
Book Section:
Musto, C. and Redgwell, C. (2017) US-import prohibition of certain shrimp and shrimp products (1998). In: Bjorge, E. and Miles, C., (eds.) Landmark Cases in Public International Law. Landmark Cases . Hart Publishing (Bloomsbury) , pp. 489-508. ISBN 9781849467889

United States—Shrimp

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I Introduction

On 30 November 1999 hundreds of people donned sea turtle costumes and marched through the streets of Seattle. They, and thousands of others, were there during the World Trade Organization's (WTO) Third Ministerial Conference to protest against the impacts of liberalized global trade on the environment and particularly the Appellate Body's (AB) recently published decision in US—Shrimp.[2] These scenes underscore the perceived tension between trade and other concerns, including the environment[3] and are testament to the impact the AB's decision in US-Shrimp had outside the trade law community.

US—Shrimp was the first case to come before the newly created WTO Dispute Settlement Body (DSB)[4] in which the AB was required to consider the compatibility with GATT 1994 of unilateral trade measures for the protection of global environmental concerns.[5] It was also the fifth dispute in less than a decade concerning the United States' environmental measures brought before a GATT panel or the WTO DSB,[6] and the second time in two years for such a dispute to be considered by the AB.[7] US—Shrimp was also the first time a claim was brought by a coalition of developing country members against a developed WTO member.[8]

India, Malaysia, Pakistan, and Thailand initiated their complaint against the US in consequence of unilateral measures pursuant to the US Endangered Species Act of 1973 which prohibited the import of shrimp harvested outside US waters and in a manner incompatible with US standards for endangered sea turtle protection. As we shall discuss below, the case is significant for its

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2 United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the AB (8 October 1996) WT/DS58/AB/R, 'US—Shrimp' or 'AB Report'.

3 See D Esty, 'An environmental perspective on Seattle' (2000) 3:1 JIEL 176–8 and ibid., 'Environment and the Trading System: Picking up the Post-Seattle Pieces' in J Schott (ed), The WTO After Seattle (Institute for Economics, 2000) 1501. See also P Galizzi, 'Globalisation, Trade and Environment: Broadening the Agenda after Seattle?' [2000] 4 Env*'l* Liab. 106.

4 1994 WTO Agreement and Dispute Settlement Understanding (DSU), in force 1 January 1995.

5 These are shared concerns in so far as certain species of endangered sea turtle are found in US waters, as well as on the high seas and in the waters of third States. The constellation of interests at stake, domestically and globally, are discussed further in section II. For brief discussion of sea turtles as a 'shared global resource' see Panel Report [7.53].

6 US—Restrictions on Imports of Tuna (Mexico), GATT Panel Report (unadopted) BISD 39S/155 (3 September 1991) DS21/R; US—Restrictions on Imports of Tuna (EEC), GATT Panel Report (unadopted) (16 June 1994) DS29/R; US—Taxes on Automobiles, GATT Panel Report (unadopted) (11 October 1994) DS31/R; US—Reformulated Gasoline-Report of the Panel (29 January 1996) WT/DS2/R; US-Reformulated Gasoline-Report of the AB (29 April 1996) WT/DS2/AB/R.

7 The first - and the first case before the newly created AB - was United States—Standards for Reformulated and Conventional Gasoline (Venezuela and Brazil) Report of the AB (29 April 1996) WT/DS2/AB/R, 'US—Gasoline'.

8 The proceedings in US—Shrimp spanned five years and involved seventeen WTO Members. In addition to the disputing Members, twelve Members participated as third parties in the Panel, AB and/or subsequent Article 21.5 compliance proceedings (Australia, Ecuador, El Salvador, the EC, Guatemala, Hong Kong, Japan, Mexico, Nigeria, The Philippines, Singapore and Venezuela).

findings on the scope of justification for trade restrictive environmental measures under GATT 1994 and for the AB's approach to treaty interpretation.

II Background to the Case

Shrimp is one of the most important globally traded fishery commodities;[9] yet shrimp harvesting contributes to large-scale drowning or killing of non-target species, notably of sea turtles,[10] an endangered species listed globally for protection under Appendix I of the 1973 Convention on International Trade in Endangered Species (CITES).[11] CITES is, however, concerned with limiting or prohibiting trade in species threatened with extinction and does not mandate specific measures for sea turtle protection and conservation. Indeed, as noted by the AB in this regard, there is no global sea turtle conservation agreement[12] and only one regional agreement, the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles,[13] which in any event was not applicable in the harvesting areas of the complainants' shrimp fisheries.

Domestically, US research programmes had concluded that the incidental capture and drowning of sea turtles in shrimp trawl nets was a significant source of sea turtle mortality.[14] In response, the US National Marine Fisheries Service (NMFS) developed a turtle excluder device (TED) for shrimp trawler nets which provided a 'trapdoor' for turtles to escape from the net. When a programme encouraging voluntary use of TEDs proved ineffective, legislative steps were taken requiring all US shrimp trawl vessels to use approved TEDs in specified areas where there was significant turtle mortality in shrimp trawls.[15] This was followed in 1989 by Section 609 of Public Law 101–102,[16] implemented through Guidelines, and which ultimately led to the WTO proceedings.[17]

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9 According to the FAO Global Study of Shrimp Fisheries (2008).

10 See WWF, 'Fact Sheet—Sea Turtle By-Catch—a Global Issue' (2017). Dolphins, seahorses, dugongs, albatrosses, and penguins also perish: ibid. For general discussion of the background to US—Shrimp see MA Young, Trading Fish, Saving Fish: The Interaction between Regimes in International Law (CUP, 2011), ch 4.

11 993 UNTS 243, in force 1 July 1975. At the time of these proceedings, all seven species of sea turtle were listed under Appendix I as species threatened with extinction, all but two of which occurred in US waters.

12 In 2009, the FAO produced non-binding global Guidelines to Reduce Sea Turtle Mortality in Fishery Operations (Rome, FAO, 2009).

13 Concluded in 1996, but did not enter into force until 2001 upon the eighth ratification. Apart from this agreement, noted the AB, the record before the Panel 'does not indicate any serious, substantial efforts [by the US Secretary of State] to carry out [the] express directions of Congress' under Section 609(a) to negotiate bilateral or multilateral agreements… for the protection and conservation of…sea turtles': AB Report [167].

14 LD Jenkins, 'Reducing Sea Turtle Bycatch in Trawl Nets: A History of NFMS Turtle Excluder Device ([by the TED) Research' (2012) 74(2) Marine Fisheries Review 26.

15 52 Fed. Reg. 24244, 29 June 1987.

16 16 USC 1537.

17 There was considerable resistance to these measures from US shrimpers, leading inter alia to the 'first successful blockade of US harbors since the War of 1812': M Donnelly, 'The History and Politics of Turtle Device Regulations' (1989) 6(11) Endangered Species UPDATE 1; see also P Cressick, 'Explaining US Policy on Shrimp-Turtle' in E Brown Weiss, JH Jackson and N Bernasconi-Osterwalder (eds), Reconciling Environment and Trade (Nijhoff, 2001) 504 and AV Margavio and CJ Forsyth, Caught in the Net: The Conflict between Shrimpers and Conservationists (Texas A&M University Press, 1996). Constitutional challenges were made to the legislation and unsuccessful attempts to use state law to block the measures: see e.g. State of Louisiana, ex rel. Guste v Verity (29 February 1988) [US District Court, E.D. LA] 681 F. Supp. 1178 and State of Louisiana, ex rel. Guste v Verity (15 August 1988) [US

Section 609 provided for an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles protected under US law. Harvesting States could escape the ban only through a certification process further specified in the subsequent Guidelines.[18] These required demonstration that a regulatory programme comparable to the US programme was in place regarding the incidental taking of sea turtles and that the average rate of incidental taking of sea turtles was comparable to that in the US.[19] For certification it was not sufficient to demonstrate that shrimp harvesting methods were comparable in effectiveness to those required under US law; i.e. what was required was a country-based measure, not merely a process-based measure (or 'how-to' restrictions).[20] Initially limited in its geographic application to the wider Caribbean/western Atlantic region, in 1996 the ban was made global.[21]

The ban had serious impacts on the complainant States where fishing for domestic consumption and for export contributes significantly to their economies.[22] Together, they produced almost a quarter of the world's wild-caught shrimp, with much of this production exported and for which the US was a key market[23] as one of the world's biggest consumers of shrimp.[24] Thus the US market was, and continues to be, extremely important for shrimp-exporting countries. For example, according to Malaysia, 'exports of shrimp to the US market […] constituted about 5.6 per cent of its total export of shrimp in 1995. Malaysia contended that the enforcement by the US of Section 609 had significantly affected the shrimp export industry in Malaysia' and that its exports to the US had fallen by 38 percent as a result.[25] In its arguments before the Panel, Pakistan similarly complained that the US ban had 'decimated Pakistan's exports to the United States', with the value of exports falling by around 65 per cent.[26]

Court of Appeals, 5th Cir] 853 F.2d 322. The regulations were finally reinstated on 15 October 1989 as the result of environmental NGOs litigation seeking effective turtle protection under the Endangered Species Act: see National Wildlife Federation, et al v. Mosbacher (11 August 1989) [US District Court, E.D. LA] Civ. A. No. 89-2089.

18 Guidelines were issued in 1991 (56 Fed. Reg. 1051) and revised in 1993 (58 Fed. Reg. 9015) and 1996 (61 Fed. Reg. 17342). For the record of certifications as of 1 January 1998, see Panel Report [2.16].

19 Or that the 'fishing environment of the harvesting country did not pose a threat of incidental taking of sea turtles in the course of shrimp harvesting'.

20 B Cooreman, 'Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?' (2016) 65 ICLQ 229, 244, drawing on Charnovitz's similar distinction between government policy and 'how to' restrictions: S Charnovitz, 'The Law of "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale JIL 59. For the AB this was 'proof' that 'the measure in application was more concerned with effectively influencing other WTO Members to adopt the same policy, rather than inquiring into the appropriateness of different comparable programs to protect the concern at issue'. Ibid, 244 n. 78.

21 This was in response to a ruling by the US Court of International Trade (CIT) that the initial 1991 Guidelines' restricted application to the wider Caribbean/Western Atlantic region violated Section 609, with a direction to the Department of State to extend the ban world-wide by 1 May 1996: Earth Institute v. Warren Christopher, 913 F. Supp. 559 (CIT 1995).

22 See fisheries statistics by country at http://www.fao.org.

23 In 1995 Thailand's shrimp exports (including fresh, frozen, wild and farmed shrimp and shrimp products) amounted to over 25 per cent of global shrimp exports by value, India's 6.5 per cent, Malaysia1.5 per cent and Pakistan about 1 per cent: FAO, Fisheries and Aquaculture Information and Statistics Service, available at http://www.fao.org.

24 ibid.

25 Panel Report [3.120].

26 ibid [3.121].

III The Proceedings

India, Malaysia, Pakistan, and Thailand[27] complained that the US measures pursuant to the Endangered Species Act of 1973 were contrary to Article XI GATT 1994 which prohibits quantitative restrictions on trade.[28] The Panel found that the US did not dispute that 'with respect to countries not certified under Section 609, [the ban] amounted to a restriction on the importation of shrimp within the meaning of Article XI:1'.[29] The US sought to justify the inconsistent measures under the general exceptions contained in Article XX GATT 1994, specifically paragraph (b) 'necessary to protect human, animal or plant life or health' and paragraph (g) 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The Panel found violation of Article XI without saving by Article XX, but (erroneously) commenced its consideration of the latter with an analysis of the chapeau[30] leaving prima facie consideration of saving under Article XX(b) or (g) to the second stage of analysis. It found unjustified discrimination between countries where similar conditions prevail and thus held that the US measure at issue 'is not within the scope of measures permitted under Article XX'.[31] Moreover, in interpreting the chapeau to Article XX the Panel placed great emphasis on protection of the world trading system, employing a 'slippery slope' type of argument:

> We are of the opinion that the chapeau of Article XX, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, only allows Members to derogate from GATT provisions, so long as, in doing so, they do not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX […] We consequently find that when considering a measure under Article XX, we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.[32]

As in the Tuna/Dolphin cases,[33] the US legislation was operating in the absence of multilateral rules agreed for the protection of the species in question. The Panel in US—Shrimp was at pains to address the international environmental law context, stressing the need 'to reach co-operative agreement on integrated conservation strategies […] taking into account the specific conditions of the different geographical areas concerned'. Sustainable development, one of the objectives of the WTO set forth in the Preamble, is expressly referred to by the Panel in exhorting such

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27 Pursuant to Article 4 DSU and Article XXII:1 GATT 1994, the complainants had first requested consultations with the US concerning Section 609 and the 1996 Guidelines, but these failed to arrive at a satisfactory solution: ibid [1.1].

28 Article 1 and Article XIII GATT were also included in their claim, but not considered further by the Panel given its findings on GATT Article XI: ibid [7.22–7.23].

29 Ibid [7.13] [7.15] [7.17]. The Panel stressed that this finding was also buttressed by sufficient evidence that such restriction had been imposed: ibid [7.17]

30 The chapeau to Article XX reads: 'Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...]' (emphasis added).

31 Panel Report [7.48–7.49].

32 Ibid [7.44] emphasis added. This reasoning was held by the AB to constitute an error in legal interpretation and was reversed: see further below.

33 Above n 5.

multilateral co-operation in order to protect sea turtles 'in a manner consistent with WTO objectives'.[34] Furthermore, it observed that:

> General international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence a negotiated solution is clearly to be preferred, both from WTO and an international environmental law perspective. [35]

This comes close to suggesting that not only is protection of the multilateral trading system at the core of the Panel's concern, but that it will be a rare unilateral measure indeed which satisfies not only the conditions of Article XX(b) and (g) but also (as interpreted by the Panel) the chapeau. This lack of balance in addressing trade and environment issues was severely criticised.[36]

The US appealed against the Panel's decision, affording the AB the opportunity to reconsider the balance between trade and environment within the GATT. In particular, it reviewed the rules of general international law relating to treaty interpretation and their application by the Panel in the instant case. Relying on language drawn implicitly from Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[37] the AB stated the relevant rules to require an 'examination of the ordinary meaning of the words of a treaty, read in their context and in the light of the object and purpose of the treaty involved'.[38] So far, so good. The AB went on, however, to observe, in a misapplication of the requirements of Article 31(1) VCLT, that:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting the provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[39]

As Gardiner rightly observes, this is a misreading of Sinclair and the VCLT because the second and third sentences do not reflect the 'proper approach to the first part of the general rule of treaty interpretation, even if they may follow a typical or logical process of thought',[40] in seeking the object and purpose by reference to the particular treaty provision, and then linking recourse to the object and purpose of the treaty with the ordinary meaning of the terms being equivocal or conclusive (a test found in Article 32 VCLT).[41]

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34 Panel Report [7.42] [7.52] and [9.1].

35 ibid [7.61]

36 See e.g. R Howse, 'The Turtles Panel: Another Environmental Disaster in Geneva' (1998) 32 JWT 73.

37 Article 3.2 DSU requires the application of 'customary rules of interpretation of public international law' of which Article 31(1) VCLT is a general reflection. In addition to its own case law, the AB relies on I Sinclair, The Vienna Convention on the Law of Treaties (MUP, 2nd ed, 1984) for the general rule of interpretation set forth in Article 31(1), in particular the application of the object and purpose test: [114] n 82.

38 AB Report [114].

39 ibid, citing Sinclair 130-31.

40 R Gardiner, Treaty Interpretation (OUP, 2nd edn, 2015), 133.

41 ibid, 133-4; see also D Shanker, 'The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement' (2002) 36 JWT 721, 741–2.

Applying this interpretative approach, the AB considered that the Panel had demonstrably failed to give the chapeau of Article XX its 'ordinary meaning'—in particular, by disregarding the reference to the manner in which the measures sought to be justified are applied. In US—Gasoline the AB had stressed the need to examine not the measure and its specified contents as such, but rather the manner of its application. Here, the Panel had failed properly to consider how the manner of the application of Section 609 constituted 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade' within the meaning of the chapeau. This is a crucial distinction because the Panel's stress upon the nature of the unilateral measures in question,[42] combined with its broad interpretative approach whereby measures which 'undermine the WTO multilateral trading system' fall outside those measures permitted under the chapeau of Article XX, set a virtually inevitable collision course between environmental measures and Article XX. In contrast, the AB took a more nuanced approach: maintaining the multilateral trading system is not an interpretative rule to be applied in interpreting specific provisions of the GATT but rather 'a fundamental and pervasive premise underlying the WTO Agreement'.[43] Indeed, the purpose of the chapeau had been identified in the US—Gasoline case where the AB indicated that its purpose 'is generally the prevention of abuse of exceptions of [Article XX]'.[44]

Not only was its interpretative approach flawed, but the Panel had also ignored the careful two-step process enunciated in earlier case law whereby the specific paragraphs of Article XX are examined before reviewing the applicability of the conditions set forth in the chapeau.[45] The AB reversed the Panel's finding that Section 609 fell outside the scope of measures permitted under Article XX and thus found it necessary to conduct the two-stage legal analysis eschewed by the Panel, namely, to consider whether the US could claim justification for Section 609 under Article XX(g) and then to test such justification, if made, by the conditions of the chapeau.[46] The first question for the AB was whether Section 609 is a measure concerned with the conservation of 'exhaustible natural resources' within the meaning of Article XX(g), a phrase it considered 'is not "static" in its content or reference but is rather "by definition, evolutionary".'[47] Accordingly, the AB explicitly adopted an evolutive approach[48] to interpretation of Article XX(g) 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[49] Though Article XX was not amended in the Uruguay Round, the AB drew inspiration for this evolutive approach from the preamble to the WTO Agreement which refers, inter alia, to 'the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so', which demonstrates that the States Parties to the WTO Agreement were 'fully aware of the importance and legitimacy of environmental protection as a goal of national and

42 ibid [115], referred to also by the AB as 'the design of the measure itself'.

43 ibid [116]

44 Above n 5 [22].

45 The Panel expressly seeks to justify such express departure at [7.28]. For criticism of this two-stage approach, see L Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 AJIL 95.

46 Article XX(b) was also invoked by the US, but only in the alternative should the Article XX(g) justification fail.

47 [130] citing general international law sources including the Namibia (Legal Consequences) Advisory Opinion (1971) ICJ Rep. 31 and the Aegean Sea Continental Shelf Case (1978) ICJ Rep. 3.

48 ibid [130].

49 ibid [129].

international policy'.[50] Such language 'demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development.'[51] It adds 'colour, texture and shading to the rights and obligations of members under the WTO Agreement, generally, and under the GATT 1994, in particular.'[52] The AB then relied on a number of 'modern international conventions and declarations [which] make frequent reference to natural resources as embracing both living and non-living resources'[53] to support its conclusion that 'living resources are just as "finite" as petroleum, iron ore and other non-living resources'.[54] At the end of this part of its analysis the AB also cites the principle of effectiveness in support of this conclusion on the interpretation of Article XX(g).[55]

Turning to the specific issue of whether the sea turtles in particular are 'exhaustible', the AB swiftly concluded that they are, not least since all seven species of sea turtle are listed in Appendix I of the 1973 CITES. All the participants in the appeal were parties to CITES, which continues to enjoy widespread support.[56] Whether there is any jurisdictional limitation on the scope of Article XX(g) was not expressly considered since sea turtles are highly migratory species and occur, inter alia, within US waters over which it clearly has jurisdiction. The AB thus found 'sufficient nexus' between the sea turtles and the US.[57]

The AB then examined the question of whether the measure sought to be justified 'relates to' the conservation of exhaustible natural resources. Once again, the interpretative methodology of the AB is clearly expressed: 'In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources.'[58] The widespread participation of all States, including the participants in the present dispute, in CITES underscores the legitimacy of the concern. More

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50 ibid.

51 ibid [153]. The AB also notes there is no evidence of the intention of the original drafters of Article XX to exclude living resources from the ambit of Article XX(g) ([131] n 81) and that earlier adopted panel reports had found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g) [131].

52 ibid [155]. In addition, the AB noted the creation of the WTO Committee on Trade and Environment (CTE) in 1994 and the preamble to the Ministerial Decision on Trade and Environment which states, inter alia, 'that there should not be, nor need by, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development, on the other'.

53 It refers to the 1982 UN Convention on the Law of the Sea (UNCLOS), the 1992 Convention on Biological Diversity (CBD), and the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS), in each case simply noting in a footnote the extent of participation by the parties to the dispute, and to Agenda 21: [130]. For discussion of how the Panel and AB in US-Shrimp acquired information about these other regimes, see Young, above n 12, 206-24. There is no explicit interpretative justification for relying on these instruments which appear to be provided as context in evidencing a shift in legal opinion since the adoption of GATT 1947: see below text at n 120. On the use of other international law as context', see I Van Damme, Treaty Interpretation by the WTO Appellate Body (OUP 2009) 258–9.

54 Above n 7 [128].

55 AB Report [131], citing previous AB Reports including US—Gasoline and Japan—Alcoholic Beverages, and a range of general international law authorities including Oppenheim and Sinclair.

56 See further http://www.cites.org At the time of the AB's decision, there were 144 States party to CITES.

57 AB Report [133]. Nor was the matter explored further in the recent EC—Seals case owing to lack of argument on this point by the parties, leaving the question open whether trade measures aimed to address environmental concerns outside the territory of the regulating State are justifiable: WTO, AB Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (2014) WT/DS401/AB/R [5.173]. For critique and a proposed 'extraterritoriality decision tree' see Cooreman, above n 20.

58 AB Report [135].

particularly, however, the AB considered it necessary to 'examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purposes to serve, that is, the conservation of sea turtles',[59] adopting the methodology employed in examining the baseline regulation of the Clean Air Act in US—Gasoline. Here the design of the measure is relevant. The AB found '[t]he means and end relationship between Section 609 and the legitimate policy of conserving an exhaustible, and in fact, endangered species, is observably a close and real one, a relationship every bit as substantial as that which we found in US—Gasoline between the EPA baseline establishment rules and the conservation of clean air in the United States.'[60] It also determined that such measures were made effective 'in conjunction with' restrictions on US shrimp trawl vessels ('in principle, Section 609 is an even-handed measure'), thus leaving only the hurdle of satisfaction of the chapeau conditions for the US measure to be a justifiable exception under Article XX.

The AB's characterisation of Section 609 as a 'legitimate' environmental measure should be contrasted with the later finding of the US Court of Appeals for the Federal Circuit in reviewing the Court of International Trade's decision in Turtle Island,[61] when it held that its 'legislative history' showed that Section 609 was primarily 'focused on protecting the domestic shrimp industry, not the sea turtle'.[62] Although invited to do so in the parties pleadings, the AB was seemingly reluctant to pierce the sovereign veil to consider the legislative history of the import ban and whether Section 609 constituted a 'disguised restriction' on trade.

The general interpretative approach of the AB to the chapeau has already been detailed above. In its light, the exceptions of (a) to (j) of Article XX are revealed as limited and conditional exceptions from substantive GATT obligations, subject to compliance with the chapeau. Indeed, the AB likens the chapeau conditions to an obligation of good faith in the exercise of rights under the GATT.[63] It thus considers whether the application of the measure provisionally justified under Article XX(g) constitutes 'unjustifiable discrimination […] or a disguised restriction on trade' within the meaning of the chapeau. As in US—Gasoline the measure fell at this final hurdle, for the AB held that in its application Section 609 had 'intended an actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO'.[64] Any flexibility intended in the primary legislation was swept aside by the 1996 Guidelines and the practical administration of the certification scheme which required a demonstration that the regulatory programme requires the use of turtle extractor device or a requirement falling within the extremely limited exceptions available to US shrimp trawlers. 'Other measures the harvesting nation undertakes to protect sea turtles' referred to in the Guidelines were of little relevance in administrative practice. In sum, the AB found 'the effect of the application of Section 609 is to establish a rigid and unbending standard' requiring other WTO members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as that applied to the United States shrimp trawl vessels'.[65]

The final obstacle to success in meeting the conditions of the chapeau was the evidence that even States complying with the regulatory conditions of the scheme, i.e. shrimp caught using

59 ibid [37].

60 ibid [141].

61 Turtle Island Restoration Network v Mallett (19 Jul 2000) 110 F.Supp.2d 1005

62 Turtle Island Restoration Network v Evans (21 March 2002) 284 F.3d 1282, 1295

63 ibid [158], as both a general principle of law and a general principle of international law.

64 ibid [161].

65 ibid [163].

methods identical to those in the US, would be subject to the import ban if the shrimp were caught in the waters of a non-certified State. This suggests to the AB 'that this measure, in its application, is more concerned with effectively influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated.'[66] Coupled with the failure to respond vigorously to the exhortation in the legislation to seek bilateral and multilateral agreements for sea turtle conservation,[67] the AB had little difficulty in determining that the measure had been applied in an unjustifiably discriminatory fashion. It also found the discrimination to be arbitrary, thus depriving the measure of Article XX protection and rendering unnecessary consideration of the final limb of the chapeau (disguised restriction on trade).[68]

Both the language and methodology of the AB is a striking departure from the wording and the approach of the Panel Report, and demonstrates a willingness to strike a more even balance between trade and environment concerns. Of particular note is the acceptance of an unsolicited NGO brief, a move consonant with general measures within the WTO to improve transparency and access for, though not the direct participation of, NGOs.[69] In US—Shrimp the AB took the view that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources was incompatible with the DSU.[70] However, in a 'practical disposition of the matter' endorsed by the AB, the Panel permitted the Parties to put forward the documents, or parts thereof, and the US duly attached part of an NGO brief as an annex to its second submission to the Panel.[71] This was not the first time such 'practical disposition' was adopted by a dispute settlement body: there is no provision for amicus briefs in the ICJ's Statute yet it permitted Hungary to adopt NGO material as part of its submission in the Gabcikovo–Nagymaros case.[72] This introduction of external views into a 'members only' WTO dispute settlement procedure has, however, proved controversial,[73] though in practice panels and the AB have been 'very restrained in actually considering them'.[74]

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66 ibid [165].

67 Only one agreement had been concluded, the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles above n 13. See further http://www.seaturtle.org.

68 This limb of the chapeau has been relatively unexplored: Bartels, above n 45.

69 As part of this initiative see http://www.wto.org/wto/ngo/contact.htm. The WTO's Committee on Trade and Environment has a number of observers from intergovernmental organisations, including representatives of the Secretariat of the CBD and CITES.

70 This was one of the issues raised in the United States appeal: US—Shrimp [98 et seq]. The Panel received a brief from the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL), and one from the World Wide Fund for Nature: ibid [99]. The CMC also played a domestic role, threatening legal proceedings against the Secretary of Commerce for failing to fulfil his mandate under the ESA and indicating that it would call for a moratorium on all shrimp fishing in waters in which sea turtles are present: see further Donnelly above n 17, 2; Margavio and Forsyth above n 1, 8.

71 Section III of the CMC/CIEL brief: ibid [110]. See generally G Umbricht, 'An "Amicus Curiae Brief" on Amicus Curiae Briefs at the WTO' (2001) 4 JIEL 773.

72 (1997) ICJ Rep 7; see currently Practice Direction XII. See generally A-K Lindblom, Non-Governmental Organisations and International Law (2005). ITLOS has similarly grappled with the introduction of amicus briefs in the absence of express authority to do so in its Statute, through its Rules of Procedure and judicial practice: see for example The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Case No. 22, Order of 22 November 2013 and, generally, A Dolidze, 'The Arctic Sunrise and NGOs in International Judicial Proceedings' (2014) 18:1 ASIL Insights.

73 See further R Howse, 'Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 EJIL 496 and P Mavroidis, 'Amicus curiae Briefs Before the WTO: Much Ado About Nothing' in A von Bogdandy, P Mavroidis and Y Meny (eds), European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter

More generally, the reliance by the AB in US—Shrimp on general international law principles, as well as general principles of international environmental law, is striking. Most telling is the AB's awareness of its wider audience, for it concludes, inter alia, with what the appeal has not decided:

> 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. 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 otherwise protect the environment. Clearly, they should and do.[75]

As it transpired this did not prove to be the AB's final word on the matter. The AB Report adopted by the WTO's DSB on 6 November 1998 was accompanied by the recommendation that the US bring the import prohibition into conformity with its obligations under the WTO Agreement. However, in implementing the decision and recommendation the US did not amend Section 609—with the import prohibition on uncertified States remaining intact—but instead issued Revised Guidelines under which a State might seek certification on the basis that it has implemented and enforced a 'comparably effective' regulatory programme to protect sea turtles without the use of TEDs. On 12 October 2000 Malaysia, one of the original complainants, requested the matter be remitted back to the original panel as it is entitled to do under the DSU where non-compliance with a DSB ruling is alleged. It argued that the US had failed to lift the import prohibition and had not taken 'the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner' and challenged the Revised Guidelines as insufficiently flexible to meet the requirements of the Article XX chapeau.[76] Malaysia also argued that the US had failed to take adequate steps to negotiate and conclude an international agreement on sea turtle protection before imposing the unilateral import ban. In justifying its steps regarding compliance, the US stressed, inter alia, its continuing efforts to secure agreement with Governments in the Indian Ocean region on the protection of sea turtles in that region.[77] The Panel noted these ongoing 'serious good faith efforts', as did the AB, which stressed that requiring the conclusion of an agreement would be unreasonable and that the mere failure to do so did not constitute 'arbitrary or unjustifiable discrimination' under the Article XX chapeau solely because agreement was reached with some parties but not with others.[78] As for the Revised Guidelines, the AB rejected the Malaysian argument that once again the measures unilaterally imposed US domestic standards on exporters, since on application for certification

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Ehlermann (2002), 317. Opposition was exacerbated by the special procedures for amicus briefs adopted in the subsequent US-Asbestos where the AB anticipated a high volume of brief from public interest NGOs (see further Young, above n 10, 221) and by the perception that briefs from environmental and labour NGOs in particular would argue against the interests of developing countries and their right to exploit their own resources: see further J Bhagwati, 'Afterword: The Question of Linkage' (2002) 96 AJIL 126.

74 Young above n 10, 221–4.

75 AB Report [185].

76 United States—Import Prohibition on Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, Report of the AB, 22 October 2001, WT/DS58/AB/RW, [6], 'Malaysia Recourse'.

77 ibid [115].

78 ibid [123].

US authorities were permitted to take into account the specific conditions of Malaysian shrimp production and of its sea turtle conservation programme.[79]

IV US—Shrimp as a Landmark

A. US—Shrimp*'s legacy within the WTO*

We could consider US—Shrimp a landmark merely because of its impact within trade law and on the 'trade and environment' debate.[80] Subsequent panels and the AB routinely cite the AB Report in US—Shrimp—usually alongside US—Gasoline—as the starting point for any analysis under Article XX. The AB's decision in US—Shrimp is also frequently cited in disputes concerning Articles 2 of the SPS and TBT Agreements.[81] This is unsurprising given the preambles to both Agreements repeat the wording of the chapeau of Article XX GATT.

In this context US—Shrimp is generally cited as authority for five main points. First, that the interpretation and application of Article XX requires a 'two-tiered' approach under which a measure must be shown to be provisionally justified by a paragraph (a) to (j) exception before its chapeau-compliance is assessed.[82] Second, that both as a requirement of and expression of the principles of 'good faith' and 'abus de droit' a panel or the AB assessing a measure under Article XX must seek to 'balance' or find 'equilibrium' between Members' right to invoke the exceptions and other Members' substantive rights under the WTO Agreement.[83] Third, that an assessment under the substantive paragraphs of Article XX requires the completion of a 'means–ends' inquiry. The standard of connection required under each individual exception is considered to shift along a sliding scale depending on the language employed - whether a measure must be 'necessary' for or merely 'relate to' its intended purpose.[84] Fourth, subsequent panels and the AB have reaffirmed US-Shrimp's distinction between a measure's 'design and structure' and its 'application', reiterating that a measure may comply with Article XX on its face, be provisionally justified under a valid exception, and yet be applied in a manner that breaches the chapeau requirements.[85] As per the AB decision in US—Shrimp subsequent decision makers have focused on the institutions, processes and procedures involved in application.[86] Fifth, US—Shrimp is frequently cited in support of the view that discrimination may arise where countries in which different conditions prevail (or

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79 ibid [148].

80 See e.g. the contributions to 9 Ybk IEL(1998) by Brack, Mann and Wirth; R Howse, 'The AB Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate?' (2002) 27 Columbia JEL 491; and JH Knox, 'The Judicial Resolution of Conflicts Between Trade and Environment' (2004) 28 Harv ELR 1.

81 See e.g.: India—Agricultural Products, Panel Report (14 October 2014) WT/DS430/R, [7.432], [7.434]; US—Tuna II, AB Report (16 May 2012) WT/DS381/AB/R, [226], [339] et seq

82 China—Raw Materials, AB Report [354]; China—Rare Earths, AB Report [5.87]–[5.89]; EC—Seal Products, AB Report [5.169]

83 Brazil—Tyres, AB Report [224]; EC—Seal Products, AB Report [5.297]; see also the EC's arguments in EC—Asbestos, Panel Report [3.499]

84 EC—Biotech, Panel Report [7.94]; Thailand—Cigarettes, AB Report (17 June 2011) WT/DS371/AB/R, [194]; China—Raw Materials, AB Report [355]; China—Rare Earths [5.90], [5.105], [5.111]; US—Tuna II, Art 21.5 Panel Report (14 April 2015) WT/DS381/RW, [7.513], [7.531]

85 China-Rare Earths [5.96]; US-Animals, Panel Report [7.573], [7.620]–[7.621].

86 See also the AB's use of US-Shrimp in support of the view that Article X(3) GATT 'establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations': Thailand-Cigarettes, AB Report [202]

may prevail) are treated the same, as well as when countries in which the same conditions prevail are treated differently, or the 'discrimination-as-inflexibility' thesis.[87]

US—Shrimp has thus been described as marking the beginning of a 'procedural turn' in WTO jurisprudence on Article XX.[88] As Lang notes, the AB made significant efforts to focus, not on the environmental purpose of the measure, nor whether it was a disguised restriction on trade, but on 'the institutions, structures and procedures through which' the Section 609 import ban was applied:

> Conceptually, then, the key move in this case was to determine the legitimacy of the US measure in question not by reference to some technically defined ideal of an optimally regulated market, nor through the application of a balancing or proportionality test, but rather by reference to the administrative ideal of good governance articulated as due process, or procedurally proper administration. What was subject to scrutiny were the procedures, structures and institutions forming the context in which the regulatory measure was applied, not the substantive legitimacy or efficacy of its content.[89]

In US—Shrimp the AB continued its move, begun in US—Gasoline, toward establishing Article XX's chapeau as essentially a good governance provision. But what conception of good governance and what assumptions, legal and conceptual, underpin its assessment? As academic discussion since US—Shrimp was decided has illuminated, the AB left space for a variety of approaches.[90] On one view, focus on the procedural aspects allows both for appropriate scrutiny of domestic (generally regulatory) measures, and appropriate deference to domestic decision-making.[91] But we could also see this shift as the AB shying away from making *explicit* judgments regarding the substantive aims of a measure, in favour of doing so *implicitly* or indirectly through construing the chapeau as giving rise to minimum (but often vague) good governance standards.

US—Shrimp's language of 'balancing' and 'equilibrium', and the view decision-makers must interpret Article XX and police its invocation so as to prevent its 'abuse' now strongly pervades subsequent Panels' and the AB's decisions. This is particularly true of decisions dealing with the exceptions in inter alia paragraphs (a), (b), and (d) that employ the language of 'necessity', where Panels and the AB frequently employ the language of 'weighing and

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87 See e.g.: India—Agricultural Products, Panel Report (14 October 2014) WT/DS430/R, [7.432], [7.434]; US—Animals, Panel Report (WT/DS447/R [7.620]; US—Poultry, Panel Report (29 September 2010) WT/DS392/R, [7.292]; See too the US's arguments in: *US—Tuna* II, AB Report (20 November 2015) WT/DS381/AB/R [7.311], [7.327]; However, cf: *US—Tuna II*, Art 21.5 Panel Report (14 April 2015) WT/DS381/RW, [7.574], where the panel re-emphasised that the chapeau requires the '*same* conditions' to prevail for a finding of discrimination.

88 A Lang, World Trade Law after Neoliberalism: Reimagining the Global Economic Order (OUP, 2011), 326.

89 ibid

90 See e.g.: Lang, above n 88, 239-41; see more generally E Fisher, Risk Regulation and Administrative Constitutionalism (Hart 2007) and B Rigod, Optimal Regulation and the Law of International Trade (CUP 2015).

91 M Andenas and S Zleptnig, 'Proportionality: WTO Law in Comparative Perspective' 42 Tex ILJ 371, 412

balancing' in assessing the Article XX consistency of measures.[92] Some have even gone so far as to suggest that Panels and the AB have adopted a proportionality standard in assessing measures' compliance under Article XX.[93]

B. US—Shrimp*'s Legacy in General International Law*

i. International Dispute Settlement

US—Shrimp is clearly regarded as a landmark – or at least a point of departure – in several contexts in WTO jurisprudence. It is difficult, however, to say the same of its influence in other areas of international dispute settlement. By way of illustration, the ICJ has not made reference to the case in any judgment to date, although Ecuador expressly relied upon the WTO's decision in US—Shrimp in support of the 'principle' of 'evolutionary interpretation' in its memorial in the Aerial Spraying case before the ICJ.[94] Further, and in spite of a clear—and arguably growing—tendency on the part of parties and tribunals to refer to WTO cases in the context of investment dispute settlement, US—Shrimp appears to have been referred to only a handful of times in investment arbitration: by the tribunals in ADF v US[95] and Venezuela Holdings v Venezuela,[96] and by the complainant investors in Merrill & Ring v Canada[97] and SD Myers v Canada.[98]

US—Shrimp was however relied upon by the tribunal in the Iron Rhine arbitration which cited the AB's reasoning to support the general proposition that some 'generic' treaty terms require the interpreter to take into account developments that occurred subsequent to the treaty's completion.[99] And it was cited by Judge Pinto de Albuquerque in his separate opinion in *Hermann v Germany* for the existence of 'a broad concept of environment balance which includes animal life and welfare' as having 'been repeatedly enshrined in international environmental law' when considering the extent to which animals are protected under the

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92 See e.g.: Korea—Beef, AB Report (11 December 2000) WT/ DS161/AB/R, [164]; China—Rare Earths, AB Report, [5.116]; and India—Solar Cells, Panel Report (24 February 2016) WT/DS456/R, [7.349]; Argentina—Goods and Services, AB Report (14 April 2016) WT/DS453/AB/R [6.221]

93 See e.g.: M Hilf, 'Power, rules and principles—which orientation for WTO/GATT law?' (2001) 4 JIEL 111, 120 et seq; Andenas and Zleptnig above n 93, 421; E Vranes, Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory (OUP, 2009), 283; G Bücheler, Proportionality in Investor-State Arbitration (OUP, 2015) 70–1.

94 Memorial of Ecuador (Vol I) (28 April 2009) Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia, ICJ, para. 8.76.

95 For the proposition that the object and purpose of treaty parties is to be 'found, in the first instance, in the words in fact used by the parties': ADF v US [Award] (9 January 2003) ICSID Case No ARB(AF)/00/1, [147].

96 Mobil Corp, Venezuela Holdings BV & ors v Venezuela [Decision on Jurisdiction] (10 Jun 2010) ICSID Case No ARB /07/27, [175]. The tribunal, which included former ICJ President Judge Guillaume, quoted the AB's discussion of the principles of good faith and abus de droit.

97 The claimant referred to the AB's interpretation of 'arbitrary' and 'unjustifiable discrimination' in its fair and equitable treatment claim under Article 1105 NAFTA: Merrill & Ring v Canada [Award] (31 March 2010) UNCITRAL, [156].

98 SD Myers Inc v Canada [Separate Opinion of B P Schwartz to Partial Award] (12 Nov 2000) NAFTA, UNCTRAL, [241]. Schwartz accepted the claimant's arguments that the AB's approach to transparency and due process under Art X:3 GATT was relevant in interpreting Art 1108 NAFTA's publication requirements.

99 Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands Award] (24 May 2005) XXVII UNRIAA 35, 73, [79], citing the AB Report at [130]

European Convention on Human Rights in the context of conscientious objection to hunting.[100]

The scarcity of express references to US—Shrimp in dispute settlement outside trade law is somewhat surprising, given the AB's reliance on the general principles of 'abus de droit' and 'good faith'[101] in developing its interpretation of 'unjustifiable discrimination' as generating general duties of cooperation, flexibility and procedural fairness. Arguably the AB's reasoning in giving effect to these principles could have reached further than the chapeau of Article XX GATT, especially as a core element of the AB's reasoning was based on the concept that all treaty (and by logic also customary) rights must be exercised 'bona fide, that is to say, reasonably'.[102] Perhaps this is explained because, as Howse noted in 2002, the AB does not appear to have been elaborating a general, 'self-standing duty to cooperate',[103] but rather used the general principles and the 'duties' to cooperate in the environmental agreements cited to support a particular reading of the express terms of Article XX.[104]

ii. Treaty Interpretation

Undoubtedly the most enduring legacy of US—Shrimp in general international law is the AB's approach to treaty interpretation.[105] In a distinct break with pre-1994 GATT jurisprudence, and following its own lead in US—Gasoline,[106] the AB interpreted GATT 1994 in accordance with international law on the interpretation of treaties, as codified in Articles 31–33 VCLT, and not in accordance with specific GATT canons of interpretation.[107]

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100 Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, Case of Herrmann v Germany App No 9300/07 (ECtHR Grand Chamber, 26 June 2012) 34–5. This use seems to stretch the AB's findings quite thin.

101 AB Report [158]; see analysis by M Fitzmaurice, 'Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' (2007) 10 Austrian RIEL 41.

102 ibid

103 Howse above n 73, 508.

104 On general duties to cooperate see e.g,: P-M Dupuy, 'The place and role of unilateralism in contemporary international law' (2000) 11 EJIL 19, 22 ff; R Briese, 'Precaution and Cooperation in the World Trade Organization: An Environmental Perspective' (2002) 22 Aust YBIL 113, esp 127, 151; R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 EJIL 649, 666; and P Sands, '"Unilateralism", values, and international law' (2000) 11 EJIL 291, 300

105 For general discussion of 'Who Interprets Treaties?' in the context of the WTO DSU, see Gardiner above n 40, 131–4; for a case study of US—Shrimp, inter alia, see Fitzmaurice above n 97, 53. On the role of the AB, inter alia, as a distinct epistemic and interpretative community see M Waibel, 'Interpretative Communities in International Law' in A Bianchi, D Peat and M Windsor (eds), Interpretation in International Law (OUP, 2015) 147. He concludes at 164 that '[b]eneath the veneer of uniformity of the VCLT's interpretative principles, distinct interpretative communities have contributed to diverse interpretative approaches in international law.' This chimes with Abi Saab's view that while Panels and the AB make reference to the customary rules on treaty interpretation, their method and underlying assumptions are different to other international legal fora because the WTO 'constitutes a legal universe quite different from the others': G Abi-Saab, 'The AB and Treaty Interpretation' in M Fitzmaurice, OA Elias and P Merkouris (eds), Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On (Nijhoff 2009), 106.

106 AB Report [16].

107 It will be recalled that Article 3(2) DSU expressly provides that the existing provisions of the WTO covered agreements are to be clarified 'in accordance with customary rules of interpretation of public international law'. In US—Gasoline the AB followed the jurisprudence of the ICJ in determining that the rules of treaty interpretation in the VCLT reflect customary international law and as such are binding on all members: above n 7 [16–[17].

This facilitated a more nuanced environmental jurisprudence[108] in particular, because 'the very decision to follow these general public international law interpretative norms enhances the legitimacy of the dispute settlement organs in adjudicating competing values—because these norms are common to international law generally, including regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.'[109] There are three related aspects of the 'treaty interpretative legacy' of US—Shrimp: the principle of mutual supportiveness, the principle of integration, and the evolutive interpretation of treaties.

a. *Mutual supportiveness*

Agenda 21 stresses the need to make trade and environment 'mutually supportive' as does Principle 12 of the Rio Declaration.[110] Both are cited by the AB in US—Shrimp; indeed, the AB Report and the follow-up compliance report are the only AB decisions to refer directly to Principle 12.[111] It has been argued that similar considerations underpin the reference in the first paragraph of the WTO Agreement preamble to 'the objective of sustainable development'.[112] It reflects a 'synergistic' rather than 'conflict' model of, inter alia, the relationship between environmental protection and trade disciplines.[113] The legal implications of 'mutual supportiveness' are, however, far from clear: is it merely a policy statement, an interpretative guideline or 'principle', a conflict clause allocating hierarchy, or a legal principle?[114] That it may play at least an interpretative role in trade disputes, alongside other principles of treaty interpretation, is illustrated by US—Shrimp which remains the 'high water mark' for such an approach.[115]

b. *'Systemic integration'*

As noted above, the AB referred both to the preamble to the WTO Agreement and to exogenous agreements including the 1982 UNCLOS, CITES, the CBD, and the CMS in the

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108 There is no provision in the DSU for panels adjudicating environmental cases to have specific environmental expertise. However, Charnovitz notes that the presiding Judge in the AB which reversed WTO panel decisions that 'threatened to render the environmental exceptions unusable' in US—Gasoline, Shrimp-Turtle, and the EC—Asbestos Cases was Florentino Feliciano: S Charnovitz, 'The WTO's Environmental Progress' (2007) 10 JIEL 685, n 53.

109 Howse in J Weiler (ed), The EU, the WTO and the NAFTA (OUP, 2000), 54.

110 Agenda 21, 13 June 1992, Chapter 2. Principle 12 of the 1992 Rio Declaration is analysed by MA Young in J Viñuales (ed), The Rio Declaration on Environment and Development. A Commentary (OUP, 2015), 325–49. 'Mutual supportiveness' was a key theme in the contributions to the influential trade and environment Agora in the AJIL 2002 vol. 96(1).

111 Young, ibid, 345.

112 P-M Dupuy and JE Viñuales, International Environmental Law (CUP, 2015), 393. In his overview of the Rio Declaration, Viñuales emphasises the principle of integration as the main expression of the concept of sustainable development, and highlights its influence on treaty practice citing as an example the influence of the preamble to the WTO Agreement in integrating environmental considerations: above n 110, 25.

113 For discussion see Pavoni above n 104.

114 Dupuy and Viñuales above n 112, 394.

115 This approach was foreshadowed in US—Gasoline where the AB recognised the importance of coordinating trade and environmental policies and considered that the language of the Preamble added 'colour, texture and shading' to the interpretation of the WTO covered agreements, a phrase repeated by the AB in US—Shrimp [153].

interpretation of 'exhaustible natural resources' in Article XX(g).[116] This was putting into practice what the AB had famously stated in US—Gasoline, viz. that the GATT (and by logical inference the other covered agreements) was 'not to be read in clinical isolation from public international law'.[117] However, for each instrument cited the AB merely footnotes the extent of participation by the complainants and the US, from which it is clear that CITES is the only agreement cited to which all five members were party. There is no explicit interpretative justification for relying on these instruments which appear to be provided as context in evidencing a shift in legal opinion since the adoption of GATT 1947.[118] Indeed, McLachlan considers US—Shrimp an example of interpretation of 'general and open-textured' treaty provisions with reference to other areas of international law as context.[119]

On the face of it then the AB Report provides only limited support for an interpretation of Article 31(3)(c) VCLT that 'applicable in relations between the parties' can be satisfied by looking to other treaties to which the treaty parties in the dispute are also parties.[120] In contrast, these references were expressly noted by the Panel in Malaysia Recourse, which went on explicitly to cite Article 31(3)(c) VCLT, stating 'the juxtaposition making it appear that the test for the provision's application was whether the parties to the dispute (rather than to the treaty under interpretation) were parties to the other instruments'.[121] Gardiner, however, considers that US—Shrimp gives 'scant support' for such interpretation, particularly bearing in mind that in this later phase in proceedings the principal parties had accepted, or committed to accept, all but one of the instruments cited in the early proceedings.[122] Moreover, in later disputes the DSB's approach has been more limited. For example, in Chile—Price Band the Panel explicitly parked the question of whether a rule of international law under Article 31(3)(c) VCLT should be applicable in the relations between all WTO members to play a role in interpretation.[123] And in China—Raw Materials[124] the Panel explicitly followed the 2006 panel report in EC—Biotech in adopting a much narrower understanding of systemic integration, interpreting Article 31(3)(c) to require that another treaty must be applicable to all WTO members in order to be relevant for the purposes of interpretation.[125]

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116 Though in the case of UNCLOS noting specifically that the US considers the relevant living resource provisions to reflect customary international law: US—Shrimp [130] n 77.

117 US—Gasoline above n 5, 17. See generally G Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 JWT 120.

118 See above n 53.

119 C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 302.

120 ibid, 314.

121 Malaysian Recourse [5.57]. The Panel did not address the issue whether the other WTO members were parties to these instruments.

122 Gardiner above n 40, 315.

123 Chile—Chile Price Bank System WT/DS207/R (2002), [7.85] (no relevant rule of international law yielded by the other agreement invoked).

124 China—Measures relating to the Exportation of Various Raw Materials WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011) (Panel Reports) [7.364].

125 Thus limiting the interpretative effect of the CBD and its Cartagena Protocol on the applicable trade disciplines: European Communities—Measures affecting the Approval and Marketing of Biotech Products WT/DS291/R, WT/DS292/R, WT/DS293/R (9 September 2006) [7.68]–[7.[70] and [7.74–[7.75].

In academic commentary some caution has been expressed regarding the AB's approach to exogenous rules in US—Shrimp. For example, Pauwelyn argues that '[o]pening the door to rules not legally binding on all WTO members, not even on the disputing parties, may be permissible, but it remains a risky step: When and how will the AB decide that something rises to the level of a "contemporary concern of the community of nations", "a widely recognised principle" or a "broad-based recognition of a particular need"? Any such explanation should not be reached lightly and must be explained.'[126] As Dunoff puts it more broadly, 'the central challenge posed by the Shrimp-Turtle dispute is whether certain people, ideas, doctrines, and policy measures would be permitted within the borders of the international trade regime'.[127]

c. Evolutive Interpretation

The AB explicitly adopted the approach taken by the ICJ in its Namibia Advisory Opinion[128] that where the concepts embodied in a treaty are evolutive, their interpretation has to conform with the subsequent development of law.[129] Following in the footsteps of US—Gasoline, the AB's approach was grounded in the inclusion of 'sustainable development' as an objective in the preamble to the WTO Agreement[130] and in the 'principle of effectiveness'.[131] As recalled above, the AB considered the term 'exhaustible natural resources' in Article XX(g) 'is not "static" in its content or reference but is rather "by definition evolutionary"'[132] and had to be interpreted 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[133] It is a generic term.[134]

Subsequently US—Shrimp has been widely cited as an example of the evolutive approach to treaty interpretation. For example, Ecuador relied upon it in support of the 'principle' of 'evolutionary interpretation' in its memorial in the case of Aerial Spraying before the ICJ:

> The WTO AB has given a similarly evolutionary interpretation [as that of the ICJ in Oil Platforms] to certain terms in the 1947 GATT Agreement. In the Shrimp-Turtle decision, for example, it referred inter alia to the 1992 Rio Declaration on Environment and Development, the 1982 UNCLOS, the 1973 CITES Convention, the 1979 Convention on Conservation of Migratory Species and the 1992 Convention on Biological Diversity in

126 J Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 ICLQ 926–7.

127 JL Dunoff, 'Border Patrol at the World Trade Organization' (1999) 9 Ybk IEL 20.

128 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276 (1970), Advisory Opinion 21 June 1971, 1971 ICJ Rep. 16, 31.

129 This approach was confirmed by the ICJ in the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, 1997 ICJ Rep. 7 at para. 112, in which the Court said that 'Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law'.

130 AB Report [129]–[130]

131 ibid [131].

132 ibid [130].

133 ibid [129-132].

134 On the interpretation of generic terms, see further E Bjorge, The Evolutionary Interpretation of Treaties (OUP, 2014) 125–7.

> order to determine the present meaning of 'exhaustible natural resources'.[135]

There remains significant controversy around what is permissible under an 'evolutionary interpretation' of treaty terms, and what 'law' can permissibly be referred to under Article 31(3)(c) VCLT, a distinction Judge Bedjaoui emphasised in his Separate Opinion in *Gabčíko*vo–Nagymaros.[136] The distinction between interpretation and revision has again recently surfaced in the parties' arguments before the ICJ in Navigational and Related Rights regarding the appropriate interpretation of the term 'commerce' in the 1858 Treaty of Limits between Costa Rica and Nicaragua,[137] and in Aerial Spraying, concerning the interpretation to be given to Article 14(2) of the 1988 UN Narcotics Convention.[138]

A final observation is that object and purpose is essential to the analysis of interpretation over time but is not in itself a complete guide 'for determining when and how a treaty should be capable of change over time'.[139] One problem is the 'multiple object and purpose' debate. Sir Ian Sinclair—whose work was repeatedly relied upon by the AB in US—Shrimp—observed that 'most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.[140] This doubtless underlies the AB's approach in assessing the purposes of the (dynamic, evolutive) general exceptions clause in Article XX separately from the (static) trade liberalisation object and purpose of the GATT as a whole. Indeed, Arato considers US—Shrimp 'usefully illustrates why the question of one or several object(s) and purpose(s) matters'.[141] In acknowledging 'different provisions are included for different reasons, and these reasons should not be subsumed into the general goals of the treaty', the AB paved the way for the 'lonely, but important provision incorporating environmental protection', Article XX(g), 'in a treaty otherwise mostly dedicated to trade liberalisation', to form the evolutive hook for dynamic interpretation of the whole.[142]

V Conclusion

US—Shrimp was a pivotal case for the fledgling dispute settlement system of the WTO, building on the decision in US—Gasoline and consolidating a more nuanced approach to the balancing of trade and environment than had been evident under the GATT 1947. It is widely portrayed in the trade law literature as a 'well-reasoned decision of great importance for the trade/environment controversy' with the AB going 'out of its way to emphasize concern for protection of the environment and respect for both general environmental law and international environmental agreements'.[143] While some view it as providing the foundation

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135 Memorial of Ecuador (Vol I) (28 April 2009) Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia, ICJ, [8.76]

136 Above n 129.

137 Dispute Concerning Navigational and Related Rights (Costa Rica v Nicaragua) [2009] ICJ Rep 213; See e.g.: Counter-Memorial of Nicaragua, Vol I (29 May 2007), [4.3.17]–[4.3.18]; Rejoinder of Nicaragua, Vol I (15 July 2008) [1.11], [3.5], [3.96]–[3.98]

138 Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia) ICJ; Memorial of Ecuador (Vol I) (28 April 2009), [8.76]; Counter-Memorial of Colombia, Vol I (29 March 2010), [8.16], [8.80].

139 J Arato, 'Accounting for Difference in Treaty Interpretation Over Time' in A Bianchi, D Peat and M Windsor (eds), Interpretation in International Law (OUP, 2015) 205, 213.

140 AB Report [130]. See discussion above, text accompanying nn 41-43.

141 Above n 139, 214.

142 ibid

143 T Schoenbaum, 'International Trade and Environmental Protection' (2004), 775.

for justifying trade restrictive measures pursuant to such an agreement under Article XX(b) or (g), a less sanguine view is that the possibility of normative conflict, of competing or even conflicting obligations and objectives, persists within and without the WTO. Nonetheless, from a general international law perspective, the use by the AB of such agreements not binding on the parties as an aid to the interpretation of existing WTO provisions, and the explicit adoption of an evolutive approach to treaty interpretation, remain its most enduring legacy.