Revisiting the WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective

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Contemporary international law faces challenges stemming from interactions between different areas of law and various stakeholders. For example, tensions arise from the interaction between international trade law and environmental law, as well as between developed and developing countries.

The interface between trade and the environment is increasing and is taking different forms. From the protection of turtles to the protection of the climate, the international community faces many different environmental challenges. Protection of markets, however, also remains a perennial and underlying concern. This increasing interface between trade and the environment has certain consequences for development. The World Trade Organization ("WTO") is the jurisdictional body before which these issues are debated. The panels and Appellate Body ("AB") have, on various occasions, been asked to decide issues having a bearing on the environment. Examples of these cases include *United States—Standards for Reformulated and Conventional Gasoline*,[1] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ("*U.S.—Shrimps*"),[2] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*,[3] and *Brazil—Measures Affecting Imports of Retreaded Tyres* ("*Brazil—Retreaded Tyres*").[4] These cases, in which certain laws were analysed in light of article XX of the General Agreement on Tariffs and Trade ("GATT"),[5] indicate a desire to protect the environment. In fact, *U.S.—Shrimps* provides an outstanding example of lawmaking in favor of the environment. In this case, as will be discussed below, the AB made some very important observations that will have a bearing on future cases.

After targeting developing countries' exports for lack of protection of turtles, the United States has contemplated targeting them again for lack of sufficient action to curb greenhouse gas emissions.[6] Such endeavors of developed countries often succeed, firstly because article XX is a general provision that can cover all sorts of restrictions, and secondly because the WTO's judicial organs tend to reinforce the position of developed nations, as happened in *U.S.—Shrimps*. As Pascal Lamy, the Director-General of the WTO, asserted in a speech in Ottawa, "the multilateral trading system . . . cannot stand as a barrier to the fight against climate change . . . ."[7] The United States will likely ensure that any new U.S. laws that tax products imported into the United States based on emissions released during their production (similar to the proposed American Clean Energy and Security Act of 2009[8]) will be in conformity with WTO rules.[9] For this reason, if developing countries approach the WTO's Dispute Settlement Body ("DSB"), then a repeat of *U.S.—Shrimps* is likely. Therefore, it is opportune to revisit *U.S.—Shrimps*.

The objectives of the WTO are to increase market access and promote nondiscriminatory treatment of imports vis-à-

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1. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996); Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Gasoline AB Report].
2. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter Shrimps I Panel Report]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimps I AB Report].
3. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).
4. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Tyres AB Report].
5. *See, e.g.*, Gasoline AB Report, *supra* note 1, at 13.
6. Martin Khor, *The Rise of 'Climate Protectionism'*, S. Bull. (S. Ctr., Geneva, Switz.), Sept. 10, 2009, at 1, *available at* http://www.southcentre.org/index.php?option=com_content&view=article&id=1069%3Asouth-bulletinissue-40-10-september-2009-the-rise-of-climate-protectionism&catid=148%3Asouth-bulletin-2009&Itemid=295&lang=en.
7. Pascal Lamy, Dir.-Gen., World Trade Org., Keynote Address at Carleton University (Nov. 2, 2009), http://www.wto.org/english/news_e/sppl_e/sppl140_e.htm.
8. H.R. 2454, 111th Cong. (2009).
9. *See* Jacob Werksman et al., Trade Measures and Climate Change Policy: Searching for Common Ground on an Uneven Playing Field 2 (World Res. Inst. Working Paper, 2009), *available at* http://pdf.wri.org/working_papers/trade_measures_and_climate_change.pdf.

vis other imports and domestic products.[10] The nondiscrimination principle is the basic principle of WTO agreements, including the GATT. The WTO "contract" requires that WTO Members do not discriminate between domestic and foreign goods, services, and service providers.[11] In WTO law, the concept of nondiscrimination can be interpreted in different ways. For example, the notion of discrimination in articles I(1) and III(4) of the GATT requires a comparison of how like products are treated, whereas the notion of nondiscrimination in article XX requires a comparison of countries in which similar conditions prevail.[12]

I. Introduction to Article XX of the GATT

Succinctly summarizing article XX of the GATT, Aaditya Mattoo and Petros C. Mavroidis explain, "according to the GATT case law, Article XX is not a positive rule establishing obligations in itself, but a list of general exceptions to obligations otherwise assumed by WTO members."[13] Although the GATT contains exceptions to its own provisions, when applied, those exceptions must still comply with the principle of nondiscrimination. Article XX sets out a list of exceptions.[14] However, these are susceptible to misuse by GATT members. In fact, these exceptions may be viewed as responses to particular conditions existing in specific countries. The propositions made by the United States for the setting up of the International Trade Organization exemplified some of these exceptions, but the United Kingdom proposed a clause (known as the article XX chapeau) to protect against misuse of GATT exceptions.[15] The chapeau of article XX basically includes both the most-favored-nation clause (prohibiting arbitrary or unjustifiable discrimination between countries where the same conditions prevail) and the national-treatment clause (prohibiting disguised restriction on international trade). However, it is not easy to decipher the exact meaning of the chapeau: What is the aim of setting out exceptions, if it is not to protect domestic industry? The answer is that article XX is necessary because it renders legal certain measures, such as a prohibition of imports dangerous to health, that would otherwise infringe article XI (general elimination of quantitative restrictions). Nevertheless, the possibility of protectionism is very real. This is due to the fact that the language of the chapeau is ambiguous; what are the meanings of the expressions "arbitrary or unjustifiable" and "disguised restriction"?

Another important aspect of article XX is that it does not require notice of measures taken in accordance with its provisions, even though it would be logical to expect that members give notice of measures that comply with the GATT only by virtue of article XX.[16] Notification would also improve compliance with article X (publication and administration of trade regulations) and would allow other members to evaluate the measure in question in the light of the objectives of article XX and of the GATT. Additionally, the members would be in a better position to formulate appropriate proposals to improve international trade while also taking into account the diverse legitimate goals that members' own laws may advocate.[17]

Article XX spells out many exceptions to the GATT, but they must be applied in a nondiscriminatory fashion. Among these exceptions are paragraphs b and g, which are directly concerned with environmental goals. Before the WTO came into force, article XX was the main provision that allowed members to impose environmental measures. With the establishment of the WTO, there are other agreements such as the Technical Barriers to Trade and the Sanitary and Phytosanitary Measures agreements that allow such measures.[18] The environmental exceptions in article XX do not fall within the four principles of the GATT (articles I, II, III, and XI).[19] Thus, the number of cases involving environmental issues is increasing because environmental protection is becoming a greater priority for members.[20] Given that a large number of environmental measures violate article XI, which prohibits quantitative restrictions, most of the cases deal with whether these measures would be justified under article XX.[21]

However, these exceptions do not refer to the word *environment*. There is disagreement on whether the legislators wanted to apply these exceptions to a broad or a narrow field of environmental issues. According to certain writers, the legislators wanted to take into account environmental protection, economic considerations, and public health, because they were aware of existing international conventions relating

10. Thomas Cottier & Krista Nadakavukaren Schefer, *Conflict Resolution. Assessing the Story so Far: Hope on the Horizon?*, *in* Trade, Investment and the Environment: Proceedings of the Royal Institute of International Affairs Conference, Chatham House, London, October 1998, at 187, 189 (Halina Ward and Duncan Brack eds., 2000).
11. Thomas Cottier & Petros C. Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in WTO Law: An Overview*, *in* Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law 3, 4 (Thomas Cottier & Petros C. Mavroidis eds., 2000).
12. Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4 Chi. J. Int'l L. 385, 397 (2003).
13. Aaditya Mattoo & Petros C. Mavroidis, *Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT*, *in* International Trade Law and the GATT/WTO Dispute Settlement System 325, 334 (Ernst-Ulrich Petersmann ed., 1997) (footnote omitted).
14. *See* John H. Jackson, World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade) 741 (1969).
15. *Id.* at 741–42.
16. *Id.*
17. *Id.* at 741–44.
18. *Id. See also* Ravindra Pratap, *Trade and Environment: Trends in International Dispute Settlement*, 42 Indian J. Int'l L. 451, 459 (2002).
19. Article I embodies the most-favored-nation clause, article II embodies the requirement that each member must provide schedules of concessions, article III embodies the national treatment clause, and article XI lays down a general prohibition on quantitative restrictions. General Agreement on Tariffs and Trade, arts. I–III, XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
20. *See generally* cases listed *supra* notes 1–4.
21. *See generally id.*

to environmental protection. They did not make an explicit exception in favor of the environment, however, because they presumed that paragraphs b and g would suffice to achieve their goal.[22]

Thus, article XX has three characteristics that could prove dangerous for developing countries that wish to export to other countries. First, the chapeau is ambiguous, as discussed above; second, measures taken in accordance with article XX need not be accompanied by notices;[23] and third, the paragraphs under the chapeau are too general.[24] This leaves the judicial organs with too much liberty to interpret this article. The main problem with paragraphs b and g of article XX is the possibility that measures taken to protect the environment could be perceived as protectionist with respect to the domestic market. It is difficult to identify whether a measure constitutes a disguised restriction on international trade, because it is frequently the application of a measure that leads to protectionism.[25] Therefore, it is useful to examine the case law relating to article XX.

II. The Shrimp-Turtle Case

The first case in which the WTO authorized unilateral national extraterritorial environmental measures against developing countries under article XX was *U.S.—Shrimps*.[26] The history of this case began when the United States made it compulsory for American trawlers to be installed with turtle-excluder devices ("TED") so that certain sea turtles protected by the Endangered Species Act could escape while catching shrimps. The United States then imposed a prohibition on imports of shrimps that had been caught without using TED. There were two reasons behind the imposition of this prohibition. First, fitting trawlers with TED requires substantial expenditure. Therefore, foreign shrimpers would be obliged to spend as much as their American counterparts, thereby protecting the latter from foreign competition.[27] The same philosophy would guide the imposition of border measures based on greenhouse-gas emissions, contemplated by the United States and Europe. This was made clear by Director-General Lamy when he said that these members "must offset the competitive disadvantage that their industry may suffer from enduring the costs of climate mitigation."[28] Second, the prohibition would exert pressure on foreign governments to take measures to protect turtles.[29]

In response to the above U.S. import restrictions, India, Pakistan, Malaysia, and Thailand lodged a complaint against the United States at the WTO, because their shrimp exports had been adversely affected. The argument of the complainants was that section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990[30] and the guidelines for its implementation had violated articles I(1), XI(1), XIII(1), XX(b), and XX(g) of the GATT.[31] In other words, they claimed a violation of the principle of nondiscrimination. India also argued that the American measure impinged India's sovereign right to formulate its environmental policy.[32] It stated that the United States should not have imposed a far-reaching extraterritorial measure on other members.[33] India believed that this measure amounted to an unacceptable interference with the sovereign jurisdiction of India.[34] The measure had been imposed unilaterally. The United States claimed that the use

22. Michael J. Trebilcock & Robert Howse, Regulation of International Trade 514–15 (2005).
23. The lack of a notice requirement implies that members would not even know when a national measure in accordance with article XX would start applying to their exports.
24. This allows members to frame and apply restrictive laws on exports, for all sorts of reasons.
25. Trebilcock & Howse, *supra* note 22, at 515.
26. This is clear from a study of the WTO cases dealing with environmental issues. *See* cases listed *supra* notes 1–4.
27. Jayati Srivastava & Rajeev Ahuja, *Shrimp-Turtle Decision in WTO: Economic and Systemic Implication for Developing Countries*, 37 Econ. & Pol. Wkly. 3445, 3446 (2002).
28. Lamy, *supra* note 7.
29. Gregory Shaffer, *International Decisions: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 93 Am. J. Int'l L. 507, 509 (1999).
30. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037–38 (1989) (prohibiting the importation to the United States of shrimp harvested with commercial fishing technology that may adversely affect sea turtles). For further information, see *Shrimp Import Restriction Legislation for Marine Turtle Conservation*, Nat'l Oceanic & Atmospheric Admin., http://www.nmfs.noaa.gov/pr/species/turtles/shrimp.htm (last visited Dec. 26, 2011).
31. Shrimps I Panel Report, *supra* note 2, ¶¶ 7.11, 7.19, 7.24. These articles state:
> [Article I(1):] With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
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> [Article XI(1):] No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
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> . . . .
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> [Article XIII(1):] No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
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> . . . .
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> [Article XX:] Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . .

GATT, *supra* note 19, arts. I(1), XI(1), XIII(1), XX.
32. Shrimps I Panel Report, *supra* note 2, ¶ 3.6.
33. *Id.*
34. *Id.*

of TED was a multilateral environmental norm and that the complainants had refused to negotiate an international agreement in this regard. India and Thailand responded that the use of TED had become an international norm only because of the pressure exerted by the United States. India also revealed another example of this pressure tactic; the United States had indicated its readiness to enter into a regional agreement with India if the latter withdrew the complaint before the WTO Dispute Settlement Mechanism ("DSM").[35]

Before the WTO, the United States raised the defense of article XX(b) and (g).[36] Article XX(b) allows members to impose measures necessary for the protection of human, animal, or plant life or health, while article XX(g) allows members to impose measures relating to the conservation of exhaustible natural resources. The panel ruled against the United States, stating that the United States had violated article XI(1).[37] The panel's rationale was that only countries certified by the United States as having a TED-implementation program could export to the United States.[38] The United States did not certify a country if the exporting country had protected turtles by means other than TED. The panel held that this distinction was discriminatory under the chapeau of article XX, because countries in the same situation (i.e., protecting turtles) were being treated differently.[39] The panel also stated that the principal objective of the GATT was to advance economic development by multilateral free trade, thereby preserving the multilateral trading system.[40] It further stated that the multilateral trading system would lose its predictability if exporters were to comply with the different laws of each importing member.[41] Moreover, the chapeau of article XX, even though an exception, does not allow reduction in market access and discriminatory treatment.[42] The United States appealed the decision of the panel.[43]

According to the AB, the fundamental principles of GATT and members' laws to implement the objectives mentioned in article XX are equally important.[44] The AB referred to the preamble of the Marrakesh Agreement to support its stance that the WTO does value environmental concerns.[45] Therefore, this decision of the AB demonstrates that environmental issues will not be dealt with as exceptions to GATT under article XX.[46] However, the AB did not clarify why article XX contained environmental "exceptions" if they were not to be dealt with as exceptions. If the AB's interpretation in *U.S.—Shrimps* is actually applied, then none of the concepts in the preamble will be considered exceptions, and these concepts include taking into account the situation of members at different levels of development.[47] Is the AB ready to apply this principle as a nonexception? Special-and-differential-treatment (S&DT) provisions actually reflect the differing levels of development of members. Are they no longer exceptions?

The AB stated that a balance has to be struck between the rights of a member under article XX and the rights of other members under provisions such as article XI.[48] The interpretation of the chapeau must not deprive parties of the rights accorded to them under the paragraphs of article XX. This is understandable; however, this does not mean that article XX is not an exception. The purpose of the chapeau is to guard against a misuse of the exceptions. Moreover, the chapeau represents the fundamental principle of nondiscrimination, which must be applied to exceptions as well.

The AB went on to say:

> [C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.[49]

The AB noted that international law had evolved over time, and that it now recognized that natural resources such as turtles should be protected.[50] The complainants had put forward a traditional interpretation of the expression *exhaustible natural resources* as envisaged in 1947.[51] Rejecting the interpretation of the complainants, the AB held that turtles would be considered exhaustible natural resources even if they could reproduce.[52] It once again took into account the preamble of the Marrakesh Agreement that refers to sustainable development and interpreted the aforementioned expression in the light of international agreements that also promote sustainable development.[53] Thus, the AB strength-

35. Ravindra Pratap, India at the WTO Dispute Settlement System 255 (2004).
36. Shrimps I Panel Report, *supra* note 2, ¶ 3.146.
37. *Id.* ¶ 7.16.
38. *Id.* ¶ 7.18.
39. *Id.* ¶ 7.33.
40. *Id.* ¶¶ 7.42–7.43; Abdul Haseeb Ansari, *Free Trade Law and Environmental Law: Congruity or Conflict?*, 41 Indian J. Int'l L. 1, 28–29 (2001).
41. Shrimps I Panel Report, *supra* note 2, ¶¶ 7.44–.7.45.
42. *See* Shrimps I AB Report, *supra* note 2, ¶ 112 (quoting Shrimps I Panel Report, *supra* note 2, ¶ 7.44).
43. *See id.*
44. *Id.* ¶¶ 156, 159.
45. *Id.* ¶ 129 (the Preamble states "seeking both to protect and preserve the environment"). *But see* Lorand Bartels, *The Appellate Body Report in European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes*, *in* Human Rights and International Trade 463, 476 (Thomas Cottier, Joost Pauwelyn, & Elisabeth Bürgi eds., 2005) (arguing that environmental protection is not a goal of the WTO).
46. The AB states that the preamble of the Marrakesh Agreement informs interpretation of Article XX(g). *See* Shrimps I AB Report, *supra* note 2, ¶¶ 153, 155; *see also* Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].
47. The preamble states:
    > The *Parties* to this Agreement,
    >
    > *Recognizing* that their relations in the field of trade and economic endeavour should be conducted . . . in a manner consistent with their respective needs and concerns at different levels of economic development,
    >
    > *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development . . . .

    Marrakesh Agreement, *supra* note 46, pmbl.
48. Shrimps I AB Report, *supra* note 2, ¶ 156.
49. *Id.* ¶ 121.
50. *Id.* ¶¶ 129–34.
51. *Id.* ¶ 127.
52. *Id.* ¶ 128.
53. *Id.* ¶¶ 129–30.

ened environmental protection in the WTO by limiting the distinction between resources capable of reproducing and those that cannot. It is logical to interpret the expression *exhaustible natural resources* in the light of the present situation, but it also means that there is no difference between resources that can reproduce and those that cannot (such as minerals). Therefore, this finding of the AB could be termed as amounting to legislating; the AB generally follows a textual approach of interpretation,[54] which it modified in this case while interpreting the word *exhaustible*.

The AB held that the prohibitory measure imposed by the United States was in conformity with article XX(g) but not with the chapeau of article XX.[55] It also held that certain modifications would be required in the measure to make it conform to the chapeau.[56] Even though the AB criticized the unilateral application of the measure, it did not criticize its logic. Gregory Shaffer has discussed this phenomenon in his work. He says that judicial forums favor economic powers by striking down the application of their laws instead of the laws themselves, thereby compelling developing countries to bring every case before the DSM.[57] The AB did not analyze the American measure in terms of balancing environmental gains and the costs associated with the restriction of international trade.[58] On the contrary, it stated emphatically, "We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is."[59] Consequently, it put an end to the notion that environmental measures are at odds with the goals of the multilateral trading system. Then the AB applied the law to the facts of the case, a technique called "complet[ing] the analysis."[60] It held that the measure could not pass the test of the chapeau of article XX because its application constituted unjustifiable and arbitrary discrimination between members.[61]

The AB even noted:

> We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[62]

This point was not raised by the parties. Hence, the AB overstepped its mandate when it said that sovereign nations "should" adopt measures to protect endangered species. Although some find this observation to be merely an *obiter dictum*,[63] that does not absolve the AB of the responsibility of making responsible statements. Additionally, this statement may seem at odds with Director-General Lamy's statement a decade later that "[r]elying on trade measures to fix global environmental problems will not work."[64] Either he was stating a general rule of the WTO, he was unaware of *U.S.—Shrimps*, or his statement itself was an *obiter dictum*. However, as mentioned above, Lamy later stated that the multilateral trading system would not act as an obstacle to the fight against climate change.[65] The AB can derive support from this statement. It is obvious that WTO law has more permanence and sanctity than the statements of its directors-general. Therefore, the DSM will not be rehearing and redeciding *U.S.—Shrimps*. It remains to be seen how the AB will decide new cases relating to these issues in light of Lamy's statements.

U.S.—Shrimps shows the desire of the AB to regulate international trade in a more comprehensive way that encompasses nontrade values as well as commercial objectives. Thus, the AB might become a court dealing with general matters and not only trade matters.[66] The panels and AB can only decide on nontrade matters as long as they have a relation with trade.

III. Evaluation of the Shrimp Case

An evaluation of the substantive and procedural matters in *U.S.—Shrimps* will show how an international tribunal uses international law to arrive at the desired result of protecting the environment.

A. *Substantive Issues*

When the AB stated that the American measure was justified under article XX(g), it recognized the extraterritorial application of the subjective discretion of the United States.[67] This shows that a measure that complies with WTO law may create obstacles to the enhancement of market access, a legitimate goal of the WTO. In such a case, the interpretation of

54. Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. Int'l Econ. L. 17, 22–23 (2002).
55. Shrimps I AB Report, *supra* note 2, ¶ 186.
56. *See id.* ¶ 183.
57. Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, *in* Int'l Ctr. for Trade & Sustainable Dev., ICTSD Resource Paper No. 5, Towards a Development-Supportive Dispute Settlement System in the WTO 1, 38–39 (Victor Mosoti ed., 2003).
58. *See* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 Colum. J. Envtl. L. 491, 503 (2002); *see also* Robert Howse & Damien J. Neven, *US—Shrimp: United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, *in* The WTO Case Law of 2001: The American Law Institute Reporters' Studies 45 (Henrik Horn & Petros C. Mavroidis eds., 2003).
59. Shrimps I AB Report, *supra* note 2, ¶ 185.
60. Howse, *supra* note 59, at 498.
61. Shrimps I AB Report, *supra* note 2, ¶ 186.
62. *Id.* ¶ 185.
63. Kevin R. Gray, *Gray Response to Sakmar*, 10 Colo. J. Int'l Envtl. L. & Pol'y 405, 408 (1999).
64. Pascal Lamy, Dir.-Gen., World Trade Org., Address at the Federation of Indian Chambers of Commerce and Industry (FICCI) (Sept. 3, 2009), http://www.wto.org/english/news_e/sppl_e/sppl133_e.htm.
65. *See supra* text accompanying note 7.
66. Brigitte Stern, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *in* The Case Law of the WTO 1998-2, at 104 (Brigitte Stern & Hélène Ruiz Fabri eds., 2006).
67. See *supra* text accompanying notes 28–31; *see also* William H. Lash III & Daniel T. Griswold, Cato Inst., WTO Report Card II: An Exercise or Surrender of U.S. Sovereignty? 7 (2000), *available at* http://www.cato.org/pubs/tbp/tbp-009.pdf.

the law by the DSM becomes all the more important. The right to impose trade-restrictive measures in accordance with article XX has an element of great discretion and subjectivity because different values are dear to different members. The 153 members of the WTO are at different levels of development, and the majority are developing countries.[68] Given that developed countries have the resources to implement such measures, it is important that the DSM take into account the position of the developing countries.[69]

The preamble refers to sustainable development and environmental protection, but it also refers to the fact that this must be done "in a manner consistent with [members'] respective needs and concerns at different levels of economic development."[70] This was reinforced by Director-General Lamy when he stated his preference for assigning climate commitments to all countries "under common but differentiated responsibilities."[71]

Principle 12 of the Rio de Janeiro Declaration states that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[72] Director-General Lamy recently stated that unilateral action could not solve the problem of climate change and competitiveness of industry.[73] However, the AB in *U.S.—Shrimps* said that unilateralism was part of the exceptions in article XX.[74] Earlier, we saw that the AB criticized the unilateral application of the measure.[75] Perhaps the AB meant that a measure taken to further the objectives in the exceptions would obviously be unilateral; however, its application should not be unilateral. In *United States––Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* ("*U.S.—Shrimps II*"), the AB held that the measure as modified by the United States would be justified under article XX as long as serious good-faith efforts were being made to arrive at a multilateral agreement,[76] and as long as it required exporters to put in place a program that would be comparable in effectiveness to the American program—allowing latitude to the exporters to adopt a program suited to their circumstances.[77] Thus, the measure was held valid only because it now had a component of international negotiation[78] and took into account the needs of the complainants. The unilateral measure was legal so long as the United States applied it by multilateral means. This seems a bit paradoxical. It is a type of forced multilateralization.[79]

In *U.S.—Shrimps II*, the AB said that a measure must take into account the specific conditions prevailing in any exporting member but not those prevailing in every exporting member.[80] The AB is not clear about what it wants to say. This reasoning—or rather the lack thereof—is not in the interest of developing members, because it turns the requirement of flexibility in the measure into a theoretical one. Moreover, the panel in *U.S.—Shrimps II* said that it was "mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality."[81] Even then, the AB chose to apply this criterion.

Another inconsistency is evident in the report of the AB. In *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*,[82] the AB disagreed with the panel's application of the criterion of legitimate expectations,[83] whereas in *U.S.—Shrimps II*, it referred to the aforementioned criterion confirming that adopted reports were part of the GATT acquis and created legitimate expectations among members.[84]

Additionally, in *U.S.—Shrimps I*, the AB disagreed with the panel's view that the American measure would undermine the multilateral trading system stating that this criterion could not be used in interpreting the law.[85] However, article 3(2) of the Dispute Settlement Understanding ("DSU") stipulates: "The dispute settlement system of the WTO is a central element in providing security and predictability to

68. *See Members and Observers*, World Trade Org., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 29, 2011).
69. *See* Bhagirath Lal Das, *Strengthening Developing Countries in the WTO*, Pt. 3, Third World Network, http://www.twnside.org.sg/title/td8.htm (last visited Sept. 4, 2011).
70. Shrimps I AB Report, *supra* note 2, ¶ 129 (quoting p note 3able development in the Preamble of the WTO Agreement).
71. Director-General Lamy also referred to the concept of sustainable development in the preamble. *See* Lamy, *supra* note 7.
72. United Nations Conference on Environment and Development, Rio De Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 12, A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992).
73. *See* Lamy, *supra* note 7.
74. Shrimps I AB Report, *supra* note 2, ¶ 121.
75. *Id.* ¶ 172.
76. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 122, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter Shrimps II AB Report]. By applying the principle of good faith, the AB was in effect saying that the complainants would contravene the said principle if they refused to negotiate. In such a situation, unilateral measures would be justified. *See* Mitsuo Matsushita et al., The World Trade Organization: Law, Practice and Policy 806 (2006).
77. *See* Shrimps II AB Report, *supra* note 76, ¶ 144.
78. Marie-Pierre Lanfranchi, *L'intégration des considérations environnementales dans les principes de l'OMC—Le principe de non-discrimination entre produits similaires* [*The Integration of Environmental Considerations into WTO Principles—The Principle of Non-discrimination Between Like Products*], *in* Droit de l'Organisation mondiale du commerce et protection de l'environnement [Law of the World Trade Organization and Environmental Protection] 76, 91 (Sandrine Maljean-Dubois ed., 2003).
79. *See* Marie-Pierre Lanfranchi, *Observations sous «Etats-Unis—Crevettes II»: quel statut pour les mesures unilatérales environnementales dans le droit de l'OMC?* [*Comments on "United-States—Shrimps II": What Status for Unilateral Environmental Measures in the Law of the WTO?*, 13 L'Observateur des Nations Unies [United Nations Observer] 65, 75 (2002) (Fr.).
80. *See* Shrimps II AB Report, *supra* note 76, at ¶ 149.
81. *See* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 5.76, WT/DS58/RW (June 15, 2001) [hereinafter Shrimps II Panel Report].
82. Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50 (Sept. 5, 1997); Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter AB Report India].
83. AB Report India, *supra* note 82, ¶ 45 ("The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.").
84. Shrimps II AB Report, *supra* note 76, ¶ 108.
85. Shrimps I AB Report, *supra* note 2, ¶¶ 12–13.

the multilateral trading system."[86] If the DSU can take the multilateral trading system into account, the panel should also be allowed to do so. Developing countries depend on the DSM, which in turn depends on WTO law. The AB should have taken this article into account.

It is obvious that the AB or any judicial forum must choose one of the different interpretations of the law to apply. Thus, the AB emphasized protection of the environment instead of the negative effect this would have on international trade.[87] Despite India's argument to take into account the needs of members at different levels of development, the AB preferred to take into account that part of the preamble of the Marrakesh Agreement that refers to the environment and sustainable development.[88] On the one hand, despite the fact that the importance of noneconomic values is increasing, it should be remembered that the WTO is supposed to regulate only those aspects of environmental measures that "have a significant effect on trade."[89] On the other hand, if article XX is part of WTO law, it should be possible to apply it. However the pressing question from the perspective of developing countries is whether the interpretation adopted by the AB will promote development in their countries.

Furthermore, even if article XX allows unilateralism for purposes of environmental protection, the American measure did not provide a guarantee against protection of the domestic American market, a phenomenon referred to as *green protectionism*.[90] Article XX positions nontrade values above trade values so long as the chapeau of article XX is satisfied.[91] Therefore, the American measure would be legal even if it led to protection of the American market, so long as it fulfilled the conditions specified in article XX.

However, even though the United States was obliged to modify its measure, the modification would not meaningfully serve many developing countries, because few countries' programs could compare in stringency with that of the United States. In addition, it may be difficult for developing countries to impose such measures on developed countries. One example of this difficulty may be found in the case of *Brazil—Retreaded Tyres*, in which the European Communities ("EC") lodged a complaint against Brazil after the latter had imposed restrictions on the imports of retreaded tires from the EC.[92] According to the EC, this amounted to a violation of articles I(1), III(4), XI(1) and XIII(1) of the GATT (i.e., the principle of nondiscrimination).[93] Brazil raised the defense of article XX, but the panel and AB held that there had been a violation of articles XI(1) and III(4) that was not justified by article XX (chapeau and paragraphs b and d).[94] This demonstrates that at least some developing countries lack sufficiently sophisticated mechanisms to frame laws that would be trade-restrictive yet WTO-friendly.

In *U.S.—Shrimps*, India argued the impropriety of the extraterritorial nature of the American measure.[95] However, the AB clarified that it would not decide the issue of the limitation of jurisdiction in article XX(g).[96] It should have ruled on this issue, considering that article XX(g) is silent on this point. The fact that article XX mentions nothing about jurisdiction can be interpreted in two ways; either it allows or prohibits extraterritorial measures. According to certain authors, article XX should be interpreted narrowly, as it lays down exceptions.[97] For others, the fact of admitting that natural resources outside the jurisdiction of a state can be regulated by that state would amount to recognizing a sort of universal competence in favor of the importing state.[98] The AB said that these turtles were found in waters within American jurisdiction.[99] Does that mean that the AB did not allow extraterritorial measures? Was the AB implying that the United States could not regulate the conditions of Indian turtles in Indian waters? Perhaps this is why the AB explicitly said that it would not rule on the question of limitation of jurisdiction in article XX(g).

Another aspect of this issue relates to the fact that, according to article XX(g), such measures are to be applied in conjunction with national measures.[100] Is it therefore possible to conclude that the United States could refuse to import Indian shrimps caught in Indian waters without protecting Indian turtles, simply because it did not allow the production and/or consumption of American shrimps caught in American waters without protecting American turtles? This makes it obvious that the question of jurisdiction is complex and required a response from the AB.

According to other writers, the AB allowed extraterritorial measures under article XX(g).[101] However, according to Howse and Neven, the United States did not impose its law or measure and did not prescribe environmental norms applicable on foreign territory.[102] It only refused to let some products enter its territory unless they fulfilled certain conditions.[103] Howse and Neven go so far as to cite *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*,[104] in which the International Court of Justice ("ICJ") held that economic pressure, including an embargo on a state to make it change its policy, did not constitute a violation of the rules of customary international law.[105] However, this judgment of the ICJ is not applicable in the present case because the WTO is a jurisdiction separate from the ICJ. The fact remains that the United States did not allow the

86. Marrakesh Agreement, *supra* note 46, annex 2, art. 3.
87. Shrimps I AB Report, *supra* note 2, ¶ 129.
88. *Id.*
89. Trade & Env't Div., World Trade Org., Trade and Environment at the WTO, 6 (2004), *available at* http://www.wto.org/english/res_e/booksp_e/trade_env_e.pdf.
90. Howse & Neven, *supra* note 58, at 66–67.
91. *See supra* notes 13–25 and accompanying text.
92. Tyres AB Report, *supra* note 4, ¶ 1.
93. *Id.* ¶ 2.
94. *Id.* ¶¶ 4–5, 258.
95. Shrimps I Panel Report, *supra* note 2, ¶ 3.6.
96. Shrimps I AB Report, *supra* note 2, ¶ 133.
97. Mattoo & Mavroidis, *supra* note 13, at 334.
98. Lanfranchi, *supra* note 78, at 89.
99. Shrimps I AB Report, *supra* note 2, ¶ 133.
100. *See* GATT, *supra* note 19, art. XX(g).
101. Matsushita et al., *supra* note 767, at 799.
102. Howse & Neven, *supra* note 58, at 64–65.
103. *Id.*
104. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
105. Howse & Neven, *supra* note 58, at 64–65.

entry of shrimps unless they fulfilled a condition imposed by the United States that was applicable in the territory of exporting countries.[106]

The method of shrimping is part of the production process of shrimps. Thus, shrimps caught using TED are the same whether they come from certified countries or not. The American measure arguably violates article XIII of the GATT even if process and production method ("PPM") is taken into consideration.[107] WTO law allows PPM-based measures only if the production process affects the physical characteristics of the product.[108] A member can resort to article XX if its measure cannot be justified in terms of the aforementioned criterion.[109] But it is important to note that restrictions in accordance with the production process are allowed by article XX only if the product is harmful to the environment.[110] The AB's report legitimizes measures to protect the environment based on the production process.[111] Yet, it is difficult to attain a level of protection comparable to that in the United States without modifying the production process. This is because the method of shrimping is part of the shrimp's production process. This production process has to be changed to achieve the protection of turtles required by the United States. Consequently, this is not a positive development as far as developing countries are concerned. First, developing countries will not be able to comply with the production-process requirements imposed by the developed countries because developing countries lack the technological and financial means to do so.[112] Second, developing countries will not be able to benefit from their comparative advantage, allowing for disguised protectionism by developed countries.[113] Thus, such measures act as an obstacle to development in developing countries. It is possible that PPM-based restrictions might also be used in climate-related trade measures, as developing countries' exports may be taxed in the future based on their emissions during the production of the exports.[114]

To decide in favor of environmental issues, the AB interpreted article XX(a) literally according to the Vienna Convention on the Law of Treaties,[115] and also XX(b) in a flexible way, to decide that turtles are an exhaustible natural resource[116] and that nonstate entities could participate in the proceedings of the DSB.[117] But what did the AB do to decide in favor of market access for developing countries? Using *U.S.—Shrimps*, other powerful members, such as the EC, could justify the imposition of trade sanctions for the protection of the environment or for the protection of their domestic markets. Further, this AB decision legitimizes unilateral measures imposed for other reasons in the preamble of the Marrakesh Agreement, such as full employment.[118]

When Malaysia lodged a complaint against the United States with respect to article 21(5) of the DSU (*U.S.—Shrimps II*), it alleged that the American measure infringed upon the sovereign right of Malaysia to formulate its own environmental policies.[119] However, the panel disagreed with Malaysia.[120] India also argued in the first *U.S.—Shrimps* case that the American measure violated India's sovereign right to formulate its own environmental policies.[121] The AB, at the time of striking down the impugned measure (because it was discriminatory), held that *sovereign* nations should adopt measures to protect the environment.[122] Why did the AB make such a finding? To emphasize the sovereignty of the United States, which is a developed country that has the resources to adopt such measures? Even if the United States were exercising its sovereign right to refuse certain imports, it should not have been an excuse to protect its market.[123]

Certain writers state that a unilateral measure taken in conformity with article XX(g) is not in conflict with the notion of sovereignty in international law.[124] Thus, it is possible to conclude that developing countries have no recourse in WTO law against the violations of their sovereignty.[125] In fact, violations of sovereignty would arguably be included in article XX, which applies to all members. Yet, developing countries will not be able to compel developed countries to implement environmental policies. For example, the United States has not ratified the Kyoto Protocol.[126] This strongly suggests a lack of concern for the environment on the part of the United States. Developing countries cannot oblige the United States to ratify the Protocol. India acceded to

106. Shrimps I AB Report, *supra* note 2, at ¶ 6.
107. *See* Shrimps I Panel Report, *supra* note 2, ¶ 4.50–.51.
108. Bernard M. Hoekman & Michel M. Kostecki, The Political Economy of the World Trading System: The WTO and Beyond 446 (2001).
109. *Id.*
110. *See* Srivastava & Ahuja, *supra* note 27, at 3445.
111. Ansari, *supra* note 40, at 31.
112. *Id.*; Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 J. World Trade 33, 53 (2000).
113. Mukerji, *supra* note 112, 53–54.
114. *See, e.g.*, Brent D. Yacobucci et al., Cong. Research Serv., R40896, Climate Change: Comparison of the Cap-and-Trade Provisions in H.R. 2454 and S. 1733 2 (2009) (discussing provisions of the failed American Clean Energy and Security Act of 2009 that would "impos[e] a border measure (an international reserve allowance scheme) on countries with inadequate carbon reduction policies").
115. *See* Shrimps I AB Report, *supra* note 2, at 61 n.152. Article 31(1) of the Vienna Convention reads, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
116. Shrimps I AB Report, *supra* note 2, ¶¶ 132–34. *See* Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 Harv. Envtl. L. Rev. 563, 582–83 (2000).
117. Shrimps I AB Report, *supra* note 2, ¶¶ 79–91.
118. Roda Mushkat, *Potential Impacts of China's WTO Accession on its Approach to the Trade–Environment Balancing Act*, 2 Chinese J. Int'l L. 227, 240–41 (2003), *available at* http://chinesejil.oxfordjournals.org/content/2/1/227.full.pdf.
119. Shrimps II Panel Report, *supra* note 81, ¶ 5.1.
120. *Id.* at ¶¶ 5.103–104, 5.123.
121. Shrimps I Panel Report, *supra* note 2, ¶ 3.6.
122. Shrimps I AB Report, *supra* note 2, ¶ 185.
123. Brigitte Stern, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21:5 by Malaysia*, *in* The Case Law of the WTO 1998-2, *supra* note 66, at 150.
124. Howse & Neven, *supra* note 58, at 64–65.
125. The fact of being a member of the WTO is not equivalent to consenting to unilateral measures that violate the sovereignty of members. Even though the AB recognized the element of unilateralism in article XX, it still preferred implementation through multilateral means such as negotiations. Shrimps II AB Report, *supra* note 76, ¶¶ 123–24.
126. *Status of Ratification of the Kyoto Protocol*, united nations framework convention on climate change, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (last visited Sept. 16, 2011).

the Protocol in August 2002.[127] At the G8 Summit in June 2005, India noted that the majority of emissions came from developed countries.[128] This creates the appearance that the intention of the United States in prohibiting the import of shrimps was not only to protect the environment but also its domestic market. Another example giving the appearance of U.S. protectionism was the recently proposed American Clean Energy and Security Act of 2009,[129] which aimed to tax developing countries' exports to the United States based on the magnitude of carbon dioxide emitted during the manufacture of the exports.[130] This bill passed in the House, but not in the Senate.[131] If the bill had become law, there is little doubt as to whose sovereignty would have been respected and whose would have been violated.

Malaysia also argued that the United States had an obligation to conclude an international agreement, because an obligation to negotiate without concluding an agreement would allow the United States to impose a unilateral measure, leading to unjustifiable discrimination so long as it did not complete the negotiation.[132] Moreover, the United States could continue negotiating without the intention to conclude an agreement, with the objective of keeping the measure in place for as long as possible. The AB responded that the obligation of the United States extended only to negotiating an agreement; i.e., it was an obligation of means and not of results.[133] The AB explained that the chapeau of article XX does not stipulate that the member imposing the measure by virtue of article XX(g) must obtain the consent of other members. The AB found that there could be no obligation to conclude an agreement because other members could compel the United States to conclude it, which would lead to reverse unilateralism.[134]

The AB's findings inexplicably did not give the same deference and treatment to the United States and the complainant developing countries. Because the modified American measure imposed an obligation to achieve certain results without any restriction on means,[135] the complainants could adopt any method to arrive at that result. This would take into account the conditions prevailing in different countries.[136] But if the WTO imposed on developing countries an obligation to achieve certain results, why did it not require the United States to conclude an agreement (i.e., achieve a result)? If it were impossible for the United States to conclude an agreement, it might also be impossible for the complainants to implement an American policy to protect turtles. Why was there a difference in the way the parties were treated? Additionally, another pertinent question is that if unilateralism is part of article XX, why can reverse unilateralism not be part of article XX? The answer, as the panel said in the first *U.S.—Shrimps* case, is that the multilateral trading system would come to an end if all the members started applying unilateral measures.[137]

The AB also recalled the major role played by the United States in the Kuantan Memorandum of Understanding, which was concluded between the United States and the countries of the Indian Ocean and of southeast Asia.[138] But it did not mention the fact that this agreement came into force on September 1, 2001,[139] after the distribution of the panel report.

The United States kept the embargo in force while the first AB proceedings were ongoing, and also while it was implementing the recommendations of the AB (i.e., during the negotiations). During this entire length of time, the complainants were deprived of access to the American market.[140] The law of the WTO does not provide any solution to such a situation.[141]

According to the panel in *U.S.—Shrimps II*, the restrictions imposed by the United States since 1996 by means of section 609[142] served as an efficient pressure mechanism that reinforced the weight of the United States in the negotiations that they undertook later on.[143] Developing countries "may have found themselves constrained to accept conditions that they may not have accepted had Section 609 not been applied."[144] In such a case, the search for a negotiated solution becomes an avenue to escape the prohibition of unilateral protectionist measures.[145]

The panel in *U.S.—Shrimps II* said that the restrictions were temporary and a last resort in the case of an emergency.[146] It also said that a permanent prohibition of imports was justified only if an international agreement allowed it or if the prohibition had been enforced after having made serious good-faith efforts to conclude a multilateral agreement.[147] The AB could have confirmed the first finding of the panel but it did not do so.[148] The silence of the AB in this regard could be interpreted as its indifference to the interests of

127. *Id.*
128. *Kyoto Protocol*, GreenCitizens.net, http://www.greencitizens.net/ecopedia/article.php?ec_id=10269706050 (last visited Sept. 16, 2011).
129. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).
130. *See* Martin Khor, *Threat to Block South's Exports on Climate Grounds*, S. Bull. (S. Ctr., Geneva, Switz.), Sept. 10, 2009, at 2, *available at* http://www.southcentre.org/index.php?option=com_content&view=article&id=1069%3Asouth-bulletinissue-40-10-september-2009-the-rise-of-climate-protectionism&catid=148%3Asouth-bulletin-2009&Itemid=295&lang=en.
131. *American Clean Energy and Security Act of 2009*, GovTrack, http://www.govtrack.us/congress/bill.xpd?bill=h111-2454 (last visited Sept. 13, 2011).
132. *See* Howse & Neven, *supra* note 58, at 52.
133. Shrimps II AB Report, *supra* note 76, ¶¶ 123–24.
134. *Id.*
135. Shrimps II Panel Report, *supra* note 81, ¶ 5.124.
136. *See* Hélène Ruiz Fabri, *Organisation mondiale du commerce: Chronique du règlement des différends (2001)* [*World Trade Organization: Chronicle of Dispute Settlement (2001)*], 3 J. du Droit Int'l [J. Int'l L.] 869, 885 (2002) (Fr.).
137. *See* Shrimps I Panel Report, *supra* note 2, ¶ 7.45.
138. Shrimps II AB Report, *supra* note 76, ¶ 131.
139. *Id.* ¶ 133 n.96.
140. *See* Srivastava & Ahuja, *supra* note 27, at 3454.
141. *Id.*
142. *See supra* notes 26–30 and accompanying text.
143. Shrimps II Panel Report, *supra* note 81, ¶ 5.73.
144. *Id.*
145. *See* Lanfranchi, *supra* note 79, at 74.
146. However, it is difficult to imagine a situation that could constitute an emergency in this case. The only emergency could have been the urgent protection of the American market; or was it the urgent protection of turtles? Shrimps II Panel Report, *supra* note 81, ¶ 5.88 ("[T]he possibility to impose a unilateral measure . . . under Section 609 is more to be seen . . . as the possibility to adopt a *provisional* measure allowed for emergency reasons than as a definitive "right" to take a permanent measure.").
147. *See id.*
148. *See* Shrimps II AB Report, *supra* note 76.

developing countries. The Kuantan agreement had no legal force.[149] The United States could impose unilateral measures and would not be obliged to remove them even if they were prohibited by the Kuantan agreement simply because it had no legal force. The chapeau of article XX does not require any process of negotiations despite the unilateral character of the measure at issue. But the elements of unilateralism identified by the AB lead to unjustifiable discrimination. It is with the aim of correcting or removing these elements of discrimination that the AB in *U.S.—Shrimps I* emphasized the process of negotiations.[150] This may perhaps be the reason why the AB did not confirm the finding of the panel that an import prohibition was justified only if an international agreement allowed it.

Section 609 required the U.S. Secretary of State to start negotiations with other countries to finalize bilateral or multilateral agreements.[151] However, this was not done.[152] Moreover, the United States even argued against the principle of good faith.[153] This suggests that the United States did not want to protect turtles. Yet, the representative of the United States did say that her country would implement the recommendations of the AB in a manner consistent not only with its WTO obligations but also with a firm commitment to the protection of turtles.[154] If section 609 had been applied in good faith, the AB would not have decided against its application.

B. Procedural Issues

This case is considered unfavorable by developing countries, not only for substantive reasons, but also for procedural reasons. Some examples of such procedural issues follow below.

During the appeal by the United States to the AB in the first *U.S.—Shrimps* case, the complainants (developing countries) raised a procedural argument that because the United States had submitted a very general declaration, the complainants had not had sufficient time to prepare their defense.[155] Their argument had no relation with the legitimacy of appeal, but the AB said that the right to appeal was an important right because it gave the opportunity to a party to show an error of law.[156] Consequently, the United States had a right to appeal. The AB rejected the argument of the complainants, and the AB stated that the submissions to the AB demonstrated that the complainants' due-process rights had not been abridged by the notice of appeal provided by the United States.[157] In fact, it did not explicitly rule on the question of insufficiency of time for appellees' preparation of their defense. Given that developing countries have fewer resources, they need time to prepare their defenses. The AB should have either ruled on this issue or extended the time granted to the complainants to prepare their defense.

In another example in *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21:5 of the DSU by India*, the AB did not allow India to appeal on a point related to article 3(5) of the Anti-dumping Agreement because the issue related to this article had been decided by the panel in the initial case, and India had not appealed before the AB in that case.[158] As a consequence of the refusal to allow an appeal on this point, India was perhaps precluded from demonstrating an error of law.

When Malaysia took recourse to article 21(5) and then appealed, the AB, while deciding the question of the competence of the panel, stated that the parties and the panel were under an obligation to accept the previous reports of the AB.[159] The AB explained that the adopted reports of the AB constituted a final decision of the case.[160] It did not mention the principle of *res judicata*, but it applied it. Similarly, India was precluded from appealing on a point related to article 3(5) of the Anti-dumping Agreement because the finding of the panel was not appealed by India before the initial AB and was subject to the principle of *res judicata*.[161] Consequently, it would seem that the application of the aforementioned principle leads to decisions that are not favorable to developing countries.[162]

In *U.S.—Shrimps*, the AB examined the facts minutely, thereby exercising a function of the panels.[163] It is a method of completing the analysis (i.e. of applying the law to the facts of the case) for the AB to arrive at a solution when the AB disagrees with the factual or legal analysis of the panel.[164] This method makes the role of the panels superfluous. According to Alan Yanovich and Tania Voon, the AB is compelled to complete the analysis because it can only examine questions of law, and because the DSM lacks a remand mechanism.[165] But Peter Van den Bossche has noted that some authors believe that article 17(13) of the DSU[166] does

149. *See* Shrimps II Panel Report, *supra* note 81, ¶ 5.81–5.83.
150. *See* Shrimps I AB Report, *supra* note 2, ¶ 166.
151. *See id.* ¶ 3 ("Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia,* to 'initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations . . . .'").
152. *Id.* ¶ 166.
153. *Id.* ¶ 18.
154. Sydney M. Cone III, *The Appellate Body, the Protection of Sea Turtles and the Technique of "Completing the Analysis"*, 33 J. World Trade 51, 54 (1999); *see also* Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 25 November 1998*, ¶ 3(a), WT/DSB/M/51 (Jan. 22, 1999).
155. Shrimps I AB Report, *supra* note 2, ¶ 92.
156. *Id.* ¶ 97.
157. *Id.*
158. Appellate Body Report, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21:5 of the DSU by India*, ¶¶ 98–99, WT/DS141/AB/RW (Apr. 8, 2003) [hereinafter Bed Linen AB Report]. India was unable to prove its allegation in the initial case and came up with new arguments before the second panel. But the panel and AB rejected India's position due to the principle of *res judicata*. *See id.*
159. Shrimps II AB Report, *supra* note 76, ¶ 97. The AB did not explicitly state that the panel was under such an obligation. However, it stated that panel proceedings under article 21(5) include AB reports. *Id.*
160. *Id.*
161. Bed Linen AB Report, *supra* note 158.
162. This also supports the conclusion that developing countries are still getting accustomed to a more judiciarized system.
163. Cone, *supra* note 154, at 56.
164. *Id.*
165. *See* Alan Yanovich & Tania Voon, *Completing the Analysis in WTO Appeals: The Practice and Its Limitations*, 9 J. Int'l Econ. L. 933 (2006) (pertinent discussion found in Part 1.A).
166. Marrakesh Agreement, *supra* note 46, annex 2, art. 17(13) ("The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the

not allow the practice of completing the analysis.[167] The AB, however, believes that it has a duty and responsibility to complete the analysis because it helps in achieving the goal of the DSM—i.e., the settlement of disputes.[168] Yet, this practice is only a partial response to the twin problems of the limitation of the AB's mandate to questions of law and the lack of a remand mechanism.[169]

The DSM uses the rule of precedent in its decisions because the panels and AB frequently refer to previous reports, even though WTO law does not contain any provisions in this regard.[170] Moreover, as mentioned earlier, the AB said in *U.S.—Shrimps II* that the parties and panels were under an obligation to accept the previous reports of the AB.[171] Also, article 17(14) of the DSU states that AB reports "shall be . . . unconditionally accepted by the parties to the dispute."[172] This implies that protection of the environment will prevail over market access in future disputes. However, the aim should be to find a balance between the two issues.

This dispute is also famous for another important point. The AB allowed private persons to participate in the dispute-settlement procedure as *amici curiae*.[173] The panel in the first *U.S.—Shrimps* case had agreed to accept information from nongovernmental organizations ("NGOs") on the condition that it be attached to the submissions of the party to the dispute.[174] The complainants had protested this, stating that the attachments contained legal arguments whereas article 13 only allows accepting of information.[175] The AB struck down the panel's stand stating that the power to seek information (in article 13 of the DSU) did not amount to a prohibition to accept unsolicited information.[176] However, the fact remains that even though the DSU does not prohibit the acceptance of unsolicited information, it does not allow it either. Additionally, the AB, which is very particular about a textual approach,[177] did not follow it in this case.

The AB added that panels had the discretionary authority to accept or reject information submitted to them whether or not they had requested it.[178] It was critical of the panel when the panel said that accepting unsolicited documents would not conform to the DSU,[179] but it agreed with the panel that the parties could add these documents to their submissions.[180] Furthermore, the AB held that panels could receive not only factual information but also legal principles applicable to the facts.[181] The AB made this important finding after a joint reading of articles 12(1) and 12(2) of the DSU.[182] However, according to article 13, only panels have the right to seek information.[183] The AB cannot intervene in the functioning of panels if the latter have exercised their right in a WTO-compliant way.

During the appeal, the AB considered documents from NGOs containing facts and legal arguments, which were attached to the submissions of the United States.[184] The appellees said that the AB should not accept these documents because they contained facts,[185] and article 17(6) of the DSU only allows legal arguments.[186] Additionally, article 17(6) refers to issues of law covered by the panel in its report and not to issues of law received from elsewhere.[187] Moreover, article 17(4) of the DSU does not allow NGOs to participate in the dispute-settlement procedure.[188] Additionally, because these documents were attached to the submission of the United States, they were no longer independent but instead reflected the views of the United States. The AB gave only four days to the appellees to respond to the revised briefs.[189]

According to Petros Mavroidis, even though the AB's functions are limited by article 17 of the DSU, the AB is not bound by what is explicitly stated in the DSU. It must have discretion in its functioning.[190] His position is that *amicus curiae* submissions can only contain questions of law because article 17 is limited to questions of law.[191] This is acceptable even if it is in favor of a member because it does not infringe article 3(2) of the DSU.[192] However, in such a case, it is obvious that articles 3(2)[193] and 13 of the DSU are not satisfied.

panel.").

167. Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System* 31 (Maastricht Faculty of Law, Working Paper 2005/1, 2005), *available at* http://www.worldtradelaw.net/articles/vandenbosscheab.pdf.
168. Shrimps I AB Report, *supra* note 2, ¶¶ 123–24.
169. *See* Yanovich & Voon, *supra* note 165, at 950.
170. Wofford, *supra* note 116, at 590.
171. Shrimps II AB Report, *supra* note 76, ¶ 97.
172. Marrakesh Agreement, *supra* note 46, annex 2, art. 17(14).
173. Shrimps I AB Report, *supra* note 2, ¶¶ 88–91.
174. Shrimps I Panel Report, *supra* note 2, ¶ 3.129.
175. *Id.* ¶ 3.131.
176. Shrimps I AB Report, *supra* note 2, ¶ 108.
177. Lennard, *supra* note 54, at 22–23.
178. Shrimps I AB Report, *supra* note 2, ¶ 108.
179. *Id.*
180. *Id.* ¶ 109.
181. *Id.* ¶ 106.
182. *Id.* ¶ 105. These articles read: "1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute. 2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process." Marrakesh Agreement, *supra* note 46, annex 2, art. 12(1)–(2).
183. Marrakesh Agreement, *supra* note 46, annex 2, art. 13.
184. Shrimps I AB Report, *supra* note 2, ¶¶ 83, 91.
185. *Id.* ¶ 82.
186. This article reads: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Marrakesh Agreement, *supra* note 467, annex 2, art. 17(6).
187. *Id.* art. 17(6).
188. This article reads: "Only parties to the dispute, not third parties, may appeal a panel report." *Id.* art. 17(4).
189. While the *amici* submitted initial briefs with the United States on July 23, 1998, they slightly revised the briefs on August 3—four days before the joint appellees responded. Shrimps I AB report, *supra* note 2, ¶¶ 79–80.
190. Petros C. Mavroidis, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing* 13 (Jean Monnet Program, Working Paper No. 2/01, 2001), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/01/010201.html ("The Working Procedures, that are adopted in accordance with Art. 17.9 DSU, cannot of course go beyond the mandate of Art. 17 DSU. . . . Is this however the end of the story? Is the Appellate Body bound only by what is explicitly stated in the DSU?").
191. *Id.* at 14.
192. *Id.*
193. This article reads as follows:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Marrakesh Agreement, *supra* note 46, annex 2, art. 3(2).

In *U.S—Shrimps*, this is because rights of certain members were enhanced at the cost of rights of other members, and because unsolicited documents were accepted.

In fact, WTO law is influenced not only by the decisions of international courts, such as those of the Inter-American Court of Human Rights and the European Court of Human Rights, but also by those of national courts such as the U.S. Supreme Court.[194] These courts have accepted *amicus curiae* submissions.[195] Consequently, these sources of law support the AB's interpretation that it also has the right to accept *amicus curiae* submissions.[196]

The AB considered the NGO submissions to be a part of the submissions of the United States, thereby preserving the state screen.[197] It took the NGO submissions into account on the condition that the United States accept them.[198] This gave the right to the United States to choose only those arguments of the NGOs that were useful to it. The United States said that even if the documents of the NGOs had been independent, it approved of their legal arguments if they were similar to the American arguments in their main submission.[199] This means that these documents acted as a support for the views of the United States. The United States possesses enormous legal resources to argue before the AB, and the opportunity to retain useful NGO arguments added to its strength. How could unsolicited submissions be useful for the WTO procedure if the United States accepted them only if they corresponded with its own arguments? Moreover, it is not clear as to why independent submissions should be attached to those of a party to the dispute (the United States in this case). This deprives these submissions of their independent identity and thus reduces their utility for the dispute-settlement procedure. Perhaps, their attachment to a party's submission is necessary precisely because nonmembers cannot participate in the dispute-settlement process.

NGOs of developing countries lack resources to participate in the dispute-settlement process.[200] Most of the NGOs that do have resources to participate in the WTO procedure are in the developed countries.[201] Hence, they may not have a good understanding of the problems of developing countries and thus cannot promote the interests of these countries. For example, in 1992, a group of NGOs led by Earth Island Institute (an NGO of San Francisco) filed a case against the U.S. Secretaries of State and Commerce in the U.S. Court of International Trade asking that the American law be applied to all exporters of shrimps so that turtles could be protected.[202] It is precisely this type of NGO that is able to participate in the dispute-settlement process of the WTO. Such NGOs, if they were instruments of powerful corporations promoting their own interests, could use such an opportunity to increase protectionism.[203]

In accepting submissions from NGOs in favor of environmental protection in the absence of NGOs in favor of market access for the exports of developing countries, the AB did not take into account the preamble of the Marrakesh Agreement, which aims to strike a balance between protection of the environment and economic development in developing countries. The preamble clearly mentions that commercial relations should be conducted in a manner consistent not only with environmental protection but also with the differing levels of development of various WTO members.[204] Would the fact of acceptance of submissions from NGOs of the North in the absence of NGOs from the South not amount to discrimination against developing countries?

According to Robert Howse, developing countries' delegates to the WTO fiercely criticize the acceptance of *amicus curiae* submissions by the AB, but developing-country NGOs want to take advantage of the opportunity to submit *amicus curiae* documents.[205] Thus, according to Howse, the idea that acceptance of such documents is useful only for the developed countries is not credible. Furthermore, according to Howse, powerful commercial interests in developed countries have access to other means, such as politicians, to get their views across to the WTO, and they do not depend on *amicus curiae* submissions for this purpose.[206] On the contrary, this practice allows other, nonparty interests to participate in the process before the AB. Members of the AB can thus receive different views when making decisions involving human values.[207]

However, members of the WTO are sovereign states and customs territories, and the AB must be cautious when allowing NGO participation. NGO submissions burden the dispute-settlement process because the panels do not have the means to deal with such submissions.[208] Additionally, such submissions compel parties to the dispute to respond to these submissions.[209] This is extremely burdensome for developing countries. This amounts to creating additional obligations on parties, which the dispute-settlement process is not authorized to do.[210] If the AB wants to implement the principle of nondiscrimination, it must not expect developing countries to respond to submissions from NGOs, particularly from NGOs whose objectives are opposed to those of developing countries. Also, even if their objectives are the same (in this case, the protection of the environment), it needs to be

194. Robert Howse, *Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 Eur. L. J. 496, 502 (2003).
195. *Id.*
196. *Id.*
197. Shrimps I AB Report, *supra* note 2, ¶ 91.
198. *Id.*
199. *Id.* ¶ 90.
200. U.N. Conference on Trade & Dev., A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations 370, U.N. Doc. UNCTAD/ITCD/TSB/10 (2000).
201. One may view the countries of origin for NGOs that have contributed position papers to the WTO at *NGO Position Papers Received by the WTO Secretariat*, World Trade Org., http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm (last visited Dec. 27, 2011).
202. Bhupinder S. Chimni, *WTO and Environment: Shrimp-Turtle and EC-Hormones Cases*, 35 Econ. & Pol. Wkly. 1752, 1754 (2000).
203. *Id.* at 1755.
204. Marrakesh Agreement, *supra* note 46, pmbl.
205. Howse, *supra* note 194, at 509.
206. *See id.*
207. *See id.* at 509–10.
208. Steve Charnovitz, *Opening the WTO To Non-governmental Interests*, 24 Fordham Int'l L.J. 173, 183–84 (2000).
209. *Id.* at 184–85.
210. *See id.* at 186.

understood that there may be other ways of achieving those objectives in developing countries.[211]

Some authors have suggested using environmental experts as members of the panels and AB when disputes relating to the environment come up.[212] Others have suggested incorporating sustainable-development experts into the pool of panel members who would be available by request in a case involving a dispute relating to the environment.[213] Suggestions have also been made regarding the amendment of the DSU to give litigants the possibility of attaching expert opinions to their submissions even when the panelists do not ask for them.[214]

Regarding the first two suggestions, it must be made clear that WTO law regulates the environment only when it relates to trade.[215] Therefore, there is no necessity for environmental experts. Also, these experts might decide against market access for developing countries that can neither implement environmental policies nor formulate them to impose on other members. Some developing countries, such as India, have always opposed the entry of nontrade values in the WTO.[216] The last suggestion may have been inspired by a desire to give more power to the developed countries, because entities that participate in the WTO or its dispute-settlement process often come from there.[217]

The receptiveness to *amicus curiae* submissions has been criticized a great deal, mainly by members of the WTO.[218] India has also criticized it, stating that it would allow powerful commercial interests to participate in dispute settlement.[219]

IV. Conclusion

The WTO is an organization that regulates trade and not nontrade values in ways that may be particularly detrimental to developing countries. This is not to say that commercial values must prevail over all other values. Expecting the WTO to settle disputes relating to social problems could put the multilateral trading system in danger.[220] Environmental-protection issues can be considered outside the framework of the WTO in the presence of experts relating to trade, environment, and development. Apart from NGOs, shrimpers from developing countries who cannot earn their livelihood must also participate in such a forum. Even though turtles are well-protected today, are Asian shrimpers well-protected too?[221]

The DSB applies the negative-consensus rule.[222] It thus has the power to modify—by means of interpretation of the WTO agreements—the rights and obligations of members, even if such modification is prohibited by article 3(2) of the DSU. Such a modification occurred in *U.S.—Shrimps* and resulted in an increase in the obligations of developing countries.[223] Trade and development may suffer significant setbacks in developing countries "[u]nless important third world countries like India act to prevent the dispute settlement machinery from assuming an extra-constitutional role."[224]

The *U.S.—Shrimps* cases demonstrate that the nondiscrimination principle is central to the multilateral trading system. The principle's application extends to exceptions for all members and not only to exceptions for developing countries. Moreover, the incorporation of this principle in the GATT and then in the WTO is proof of its importance.[225] However, its poor application can lead to results considered unfavorable by developing countries, as happened in the *U.S.—Shrimps* cases.

Perhaps the United States will learn from this case. We can expect that it will comply with the principle of nondiscrimination in any future case related to climate protectionism. However, even if that is not the case, the AB will likely come to its rescue. It is noteworthy that this enthusiasm for the protection of the environment was absent during the GATT.[226] However, the AB has not hesitated to decide issues at the intersection of trade and environmental protection. In fact, Director-General Lamy has expressed his support for an international agreement on climate change involving as many players as possible where the WTO would enter the picture at the stage of implementation.[227] Thus, he believes that the WTO is the right forum to decide these matters and has stated that a trading system that ignores carbon prices and greenhouse-gas emissions would reduce human welfare.[228]

The *U.S.—Shrimps* cases illustrate perfectly the challenges faced by developing countries in international law and the challenges faced by international law in finding solutions to the challenges faced by developing countries.

211. Badri Narayanan G, *Questions on Textile Industry Competitiveness*, 40 Econ. & Pol. Wkly. 905, 905 (2005).
212. Wofford, *supra* note 116, at 570 n.44.
213. James Cameron & Karen Campbell, *Challenging the Boundaries of the DSU Through Trade and Environment Disputes*, *in* Dispute Resolution in the World Trade Organisation 204, 229 (James Cameron & Karen Campbell eds., 1998).
214. *Id.*
215. *See supra* note 89 and accompanying text.
216. Clem Tisdell, *Globalisation and the WTO: Attitudes Expressed by Pressure Groups and by Less Developed Countries* 11 (Univ. of Queensl. Sch. of Econ.; Econ., Ecology & the Env't Working Paper No. 40), *available at* http://ageconsearch.umn.edu/bitstream/48003/2/WP40.pdf.
217. *See supra* note 201 and accompanying text.
218. Charnovitz, *supra* note 208, at 187.
219. *Id.*
220. *See supra* Part II.
221. Stern, *supra* note 123, at 151.
222. *WTO Bodies Involved in the Dispute Settlement Process*, World Trade Org., http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (last visited Sept. 6, 2011).
223. *See supra* Part III.
224. Bhupinder S. Chimni, *WTO and Environment: Legitimisation of Unilateral Trade Sanctions*, 37 Econ. & Pol. Wkly. 133, 133 (2002).
225. *See supra* Parts I–III.
226. See description of GATT cases in Brandon L. Bowen, *The World Trade Organization and its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, 29 Ga. J. Int'l & Comp. L. 181, 185–89 (2000). Bowen notes, "The panel itself stated that policies like the [U.S. Marine Mammal Protection Act] are contrary to the objectives of the GATT." *Id.* at 189.
227. *See* Lamy, *supra* note 7.
228. *Id.*