpose

It needs to be examined what kind of nexus the AB targeted at.

It can be inferred from the AB's remark that it did not decide on the question whether or not paragraph g of Article XX of the GATT contained any jurisdictional

[218] *Shrimp-Turtle* para. 133.
[219] *Shrimp-Turtle* para. 133.
[220] See overview at The World Trade Organisation 'Environment: Disputes' available at *http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm*, accessed on 18 January 2012.
[221] See at Erich Vranes *Trade and the Environment, Fundamental Issues in International Law, WTO Law, and Legal Theory* (2009) page 161.
[222] Erich Vranes (footnote 221) page 161 and footnote 405.

limitations or on the nature and extent of these limitations, that the nature of the nexus is not a jurisdictional one.[223] If the AB had required a sufficient jurisdictional nexus, it would actually have recognised a jurisdictional limitation: paragraph g would only include exhaustible natural resources that were linked to the territory over which the country implementing the protection measure exercised jurisdiction. In contrast to that, the *Shrimp-Turtle* decision explicitly stated that it did not pass upon the question of jurisdictional limitations. What also argues against a jurisdictional nature of the nexus is the following consideration: If the nexus was jurisdictional and the resource had to be linked to the territory of the country implementing the measure at issue, that would mean that measures with extraterritorial effect would be prohibited generally, with the only exception of migratory resources.[224] That would, however, make the scope of paragraph g of Article XX of the GATT unreasonably narrow. In contrast to that, the *Shrimp-Turtle* decision has mostly been interpreted as a decision permitting extraterritorial measures.[225] [226] The view that exhaustible natural resources do not have to be within the territory of the country adopting the protective measure is also in line with the *Tuna-Dolphin* panel report. The panel report stated that the resource at issue did not have to be located within the jurisdiction of the country implementing the measure.[227] The panel based this finding on general rules of treaty interpretation, namely the wording of Article XX (g) of the GATT, findings of previous panels, other provisions of the GATT, and principles of general international law. [228] Hence, the resource to be conserved does not have to be situated within the territory over which the country implementing the measure exercises jurisdiction for constituting a sufficient nexus and the nexus is not jurisdictional in nature.

Rather, the sufficient nexus requirement appears to be based on the exploitability of the resource by the country that adopts the measure to conserve the resource:[229]

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[223] See a different point of view at Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(c) The test of "sufficient nexus" in paragraph (g)'.
[224] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(c) The test of "sufficient nexus" in paragraph (g)'.
[225] Erich Vranes (footnote 221) page 161; Lorand Bartels 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (2002) 36 *Journal of World Trade Law* 353 at 388.
[226] Moreover, it will be shown under V. that extraterritorial measures are generally permitted in the context of Article XX (g) of the GATT.
[227] *Tuna-Dolphin* para. 5.20 et seq.
[228] *Tuna-Dolphin* para. 5.15 et seq.
[229] See a different approach that also mentions exploitability at Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(c) The test of "sufficient nexus" in paragraph (g)'.

According to the AB, the US as the country implementing the protective measure had no exclusive ownership over the migrating sea turtles but it was sufficient that the sea turtle species at issue occurred in US waters.[230] Thus, the AB required some sort of control over the resource. If a country does not own the resource at stake and the resource is also not permanently located within its territory, the country can still exercise control by means of exploitation. Exploitation in this sense includes the prevention of potential extinction in order to insure comprehensive protection of exhaustible natural resources under Article XX (g) of the GATT. [231] If a country exploits a resource by adopting measures to conserve it, it has a sufficient nexus to the resource. What supports this view is that a state which exploits a resource has a protective interest that is comparable to its domestic interests which are unquestionably protected by Article XX of the GATT.[232] The view that the sufficient nexus is based on exploitation is also in line with the nature of the GATT as an international trade agreement. When countries trade in certain goods including natural resources, they exploit these goods. Thus, exploitability is an appropriate basis for a sufficient nexus between a country implementing a protective measure and a resource under Article XX (g) of the GATT. Hence, the sufficient nexus requirement is based on exploitation.

d) Conclusion

For a measure to fall within the scope of paragraph g of Article XX of the GATT, the resource protected by the measure must have a sufficient nexus with the implementing country. The nexus has to be based on exploitability of the resource by the country adopting the protective measure. The question where such a nexus is sufficient needs to be determined by the WTO adjudicating body on a case-by-case basis taking into account the specific circumstances of each case.[233] One example of a sufficient nexus that the *Shrimp-Turtle* AB report gave was that of a resource that was, if not necessarily permanently, situated within the territory of the country implementing the measure.[234] However, that is no mandatory criterion.

[230] *Shrimp-Turtle* para. 133.
[231] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(c) The test of "sufficient nexus" in paragraph (g)'.
[232] Ibid.
[233] See *Shrimp-Turtle* para. 133.
[234] Ibid.

2. *THE NOTION OF 'SERIOUS ATTEMPT'*

In its *Shrimp-Turtle* decision, the AB found that the measure at stake was inconsistent with the chapeau of Article XX of the GATT since, inter alia, the US had failed to 'seriously attempt' reaching international agreements with all shrimp exporting countries. Thus, the measure was applied in a way that posed an unjustifiable discrimination.[235] Yet, it is unclear when an attempt can be deemed serious. It is particularly unclear in how far the country that wants to implement a measure has to offer a sacrifice or compromise before it is allowed to adopt the measure unilaterally.[236]

The AB's remarks in its *Shrimp-Turtle* decision need to be analysed and searched for criteria of the serious-attempt requirement.

a) The quality of negotiations

The AB found that the US had to enter into serious negotiations with affected countries before implementing the protective measure unilaterally.[237] According to the AB, the US had to seek for international consensus. International consensus did not have to be reached but only attempted. [238] The fact that the attempt had to be serious, however, implied that there had to be actual room for negotiations and that not only one outcome was preconceived.[239] Otherwise, the negotiations would not have been serious but rather fictitious.

b) The interests to consider

When examining the requirements of the chapeau of Article XX of the GATT, the AB balanced the rights of the country that wanted to implement the environmental protection measure and the substantive rights of all other countries concerned under the GATT.[240] In this context, according to the AB, the US had to negotiate and cooperate with all shrimp exporting countries in order to show regard for the other coun-

[235] *Shrimp-Turtle* paras. 166, 167.
[236] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(a) The meaning of "serious attempt"'.
[237] *Shrimp-Turtle* para. 166.
[238] *Shrimp-Turtle* para. 167.
[239] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(a) The meaning of "serious attempt"'.
[240] *Shrimp-Turtle* para. 159.

tries' rights. Against this backdrop, a 'serious, across-the-board negotiation'[241] requires to consider the interests of all negotiating parties involved.

In addition to that, the country that wants to adopt an environmental protection measure must not only take into account other countries' rights under the GATT but also other interests of the countries concerned. For example, in the *Shrimp-Turtle* dispute, the negotiations failed due to a disagreement regarding the allocation of the costs of implementing the US policies.[242] As can be inferred from the *Shrimp-Turtle* decision, the term 'serious attempt' implies that in such a case, the country wanting to adopt the measure must offer technical or financial assistance. According to the AB, the US failed to take into account administrative and financial costs of implementing the regulatory program required by the US.[243] The US discriminated against some countries since it supported specific countries more than others in transferring the required technology.[244]

c) Migratory resources in particular

The AB pointed out that in case of highly migratory species in particular, international cooperation by all countries through which the species migrated was demanded.[245] Thus, there is a special requirement in terms of migratory resources that each country through which the species migrate must participate in the negotiations and that an effort to enter into an international agreement with these countries is stringently necessary.[246]

d) Intensity of negotiations

What must not be neglected is the fact that the length of negotiations and the level of compromise offered by the country that wants to adopt a measure varies depending on how urgent a protective measure is.[247]

[241] *Shrimp-Turtle* para. 166.
[242] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(a) The meaning of "serious attempt"'.
[243] *Shrimp-Turtle* para. 174.
[244] Ibid 175.
[245] Ibid 168.
[246] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(a) The meaning of "serious attempt"'.
[247] Ibid.

It is logically consistent that in case of an endangered species negotiations can be shorter and less liberal than in case of a resource that is not threatened with extinction. If a negotiated compromise cannot be reached within a reasonable time, a protective measure can be adopted unilaterally. This view is supported by Principle 12 of the Rio Declaration stating that countries 'should' cooperate and 'should' avoid unilateral action but it does not generally prohibit unilateral action where international consensus cannot be reached.

e) Conclusion

As a result, a state that wants to adopt an environmental protection measure must enter into more or less extensive negotiations offering actual sacrifices and compromises. The negotiations must usually include all countries affected by the measure in a non-discriminating way. Particularly in terms of migratory species, the country wanting to implement a protective measure must involve all other countries concerned, i.e. the countries through which the species migrate.

The criteria outlined above must be considered when determining if entering into an international agreement was seriously attempted. In the end, it needs to be assessed on a case-by-case basis if there has been a serious attempt.[248]

3. MULTILATERAL AGREEMENTS AS A MEANS TO INTERPRET ARTICLE XX OF THE GATT

Another crucial point of the *Shrimp-Turtle* decision that has to be examined is the AB's use of multilateral agreements other than the GATT to interpret Article XX (g) of the GATT. In particular, the AB employed the CITES in order to assess whether the resource at stake was 'exhaustible' within the meaning of paragraph g of Article XX of the GATT.[249] Also, it referred to the Rio Declaration in order to examine whether the measure at issue was applied in a way that posed an unjustifiable discrimination under the chapeau of Article XX of the GATT.[250]

The use of multilateral agreements other than the GATT as a means to interpret the GATT entails that the interpretation of provisions such as Article XX of the

[248] Pierre-Marie Dupuy 'The Place and Role of Unilateralism in Contemporary International Law' (2000) 11 *European Journal of International Law* 19 at 25.
[249] *Shrimp-Turtle* para. 132.
[250] *Shrimp-Turtle* para. 168.

GATT can vary depending on the different agreements the parties to the dispute have entered into. Thus, it needs to be examined whether the AB's approach was legally permissible and suitable.

a) The legality of the use of multilateral agreements to interpret the GATT

It first needs to be assessed whether it is legally permissible to interpret the GATT by means of multilateral agreements outside of the GATT.

Using agreements between the parties other than the treaty at issue for interpretative means is a general rule of international law laid down in Article 31 (3) (c) of the VCLT. According to this provision, a treaty (here: the GATT) shall be interpreted taking into account any relevant rules of internal law applicable in the relations between the parties. The multilateral agreements referred to by the AB, particularly the CITES and the Rio Declaration, are such rules of international law.

Also Article 3.2 of the DSU that deals with the purpose and competence of the WTO dispute settlement body only prohibits the adding to or diminishing of rights and obligations under the WTO agreements but allows for the interpretation pursuant to public international law.

Thus, there is no legal obstacle to employing multilateral agreements other than the GATT to interpret Article XX (g) of the GATT.

b) Other considerations

Critics of the AB's approach contend that it is not desirable that WTO Members can influence the way the WTO Agreements are interpreted by entering into multilateral agreements with other Members.[251] If the WTO adjudicating body uses a multilateral agreement between the parties to a dispute to interpret the GATT, the outcome can differ from another dispute the parties to which had not entered into a multilateral agreement or had entered into a different one.

[251] Lorand Bartels (footnote 225) at 360, 361; Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(b) The use of external sources (i) Multilateral agreements'.

However, the WTO Agreements are treaties that interact with other provisions of international law.[252] In international law, there is a general interrelation between a treaty and other international rules. The treaty must be assessed in the context of these other rules, particularly other treaties being applicable between the parties of the dispute, as made clear by Article 31 (3) (c) VCLT.[253]

Also, what must not be neglected is that the WTO is an international organisation consisting of its various Members and is based on regulatory diversity.[254] It guarantees the rights of its Members by means of the most-favoured-nation treatment,[255] an instrument that only exist because different Members have different rules. Unlike the law of the European Union, WTO law does not constitute a uniform legal order where the same rules equally apply to all Members.[256]

Thus, a uniform interpretation of the GATT is not mandatory and differences in the application of WTO law are accepted as long as these differences do not lead to a discrimination of Members.

c) Conclusion

As a result, it is legally permissible and appropriate when the WTO adjudicating body employs multilateral agreements outside of the GATT to interpret Article XX of the GATT.

4. CONCLUSION

In conclusion, the *Shrimp-Turtle* decision contains some areas of uncertainty that need to be clarified by the WTO adjudicating body but also new requirements and guidelines that future decisions can draw on. The AB tried to interpret and narrow down ambiguous criteria of Article XX (g) of the GATT, namely the terms 'exhaustible natural resource' and 'unjustifiable discrimination'. However, in some points it failed to elaborate on its interpretation and establishment of new requirements. Nevertheless, subsequent decisions of the WTO adjudicating body can draw on the

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[252] Joost Pauwelyn 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 *European Journal of International Law* 575 at 589.
[253] See above IV. 3. a).
[254] Lorand Bartels (footnote 225) at 361.
[255] Article I of the GATT.
[256] Lorand Bartels (footnote 225) at 361.

Shrimp-Turtle decision and further develop and improve the criteria set out therein in accordance with the presented remarks.

V. THE ISSUE OF UNILATERAL MEASURES WITH EXTRATERRITORIAL EFFECT AND THE BALANCING OF CONFLICTING RIGHTS

It is said that the *Shrimp-Turtle* decision, in contrast to the *Tuna-Dolphin* panel reports, recognised the legality of extraterritorial measures to protect the environment under Article XX (g) of the GATT.[257] However, the legality of such measures has to be examined not only by interpreting WTO jurisprudence but also against the backdrop of general rules of treaty interpretation, particularly principles of general international law: Since the wording of Article XX (g) of the GATT does not determine whether the provision covers extraterritorial measures,[258] other means of interpretation must be taken into account. As pointed out by Articles 31 and 32 of the VCLT, one must look at the context of the treaty including applicable rules of international law.[259] Among these rules of international law are customary international law and general principles of law such as the principles of state sovereignty, non-intervention and the balancing of rights.[260] These principles need to be analysed in order to assess the legality of unilateral measures with extraterritorial effect in the present context.

1. THE NOTION OF UNILATERAL AND EXTRATERRITORIAL MEASURES

In order to examine the question in how far unilateral measures with extraterritorial effect can be consistent with Article XX of the GATT against the backdrop of principles of international law, it first needs to be determined what the terms 'unilateral' and 'extraterritorial' mean.

a) Unilateral measures

Deduced from common parlance, a measure that a country implements unilaterally is an individual action by a state regarding its foreign affairs without or with only min-

[257] Joost Pauwelyn (footnote 252) at 586.
[258] *Tuna-Dolphin II* para 5.15; Lorand Bartels (footnote 225) at 358 and footnote 26.
[259] Article 31 (3) (c) of the VCLT.
[260] Lorand Bartels (footnote 225) at 360.

imal involvement of other states.[261] 'Unilateral' contrasts with the terms 'multilateral' or 'cooperative'. A unilateral measure expresses the will of only one state.[262]

In the present context, the unilateral measure is a legislative act.[263] For example, a country that wants to promote environmental protection imposes trade sanctions on other countries in order to enforce its environmental legislation. In the *Shrimp-Turtle* case, the measure that the US implemented to promote the protection of sea turtles was Section 609 which was a legislative act.

Hence, a unilateral measure is the unilateral enactment of norms in the trade-environment context that expresses the will of one state without the consent of other states concerned.

b) Extraterritorial measures

A unilateral measure can have extraterritorial effect, even if it is a trade measure.[264]

A measure has extraterritorial effect if it applies to conduct on foreign territory.[265] In other words, an extraterritorial measure regulates an action occurring outside of the territory of the country implementing the measure.[266]

Article 101 of the Treaty on the Functioning of the European Union (TFEU)[267]is an example of a trade measure with extraterritorial effect. The provision prohibits certain actions conducted on foreign territory. It imposes legal consequences on undertakings acting in an anti-competitive way no matter if the undertaking at issue enters the territory of the country enforcing the measure.[268]

Critics argue that trade measures are in any case domestic or territorial since they are applied within the territory or at least at the border of the country implementing the measure.[269] In contrast to that, at least trade measures that regulate the way in which a product is produced and processed (non-product-related measures) must be deemed extraterritorial. Since, in case of non-product-related measures the produc-

[261] Erich Vranes (footnote 221) pages 173, 174.
[262] Pierre-Marie Dupuy (footnote 248) at 25.
[263] See Bernhard Jansen 'The Limits of Unilaterism from a European Perspective' (2000) 11 *European Journal of International Law* 309 at 310 et seq.
[264] Lorand Bartels (footnote 225) at 376 et seq.
[265] Erich Vranes (footnote 221) pages 165, 174.
[266] Lorand Bartels (footnote 225) at 358.
[267] Former Article 81 of the Treaty of the European Community (TEC).
[268] Erich Vranes (footnote 221) pages 165, 166.
[269] See overview at Erich Vranes (footnote 221) page 159.

tion and processing takes place outside of the regulating country's territory, these measures have extraterritorial effect.[270] The measures at stake regulate conduct occurring abroad.

In the *Tuna-Dolphin* and *Shrimp-Turtle* disputes, the US imposed an import ban of tuna/shrimp because of the way in which it was harvested outside of the territory of the US. Thus, according to the panels/AB, these measures had extraterritorial effects.[271] Admittedly, even among those authors who recognise the extraterritorial effect of non-product related trade measures, critics contend that it is not sufficient for a measure to be extraterritorial that it only has indirect effects on foreign countries. According to this opinion, a measure that only prohibits the importation of certain products due to the way they got produced or processed abroad does not directly apply to foreign conduct and can, thus, not be deemed extraterritorial.[272] What must not be neglected, however, is the fact that the GATT/WTO jurisprudence has supposed that also import bans can have extraterritorial effect if they are non-product-related measures.[273] In the *Tuna-Dolphin* disputes, this perception became clear when the panel addressed the personal principle as well as other principles of extraterritorial jurisdiction.[274] Accordingly, the AB in *Shrimp-Turtle* stated that the sea turtles at stake did not fall under the exclusive ownership of the US but that there was a sufficient nexus between the sea turtles and the US.[275] It can be inferred from the sufficient nexus requirement that the AB regarded the measure at stake as extraterritorial.[276] Hence, the measures at issue in *Tuna-Dolphin* and *Shrimp-Turtle* are deemed extraterritorial for the further examination of the legality of unilateral measures with extraterritorial effect to protect the environment. Apart from this, the following discussion of the principles of state sovereignty and non-intervention is useful and necessary in terms of non-product-related measures other than import bans that have direct legal implications on foreign countries.

[270] Lorand Bartels (footnote 225) at 358; Erich Vranes (footnote 221) page 160.
[271] *Tuna-Dolphin II* paras. 5.13 et seq; *Shrimp-Turtle* paras. 133, 161 et seq.
[272] Erich Vranes (footnote 221) page 166.
[273] Lorand Bartels (footnote 225) at 386.
[274] *Tuna-Dolphin II* para. 5.17; Erich Vranes (footnote 221) page 166 footnote 404.
[275] *Shrimp-Turtle* para. 133.
[276] Erich Vranes (footnote 221) page 161.

c) Measures pursuing territorial or extraterritorial concerns

A unilateral measure regulating conduct occurring abroad can serve domestic as well as extraterritorial concerns.

The measure at issue in *Shrimp-Turtle*, for example, applied to conduct occurring on foreign territory, namely the harvesting of shrimp by exporting countries in waters within their jurisdiction, and promoted an extraterritorial concern, which was the protection of endangered sea turtles.[277] In the *Tuna-Dolphin* dispute, on the other hand, the legal provision at stake regulated domestic and foreign conduct (the fishing of tuna in and outside of waters over which the US had jurisdiction) to pursue extraterritorial concerns, namely to protect dolphins in the eastern tropical Pacific Ocean.[278] A third example is Article 101 TFEU which applies to anti-competitive agreements concluded on both domestic and foreign territory and promotes domestic concerns, namely domestic competitiveness.[279]

When assessing the legality of measures in the trade-environment context, one has to take into account whether the measure at issue regulates domestic or extraterritorial conduct and whether it promotes domestic or extraterritorial concerns. In general, a trade restricting measure is easier to justify if it regulates an action taking place on foreign territory but is based on consensus of the other states concerned. Also, the fact that a measure regulating conduct abroad was implemented to protect domestic concerns is a relevant factor for assessing the justifiability of the measure.[280] Article 101 TFEU, for example, has extraterritorial effect.[281] However, the provision's extraterritorial effect is justified on the basis that extraterritorial measures by foreign actors have negative domestic economic impacts. Thus, the provision pursues legitimate domestic interests.

For purposes of the current analysis, an extraterritorial measure includes not only measures with legal effects on foreign countries but also measures that deal with extraterritorially located concerns.

[277] *Shrimp-Turtle* paras. 2 et seq.
[278] *Tuna-Dolphin II* paras. 2.4 et seq.
[279] Erich Vranes (footnote 221) page 175.
[280] Ibid page 177.
[281] See above V. 1. b).

2. *THE LEGALITY OF UNILATERAL MEASURES WITH EXTRATERRITORIAL EFFECT AGAINST THE BACKDROP OF THE PRINCIPLES OF STATE SOVEREIGNTY AND NON-INTERVENTION*

The question remains whether general principles of international law allow for the justification of unilateral measures with extraterritorial effects where those measures promote extraterritorial interests, namely the conservation of resources situated outside of the territory of the country implementing the measure.

a) State sovereignty

The first general principle of international law that needs to be discussed is the principle of state sovereignty since extraterritorial measures affect foreign sovereign states. State sovereignty relates to the equality of states,[282] and the competences and jurisdictions amongst states.[283] It includes the right of a state to set down its own political and economic system, and foreign policies.[284] In other words, sovereignty involves the right to self-determination comprising a state's internal and external competence.

It has to be noted that in the absence of a transfer of sovereign rights to the international level, WTO Members generally remain free to unilaterally regulate their own markets, provided that they respect the relevant GATT rules.[285] The AB in its *Shrimp-Turtle* decision recognised this and even went one step further by stating that a country's domestic measure is not necessarily unjustifiable under Article XX of the GATT just because it forces other countries to comply with its policies.[286] According to the AB, the WTO Members had recognised the domestic policies behind the measures referred to in the individual paragraphs of Article XX of the GATT as important and legitimate by explicitly including them in one of the paragraphs.

When a country implements extraterritorial measures, the sovereign rights of that country often conflict with the sovereign rights of other states affected by the measure: The country implementing the extraterritorial measure exercises its state compe-

[282] See Article 2 (1) of the UN Charter.
[283] Erich Vranes (footnote 221) pages 112, 113.
[284] See UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN (Friendly Relations Declaration).
[285] Petros C. Mavroidis 'Trade and Environment after the *Shrimps-Turtles* Litigation' (2000) 34 *Journal of World Trade* 73 at 73, 74.
[286] *Shrimp-Turtle* para. 121.

tence which includes the right to self-determination by implementing domestic laws.[287] Generally, due to the sovereignty principle, other states must not interfere with the sovereign state act by the country implementing the measure. However, other states affected by the extraterritorial measure can, in turn, make use of their state competences and their right to self-determination. These states also have the right to set down their own polices and to implement their own rules in accordance with the sovereignty principle. Thus, the sovereign right of the country implementing the extraterritorial measure is constraint by conflicting sovereign rights of the other states.

As this conflict shows, state sovereignty and the right to self-determination cannot be absolute. Instead, the contradictory rights of various countries need to be reconciled. A general principle of law which is used to solve this issue is the principle of the balancing of rights. The sovereign rights of all countries concerned must be balanced.[288] The balancing of rights, to which also the AB in *Shrimp-Turtle* referred, will be explained and analysed below.[289]

b) Non-intervention

A principle that is closely connected to sovereignty is the principle of non-intervention. As a counterpart of sovereignty, it poses a barrier to extraterritorial measures.[290] Intervention by a foreign country is prohibited if it restricts another country's right to determine its own political and economic system, and foreign policies, and if it forces certain policies on that other country.[291] Thereby, the principle of non-intervention shields a country from jurisdictional interferences by foreign countries.

Against this backdrop, it appears to be unlawful to adopt a domestic measure with extraterritorial effect in order to make other countries change their policies where these other countries want to get access to the regulating country's market, as was the case in *Tuna-Dolphin* and *Shrimp-Turtle*. If a country implements a certain measure and thereby forces other countries to change their policies, the implementing country restricts the other countries' rights to determine their own policies. If the

[287] Erich Vranes (footnote 221) page 122.
[288] Erich Vranes (footnote 221) page 124.
[289] See below V. 3.
[290] Erich Vranes (footnote 221) page 124.
[291] Ibid page 125.

other countries still want to access the implementing country's market, they cannot enforce their own polices but have to follow the implementing country's rules. This appears to be an intervention by the implementing country. On the other hand, what must not be neglected is that the right to implement domestic measures, even where those measure have extraterritorial effect, is included in the sovereignty principle. It is a sovereign right of each state to set down its own foreign policies. As this conflict shows, it needs to be assessed when an extraterritorial measure falls under a state's right to sovereignty and when the principle of non-intervention is violated.

What becomes clear is that, as with sovereignty, the principle of non-intervention cannot be absolute. When a country makes permissible use of its sovereign rights and when it crosses the line to prohibited intervention must be analysed on a case-by-case basis taking into account conflicting rights of other states concerned.[292] The scope of the non-intervention principle is dependent on the protected interests at issue.[293] Under Article XX (g) of the GATT, the protected interest of the country implementing the extraterritorial measure is the conservation of exhaustible natural resources. This is a goal that the WTO Members explicitly recognised as important by including it in Article XX of the GATT as an exception to their obligations under other GATT provisions. Moreover, the reference to sustainable development in the preamble of the Marrakesh Agreement shows that environmental protection plays a significant role within the WTO.[294] On the other hand, the sovereign rights of the country adopting the environmental protection measure are restricted to some extent because of the commitments it has made under the WTO Agreements including the GATT. Although the WTO Members did not transfer their sovereign rights to an international institution, they agreed on certain obligations limiting their external competence and their right to self-determination by concluding an international treaty.[295]

In the end, it remains necessary to reconcile the conflicting rights of the countries involved. In the present context, the right to sovereignty in terms of implementing a certain environmental protection measure conflicts with the right to invoke the principle of non-intervention of countries whose access to the implementing country's market is subject to a change of environmental policies.

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[292] Ibid page 129.
[293] Erich Vranes (footnote 221) page 179.
[294] *Shrimp-Turtle* para. 153.
[295] Petros C. Mavroidis (footnote 285) at 73, 74.

c) Conclusion

The principles of sovereignty and non-intervention are general principles of international law which must be observed when a country implements an extraterritorial measure. However, these principles are not absolute. Instead, their scope is vague and needs to be interpreted and assessed on a case-by-case basis considering the conflict of states' rights inherent in extraterritorial measures that are adopted unilaterally.

As a result, the analysis of sovereignty and non-intervention amounts to a necessity to balance the conflicting rights of the states concerned. In the following paragraph it will be described how this balancing of rights works.

3. THE BALANCING OF RIGHTS

When measures with extraterritorial effects on foreign countries are implemented unilaterally, the conflicting rights of the states concerned need to be balanced so that the principles of state sovereignty and non-intervention are reconciled.[296] In terms of the trade-environment conflict within the WTO, that means that the right of a country to invoke an exception under Article XX (g) of the GATT must be balanced with the substantive rights of other countries under the GATT.[297] It needs to be analysed what 'balancing of rights' means and how it should be conducted.

a) The notion of balancing of rights

The balancing of rights is a mandatory requirement for extraterritorial measures in international law.[298] It is said to be a general principle of law resulting from the non-intervention principle.[299] A measure is inconsistent with the principle of non-intervention where the sovereign right of a state to determine its own policies is violated by an act of another sovereign state.[300] The conflicting rights need to be brought in accordance with each other. Since each country generally has the right to determine and enforce its own policies without interference by other countries, the rights

[297] See *Shrimp-Turtle* paras. 156 et seq.
[298] See Erich Vranes (footnote 221) pages 133, 134, 136.
[299] Ibid 134.
[300] See above V. 2.

of all states concerned have to be considered and no state must be deprived of its right to set down its own policies.

The balancing of competing rights is usually conducted by an international court.[301] Particularly in terms of international environmental law, international courts have been balancing conflicting rights of sovereign states, as can be seen in the *Shrimp-Turtle* decision.[302]

In the *Shrimp-Turtle* decision, the AB balanced the right of a Member to invoke an exception under Article XX of the GATT on the one hand and the substantive rights of the other Members under the GATT on the other hand.[303] It drew 'a line of equilibrium'[304] between the right of one Member State to implement a measure to conserve exhaustible natural resources and the rights of the other Member States under the GATT. The AB made clear that neither the right of the regulating country to invoke an exception under Article XX (g) of the GATT nor the rights of the exporting countries relying on the trade related commitments made by the regulating country must be nullified.[305] According to the AB, if a Member abused its right to invoke an exception, it would reduce its obligations under the GATT denying their mandatory nature. Thereby, the regulating state negated the rights of the other WTO Members under the GATT which posed a violation of the GATT.[306]

Often, the principle of proportionality is used to guide and structure the balancing of rights.[307] The proportionality principle is a means of interpretation which helps determining vague legal concepts like the concept of balancing of rights. [308] It serves as a guideline to balance conflicting interests in various national and international legal orders.[309] The balancing of rights is a complex concept which involves considering various rights of many different countries. Courts must give themselves certain guidelines on how approach the balancing process to make sure that they consider all rights equitably. If the balancing process is broken down into certain steps that are steady in any case, jurisprudence gains consistency which leads to more legal

[301] Mads Andenas et. al. 'Proporttionality: WTO Law: in Comparative Perspective' 42 *Texas International Law Journal* 371 at 384.
[302] Erich Vranes (footnote 221) page 134.
[303] *Shrimp-Turtle* paras. 156 et seq.
[304] *Shrimp-Turtle* para. 159.
[305] *Shrimp-Turtle* paras. 156 et seq.
[306] *Shrimp-Turtle* para. 156.
[307] Mads Andenas et. al. (footnote 300) at 384.
[308] Erich Vranes (footnote 221) page 134.
[309] Mads Andenas et. al. (footnote 300) at 384.

certainty.[310] This can be achieved by the use of the proportionality principle to structure the balancing process. A court does not merely compare the conflicting rights at issue but rather follows a certain line of argument to reconcile conflicting rights. All arguments must fit under the structure of the proportionality test. Thereby, countries can better assess the legality of a measure before implementing it.

In order to see how the structuring of the balancing process by means of the proportionality principle works, it needs to be analysed what 'proportionality' means, how the proportionality principle is applied, and whether this principle has been recognised by the WTO adjudicating body under Article XX of the GATT.

b) The notion of proportionality

There is no single overarching principle of proportionality, neither under WTO law nor in general international law.[311] It can be applied and interpreted in different ways taking into account the distinctive features of each legal system.[312] If one wants to use the proportionality principle as a means to structure the balancing of rights in the present context, it needs to be made clear how the proportionality test should be understood and approached in terms of Article XX of the GATT.

In the context of the balancing of rights under the chapeau of Article XX of the GATT, the goal pursued by a certain measure must be compared with the disadvantages caused by that measure.[313] There has to be a causal connection between the measure and the goal. This is shown by the *Shrimp-Turtle* decision where the AB stated that the measure at stake had to be implemented to conserve exhaustible natural resources.[314] Secondly, as outlined by the AB, the measure chosen must not be the heaviest one if other alternatives are reasonably available.[315] Rather, the measure must be the least restrictive one.[316] Thirdly, the disadvantage caused must not be disproportionate to the advantages the measure aims at.[317]

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[311] Axel Desmedt 'Proportionality in WTO Law' (2001) 4 *Journal of International Economic Law* 441.
[312] Mads Andenas et. al. (footnote 300) at 382.

[314] *Shrimp-Turtle* para. 160.
[315] *Shrimp-Turtle* para. 171.
[316] Axel Desmendt (footnote 310) at 446.
[317] Axel Desmendt (footnote 310) at 446.

These three components of the balancing process by the AB (causal connection, least restrictions and no disproportionality) show distinct similarities to the three-step proportionality test as it is known under the law of the European Union. Under European law, the balancing process is structured by means of an assessment of a measure's proportionality. The European proportionality test is based on the three criteria of suitability, necessity and proportionality in the narrow sense. [318] Only if the measure fulfils all three criteria, it can be deemed proportionate. It will be explained in the following what these three criteria mean in order to analyse if the European three-step approach can be transferred to Article XX of the GATT:

Under the three-step approach, first, the country implementing the measure at stake needs to pursue a legitimate goal and the measure must be suitable to promote this goal (suitability).[319] For example, environmental protection is a legitimate goal; the measure at issue has to further environmental protection in some way. The suitability requirement is not fulfilled where a measure cannot further the goal at all or has a mere protectionist purpose.[320] The threshold of this requirement is rather low since this first step constitutes a coarse filter only.[321] That means most measures will pass the suitability test but they can still violate the proportionality principle in case they are not necessary or disproportionate.

Secondly, from all measures reasonably available, the chosen measure has to be the least restrictive one (necessity).[322] In other words, the measure must not violate the competing rights more than necessary but has to be the mildest means. In order to examine the necessity requirement, one has to look for alternative measures, first. If alternative measures are available, one has to assess whether these alternatives are equally effective in pursuing the goal, afterwards.[323] If a less restrictive measure is available and equally effective, the chosen measure is not necessary, and thus, in violation of the proportionality principle. In the present context, that means that a country has to adopt the least trade restrictive measure to promote environmental protection policies.

[318] Axel Desmendt (footnote 310) at 446, 447; Erich Vranes (footnote 221) page 141, 142.
[319] Mads Andenas et. al. (footnote 300) at 382; Erich Vranes (footnote 221) page 141.
[320] Mads Andenas et. al. (footnote 300) at 387.
[321] Erich Vranes (footnote 221) pages 148, 149.
[322] Axel Desmedt (footnote 310) at 444.
[323] Mads Andenas et. al. (footnote 300) at 388.

Lastly, the negative, i.e. trade-restricting, effects must not be disproportionate to the goal pursued. The requirement is referred to as proportionality in the narrow sense.[324] The issue of proportionality in the narrow sense is only relevant where the measure at stake has been found to be suitable and necessary. It is this last step where the actual weighing and balancing of rights comes into play. [325] The assessment of proportionality in the narrow sense requires a comprehensive reasoning considering all relevant facts and circumstances of the case at issue.[326] One must particularly look at the objectives of the country implementing the measure and the intensity of the restriction of the conflicting rights. Only where a thorough assessment leads to the result that the measure at stake is not disproportionate in relation to the goal pursued, the proportionality-in-the-narrow-sense requirement is fulfilled.

Thus, under European law a measure is consistent with the proportionality principle if it is suitable, necessary and proportionate in the narrow sense in relation to the goal its pursues.

c) The proportionality principle under Article XX of the GATT

The question remains whether the proportionality principle with the three-step approach can be transferred to Article XX of the GATT and whether the WTO adjudicating body has recognised the principle as a guideline for the balancing of rights.

(i) First, it must be noted that no WTO decision dealing with extraterritorial measures in the trade-environment conflict has ever expressly referred to the principle of proportionality. Thus, the principle is not explicitly recognised under Article XX (g) of the GATT. However, it could have been implicitly referred to by the WTO adjudicating body.

In *Shrimp-Turtle*, in the context of the balancing of rights, the AB used the terms 'good faith', 'abus de droit' (abuse of rights), and 'reasonableness' as an 'interpretative guidance' for the balancing of rights. [327] These terms can all be deemed references to the proportionality principle since there is no consistent terminology with

[324] Axel Desmedt (footnote 310) at 445; Mads Andenas et. al. (footnote 300) at 389.
[325] Mads Andenas et. al. (footnote 300) at 389.
[326] Erich Vranes (footnote 221) page 155.
[327] *Shrimp-Turtle* para. 158.

regard to this principle.[328] Particularly, the term 'reasonableness' is often used as a synonym for 'proportionality' and the abuse of rights doctrine is sometimes understood as being related to the proportionality principle.[329] Thus, it needs to be examined if the AB intended to refer to the principle of proportionality since that would mean that the AB has recognised the proportionality principle as a guiding principle for the balancing of rights under the chapeau of Article XX of the GATT.

According to *Shrimp-Turtle*, the principle of good faith was a general principle of international law and governed the exercise of rights by countries in general. The abuse of rights doctrine, on the other hand, proscribed the abusive exercise of countries' rights, for example the abusive exercise of exceptions provided for in Article XX (a) to (j) of the GATT.[330] The AB referred to 'reasonableness' stating that the abuse of rights doctrine made sure that rights were invoked in a reasonable way where these rights interfered with other rights included in a treaty.[331] If a Member exercised its right to invoke an exception in a way that negated the substantive rights of other Members, that would lead to a breach of the GATT.[332]

Following these remarks, the doctrine of abuse of rights could be understood in a way that relates to the proportionality principle as an instrument to guide the balancing of conflicting rights[333]. Both principles have the function to prevent the abusive exercise of one right that rules out a conflicting right. On the other hand, there is a strong position within legal literature that denies that the AB referred to the proportionality principle in this passage of the *Shrimp-Turtle* decision. According to these authors, the AB intended to interpret the words 'arbitrary and unjustifiable discrimination' independently in connection with the notion of abuse of rights instead of referring to the notion of proportionality.[334] The abuse of rights doctrine was 'more limited' than the proportionality principle and did merely require a comparison of the conflicting rights in the respective case instead of establishing a hierarchy.[335] Moreover, the AB had never outlawed a measure because of its negative effects on interna-

[328] Axel Desmedt (footnote 310) at 443.
[329] Erich Vranes (footnote 221) page 138; Mads Andenas et. al. (footnote 300) at 387.
[330] *Shrimp-Turtle* para. 158.
[331] Ibid.
[332] *Shrimp-Turtle* para. 158.
[333] Erich Vranes (footnote 221) page 138.
[334] Axel Desmedt (footnote 310) at 474.
[335] Axel Desmedt (footnote 310) at 474.

tional trade although it had found the measure to be legitimate and necessary. [336] Also, the WTO adjudicating body did not explicitly mention the term 'proportionality'.[337]

Hence, the AB's remarks on the principles of good faith, abuse of rights, and reasonableness cannot be read as an implicit acknowledgement of the proportionality principle. Thus, the principle of proportionality has not been recognised as an instrument to balance conflicting rights under the chapeau of Article XX of the GATT.[338]

(ii) Nevertheless, the application of the three-step approach to the proportionality principle is a useful means for the WTO adjudicating body to structure the balancing of rights under the chapeau of Article XX of the GATT. It makes perfect sense to transfer the European approach to Article XX of the GATT as will be shown by a comparison with Article 36 of the Treaty on the Functioning of the European Union (TFEU).[339]

The three-step approach that is recognised under European law is particularly applied under Article 36 of the TFEU. If a European Court has to determine whether a measure fulfils the requirements of this provision, it examines whether the measure at stake is suitable, necessary and proportionate in the narrow sense.[340] Article 36 of the TFEU justifies trade restrictions that violate Articles 34 and 35 of TFEU. According to Articles 34 and 35 of TFEU, quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between Member States of the European Union. Article 36 of the TFEU states that

'[t]he provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

[336] Petros C. Mavroidis (footnote 285) at 79.
[337] Petros C. Mavroidis (footnote 285) at 79.
[338] See also Mads Andenas et. al. (footnote 300) at 405: '[T]he principle of proportionality is not explicitly (or implicitly) recognised in the law of the WTO.'
[339] Former Article 30 of the Treaty of the European Community (TEC).
[340] See examples at Mads Andenas et. al. (footnote 300) at 387 et seq.

The nature and text of the provision are very close to Article XX of the GATT.[341] Article XX justifies quantitative restrictions in violation of Article XI of the GATT on grounds of, inter alia, the protection of animal or plant life or health, and the conservation of exhaustible natural resources.[342] Article 36 of the TFEU justifies such restrictions on grounds of the protection of health and life of animals or plants. Thus, the protective purpose of both provisions overlaps. Moreover, both provisions only allow for justification provided that the measure at issue does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. At this point, the wording of Article XX of the GATT and Article 36 of the TFEU is almost identical. The clause prohibiting an arbitrary discrimination or disguised restriction guarantees that the exceptions provided for in the individual paragraphs in Article XX of the GATT and sentence 1 of Article 36 of the TFEU respectively are not abused.[343]

Also the jurisprudence based on the two provisions of the GATT and the TFEU is similar. The European Court of Justice held in its *Stoke-on-Trent* decision[344] that the assessment of a justification under Article 36 TFEU[345] requires the weighing of the implementing country's interest in pursuing the legitimate goal against the interest of the other Member States to ensure the free movement of goods.[346] Similarly, the AB in *Shrimp-Turtle* found that the chapeau of Article XX of the GATT requires a balancing of rights between the rights of a Member to invoke an exception and the substantive rights of the other Members under the GATT.[347] One of these substantive rights is the right to free trade following from the prohibition of quantitative restrictions in Article XI of the GATT.

According to this comparison, Article XX of the GATT shows distinct affinities to Article 36 of the TFEU. The proportionality principle with its three steps is recognised in terms of Article 36 of the TFEU as a means to balance conflicting rights, inter alia, in the trade-environment conflict. Due to the similarities of the provisions,

[341] Axel Desmedt (footnote 310) at 462, 473.
[342] See paragraphs b and g of Article XX of the GATT.
[343] See above V. 3. a); *Shrimp-Turtle* para. 151.
[344] European Court of Justice, *Stoke-on-Trent v B&Q* (1992) Case C-169/91 (*Stoke-on-Trent*).
[345] The *Stoke-on-Trent* decision refers to former Article 30 of the TEC which has the same wording as the current Article 36 of the TFEU.
[346] *Stoke-on-Trent* para. 15.
[347] *Shrimp-Turtle* para. 156.

it also is a useful and appropriate means to structure the balancing of rights under the chapeau of Article XX of the GATT.

(iii) Moreover, although WTO jurisprudence does not explicitly or implicitly recognise the proportionality principle in terms of the balancing of rights under Article XX of the GATT, the AB's way of balancing conflicting rights resembles a proportionality analysis.[348] The *Shrimp-Turtle* decision shows similarities to the three-step approach to some extent:

In in the context of the balancing of conflicting rights, the AB found that the protection of a transnational natural resource requires international cooperation before implementing a measure unilaterally.[349] This finding can be interpreted to the effect that a unilateral measure that deals with not only domestic but also extraterritorial environmental concerns is – without prior negotiations – not even suitable to promote a transnational policy goal.[350] As stated above, a measure is not suitable if it has a merely protectionist purpose.[351] The unilateral measure at stake in *Shrimp-Turtle* had a protectionist purpose since, instead of seeking a negotiated compromise, the US used an import ban to promote its policies. Thus, the previous remarks of the AB match the suitability-step.

The AB continued its balancing process stating that an alternative course of action was open to the US and that this alternative would have been less trade-restrictive. It held that the measure applied in the *Shrimp-Turtle* dispute was 'the heaviest "weapon"' and that other measures to promote the policy goal would have been reasonably available.[352] Therefore, the AB deemed the measure inconsistent with the chapeau of Article XX of the GATT. This reasoning resembles the necessity-step of the three-step approach to the proportionality principle.[353] The AB pointed out available alternative measures and found that these alternatives could equally support the policy goal without being the heaviest weapon.

[348] Mads Andenas et. al. (footnote 300) at 411.
[349] *Shrimp-Turtle* para. 166 et seq.
[350] Erich Vranes (footnote 221) page 280.
[351] See V. 3. b); Mads Andenas et. al. (footnote 300) at 387.
[352] *Shrimp-Turtle* para. 171.
[353] Erich Vranes (footnote 221) page 280.

Proceeding with the analysis of the chapeau of Article XX of the GATT, the AB held that the measure at issue was applied without previous inquiries as to whether it was appropriate for other countries considering the varying conditions prevailing in various exporting countries.[354] Also, the AB found that the measure was applied in a way that was barely or not at all flexible.[355] These findings fit under both the suitability and necessity requirement of the proportionality principle: [356] The application of the measure was not suitable to promote extraterritorial environmental concerns since it did not take into account varying conditions in foreign countries. If the varying conditions had been considered, and if the measures had been applied in a more flexible way, the alternative application would have been less trade-restrictive.

The AB stated that the chapeau of Article XX of the GATT involved the balancing of the right of a Member to invoke an exception and the substantive rights of other Members under the GATT, and that a legitimate policy goal could justify a trade-restricting measure as long as the application of that measure did not distort and nullify the balance of rights.[357] The idea of balancing conflicting rights by looking at the means and ends and considering the objective of the measure and the intensity of the restrictions caused resembles the third-step of the proportionality principle.[358] Also, the AB pointed out the importance of taking into account the particular circumstances of each specific case which is in line with the proportionality-in-the-narrow-sense requirement as outlined above.

These remarks show that the AB's application of Article XX of the GATT focusing on the balancing of conflicting rights resembles the proportionality principle with the three-step approach.[359]

(iv) In addition to that, there are no legal obstacles in the law of the WTO to applying Article XX of the GATT in a way that includes the proportionality principle.

According to Articles 3.2 and 19.2 of the DSU, the WTO DSB cannot add to or diminish the rights and obligations provided in the WTO Agreements. These provi-

[354] *Shrimp-Turtle* para. 177.
[355] *Shrimp-Turtle* para. 177.
[356] Erich Vranes (footnote 221) page 281.
[357] *Shrimp-Turtle* para. 159.
[358] See above V. 3. b).
[359] See also Mads Andenas et. al. (footnote 300) at 412.

sions prohibit judicial activism that changes the substance of the rights and obligations of the WTO Members under the GATT.[360] However, the WTO adjudicating body can clarify the provisions contained in the GATT and interpret them pursuant to customary rules of interpretation of public international law.[361] As outlined above, the balancing of rights is used to interpret the chapeau of Article XX of the GATT. The three-step proportionately test, in turn, is a means to structure the balancing process. It thereby serves interpretative purposes.[362] As a result, the proportionality principle is a means to clarify and interpreted Article XX of the GATT since it is applied in connection with the balancing of rights to determine the legality of measures und the chapeau of Article XX.[363]

Thus, the application of the proportionality principle under the chapeau of Article XX of the GATT is a legitimate instrument and in accordance with the DSU.

d) Conclusion

The assessment of the legality of an extraterritorial measure as an exception under Article XX of the GATT requires the balancing of the right of the Member invoking the exception and the substantive rights of other Members concerned under the GATT.

What helps to structure the balancing of rights is the use of the proportionality principle. Although WTO jurisprudence has not recognised the principle yet, the European three-step approach to the proportionality principle can be transferred to the chapeau of Article XX of the GATT. Article XX of the GATT is similar to Article 36 of the TFEU where European courts apply the three-step approach. The AB's way of balancing conflicting rights under the chapeau of Article XX of the GATT shows distinct similarities to this approach, and as an instrument of interpretation the proportionality principle is consistent with the law of the WTO.

WTO jurisprudence has already clarified the GATT to some extent and made its application more consistent. In order to achieve further improvements, the panels and AB must impose certain guidelines for themselves. The proportionality principle is a

[360] Axel Desmedt (footnote 310) at 480.
[361] See Article 3.2 of the DSU.

[363] Also see Erich Vranes (footnote 221) page 142 stating that the proportionality principle is a means of interpretation.

suitable instrument to reach more consistency and legal certainty and, at the same time, offers enough space and discretion for the adjudicating body to assess each individual dispute on a case-by-case basis.

Thus, the WTO adjudicating body should recognise the proportionality principle with its three-steps as a means to structure the balancing of rights under the chapeau of Article XX of the GATT.

VI. THE ISSUE OF UNILATERISM AND THE PRINCIPLE OF INTERNATIONAL COOPERATION

Another principle of general international law that needs to be analysed in order to assess the legality of unilateral measures with extraterritorial effect in the trade-environment context is the principle of international cooperation. It has to be examined what the principle of international cooperation means and what implications it has on unilateral measures with extraterritorial effect.

1. THE PRINCIPLE OF INTERNATIONAL COOPERATION

The principle of international cooperation is a general principle of international law. According to this principle, no country can unilaterally impose its policies on other countries without these countries' consent.[364]

The principle of international cooperation includes the obligation to negotiate.[365] Negotiation is a part of cooperation. Both negotiation and cooperation are obligations of conduct. That means, a country must seek to come to a negotiated compromise with other states concerned but the countries do not necessarily have to reach a conclusion if a conclusion is not reasonable available.[366] Also the AB in *Shrimp-Turtle* referred to this principle in connection with its serious-attempt requirement.[367]

The question remains if the principle of international cooperation always outlaws unilateral measures that have been implemented without prior negotiation and cooperation efforts or whether there are situations in which prior negotiation and cooperation are dispensable. In order to answer this question, two provisions incorporating the principle of international cooperation will be analysed below.

2. THE GENERAL OBLIGATION TO COOPERATE UNDER ARTICLE 1 OF THE UN CHARTER

The first provision that needs to be examined in order to analyse the principle of international cooperation is Article 1 of the UN Charter. This provision includes the

[364] Pierre-Marie Dupuy (footnote 248) at 23.
[365] Pierre-Marie Dupuy (footnote 248) at 23, 24.
[366] Ibid at 24.
[367] See above IV. 2.; *Shrimp-Turtle* paras. 166 at seq.

general obligation to cooperate.[368] It is a rule of general international law that lays down customary rules.[369] Thus, the rule is applicable to disputes regarding Article XX of the GATT since WTO law is no self-contained legal order but interrelates with general international law.[370]

According to Article 1 of the UN Charter, one of the purposes of the UN is to safeguard peace.[371] This safeguarding of peace is facilitated through the development of friendly relations among states.[372] Friendly relations, in turn, are particularly established through international cooperation.[373] The provision contains the obligation of countries, which want to promote transnational interests, to seek for negotiated solutions, at least where cooperation and negotiation is reasonably open to them, particularly through international institutions and treaties.[374] Whether or not cooperation and negotiation structures are reasonably available must be assessed on a case-by-case basis.[375]

The AB in *Shrimp-Turtle* followed this argument stating that a serious effort to negotiate was required in the present case since negotiation structures were reasonably available due to the Inter-American Convention.[376] According to the AB, the need of cooperative efforts was recognised by the WTO itself and various international instruments and declarations.[377]

In terms of transnational environmental concerns, cooperation and negotiation structures will usually be reasonably available due to a variety of international organisations and treaties being applicable in the trade-environment context. For example, if a certain species of animal, which is located not only on the territory of the country which wants to implement a measure but also in other countries, is threatened with extinction, action is required urgently. It would be unreasonable to require the country to enter into time-consuming negotiations before adopting a protective measure unilaterally. However, the regulating country would at least be required to negotiate

[368] Erich Vranes (footnote 221) page 176.
[369] Pierre-Marie Dupuy (footnote 248) at 22.
[370] See above IV. 3. b); Joost Pauwelyn (footnote 252) at 589; Christian Tietje (footnote 24) at 293, 294.
[371] Article 1 (1) of the UN Charter.
[372] See Article 1 (2) of the UN Charter.
[373] Article 1 (3) of the UN Charter.
[374] Erich Vranes (footnote 221) page 176; Pierre-Marie Dupuy (footnote 248) at 24.
[375] Pierre-Marie Dupuy (footnote 248) at 25.
[376] *Shrimp-Turtle* para. 169-171.

within the international forums dealing with environmental concerns to which he has already been a Member. Within existing forums, negotiations are generally less time-consuming since they have been established particularly for international negotiations. Therefore, international forums dealing with environmental concerns to which the implementing country has already been a Member offer an alternative reasonably available even where an environmental protection measure is urgently required.

Thus, Article 1 of the UN Charter contains the general principle that international cooperation and negotiation is usually required in terms of promoting transnational environmental concerns. This makes the unilateral implementation of extraterritorial measures the exception to the rule.[378]

3. THE COOPERATION PRINCIPLE UNDER PRINCIPLE 12 OF THE RIO DECLARATION

The second provision that has to be analysed to answer the question whether international cooperation is a mandatory requirement in the present context is Principle 12 of the Rio Declaration. First, the nature of the provision must be clarified, before discussing its content and consequences for unilateral measures promoting international environmental concerns.

a) The nature of Principle 12

The Rio Declaration is an instrument expressing international consensus regarding environmental issues but does not contain any legally binding rules.[379] The declaration is qualified as soft law. Consequently, Principle 12 of the Rio Declaration does, in general, not impose binding obligations on countries, either.

However, Principle 12 obtained legally binding effects in the context of the *Shrimp-Turtle* decision. Interpreting the chapeau of Article XX of the GATT, the AB balanced, inter alia, the right of an individual state to invoke exceptions under Article XX with the rights of all other states concerned to be involved in international cooperation efforts.[380] The AB stated that the need for international cooperation had been recognised by the WTO and other international instruments such as the Rio Declaration.[381] According to the AB, Principle 12 of the Rio Declaration was of par-

[378] Erich Vranes (footnote 221) page 176.
[379] David Hunter (footnote 15) page 162 et seq.
[380] *Shrimp-Turtle* para. 159 et seq, particularly 168;Christian Tietje (footnote 24) at 293, 294.
[381] *Shrimp-Turtle* para. 168.

ticular relevance since it pointed out the need to seek for international consensus regarding transboundary or global environmental problems. For the US had violated the cooperation requirement, the AB found an unjustifiable discrimination.[382] Thus, the AB used Principle 12 of the Rio Declaration to find a violation of the chapeau of Article XX of the GATT. Thereby, Principle 12 obtained direct legal effects.[383] Since the principle was used to find a violation of Article XX of the GATT, which is beyond question a binding rule, Principle 12 and the obligation to cooperate internationally became legally binding itself.[384]

Hence, Principle 12 of the Rio Declaration can, although being soft law, lead to a legally binding obligation to seek for international cooperation regarding extraterritorial environmental concerns. Thus, its content has to be analysed in order to assess the legality of unilateral measures to protect the environment.

b) The content of Principle 12

It needs to be examined whether Principle 12 stipulates a strict obligation to cooperate internationally or whether unilateral measures are permitted under that principle.

According to the text of the principle, international cooperation is the general rule since international environmental concerns 'should, as far as possible' be addressed by internationally agreed solutions.[385] In contrast to that, unilateral measures are the exception in the trade-environment context for they should be avoided according to Principle 12 sentence 3 of the Rio Declaration.[386]

The parties to the Rio Declaration have acknowledged this rule-exception relationship since the declaration expresses international consensus.[387] Moreover, Principle 12 is a highly important provision in the current trade-environment relationship for it includes both international custom and developing principles of international law with regard to international environmental protection.[388]

Thus, the rule-exception relationship stipulated in Principle 12 of the Rio Declaration should be taken seriously. Unilateral measures concerning extraterritorial envi-

[382] *Shrimp-Turtle* paras. 168 at seq; see Erich Vranes (footnote 221) page 178.
[383] Ilona Cheyne (footnote 38) under 'Some areas of uncertainty', '(b) The use of external sources (i) Multilateral agreements'.
[384] Speaking of an obligation to cooperate internationally: Christian Tietje (footnote 24) at 292.
[385] Principle 12 sentence 4 of the Rio Declaration.
[386] See also Erich Vranes (footnote 221) pages 176, 177.
[387] David Hunter (footnote 15) page 162 et seq.
[388] Erich Vranes (footnote 221) pages 177, 178.

ronmental issues are only permissible where international consensus could not be reached.

4. *CONCLUSION*

The principle of international cooperation contains the general rule that countries have to seek for international consensus before implementing a measure that relates to extraterritorially located environmental concerns unilaterally. International cooperation is the rules whereas unilateral measures pose the exception. An exception can only be invoked where either an agreement based on negotiations could not have been reached after reasonable efforts or negotiation and cooperation structures are not reasonably available.

VII. CONCLUSION

The legality of unilateral measures with extraterritorial effect to protect the environment under the WTO/GATT is a highly complex issue. What must be analysed in order to assess the legality of such measures are not only the conflicting provisions and interests under the WTO/GATT itself but also general principles of international law.

The WTO/GATT adjudicating body has had occasion to comment on the legality of unilateral measures with extraterritorial effect to protect the environment. According to the *Tuna-Dolphin* dispute, such measures were unlawful. The *Shrimp-Turtle* decision suggested that extraterritorial measures to protect the environment could be lawful provided they satisfied certain conditions. These conditions derive both from the GATT and general principles of international law. The AB chose an appropriate approach to solve the trade-environment conflict which allowed WTO Members to further international environmental protection standards and, at the same time, ensured the liberalisation of international trade.

By drawing on the *Shrimp-Turtle* decision, the WTO adjudicating body can enhance a consistent jurisprudence and legal certainty among WTO Members as long as the Members themselves cannot find a solution to the issue of extraterritorial measures to protect the environment.

1. *IMPLICATIONS OF THE SHRIMP-TURTLE DECISION*

The *Shrimp-Turtle* decision clarified the requirements of Article XX (g) of the GATT pointing out several conditions that an extraterritorial measure to protect the environment had to meet.

The first condition that the AB pointed out in *Shrimp-Turtle* was the sufficient-nexus requirement. Interpreting paragraph g of Article XX of the GATT, the AB held that there had to be a sufficient nexus between the resource to be protected and the country implementing the protection measure. However, the meaning of 'sufficient nexus' still needs to be clarified by prospective panels and the AB. Prospective decisions should particularly determine what the nature of the nexus is and when the nexus is sufficient.

Secondly, according to the AB, countries had to seriously attempt to reach a multilateral agreement with all countries concerned before implementing a measure addressing international environmental concerns. Particularly in terms of migratory species, the regulating country has to include every country through which the species migrate. How hard a country has to seek for a multilateral solution depends on the relevant circumstances of each case.

Besides that, the AB employed multilateral agreements other than the GATT to interpret Article XX (g) of the GATT. The analysis in this paper showed that this is a legitimate approach to interpret the GATT.

Moreover, the *Shrimp-Turtle* decision introduced a balancing test under the chapeau of Article XX of the GATT. The AB balanced the right of a Member to invoke an exception under the individual paragraphs of Article XX and the substantive rights of other Members concerned under the GATT. In order to structure the balancing of rights, the European approach to the balancing process by means of the proportionality principle should be transferred to the chapeau of Article XX of the GATT. Under EU law, a measure is consistent with the proportionality principle if it is suitable, necessary and proportionate in the narrow sense in relation to a legitimate policy goal. This approach is a useful tool to order the balancing process.

What must be taken into account is that due to the principle of international cooperation, a unilateral measure to promote extraterritorial environmental concerns can only be the exception to the rule, even where the measure is consistent with the balancing/proportionality principle.

2. The role of the WTO adjudicating body

Prospective WTO decisions should draw on and clarify the conditions outlined by *Shrimp-Turtle*.

Since the current round of trade negotiations within the WTO turned out to be time consuming and complex, a negotiated compromise by the WTO Members is not likely to be reached in the near future. It is particularly unlikely that the Member States will adopt a provision clarifying the trade-environment relation or explicitly implement the proportionality principle into WTO law.

Thus, it is the task of the WTO adjudicating body to clarify and refine the conditions under which Members can unilaterally implement measures with extraterritorial effect to protect the environment. If the WTO adjudicating body draws on the criteria outlined in *Shrimp-Turtle* and uses the proportionality principle to structure the bal-

ancing of conflicting rights under Article XX of the GATT, WTO jurisprudence will gain an increase of predictability and WTO Members will have more legal certainty in terms of the legality extraterritorial measures to protect the environment.

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