

# **A GREEN ROAD TO DEVELOPMENT: ENVIRONMENTAL REGULATIONS AND DEVELOPING COUNTRIES IN THE WTO**

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## INTRODUCTION

The intersection of environmentalism and economic development is of growing interest and renewed prominence—as are the tensions associated with balancing these interests. With the collapse of the Doha negotiations in the summer of 2008, a fractured chasm continues to grow between the developed and the developing worlds.<sup>1</sup> However, the conflicts do not evidence a failure of the international trade regime; instead they signify the growing influence and sophistication of developing states. The rise in influence of these states, however, is viewed by some as a threat to environmental conservation. Skeptical states even proposed alternative international organizations to address the perceived diverging ambitions.<sup>2</sup> Nonetheless, environmentalists should not advocate withdrawing from the trade-environment debate, but instead should encourage sustainable development as an alternative to ostracizing any group of Nations. This paper contends that the World Trade Organization is the proper forum for greening the road to development and bridging the interests of the developed and developing worlds.

The Marrakesh Declaration of 1994<sup>3</sup> affirmed the establishment of the World Trade Organization (WTO), effectively transitioning the

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1. See, e.g., *Collapse of Doha Round of Global Trade Talks Disappointing, Says Ban*, UN DAILY NEWS, July 30, 2008, at 2•3, available at <http://www.un.org/news/dh/pdf/english/2008/30072008.pdf>.

2. Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323, 343–46 (2002).

3. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994), 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

international community from the General Agreement on Tariffs and Trade (GATT)<sup>4</sup> framework to the WTO system.<sup>5</sup> The historic agreement of the WTO recognized the importance of integrating developing countries into the international trade community whilst also preserving the environment.<sup>6</sup> The framers emphasized that sustainable development is a primary objective, though the means thereto should reflect the “needs and concerns” of countries “at different levels of economic development.”<sup>7</sup> Indeed the change in language from GATT 1947 evidences negotiations recognizing “that the objective of ‘full use of the resources of the world’ set forth in the preamble . . . was no longer appropriate to the world trading system of the 1990s.”<sup>8</sup> Though not an explicitly binding obligation, the preamble of the WTO does “add[] colour, texture and shading to [an] interpretation of the agreements annexed to the *WTO Agreement*.”<sup>9</sup> The Marrakesh Agreement also created a permanent WTO Committee on Trade and Environment (CTE) that “contribute[s] to identifying and understanding the relationship between trade and environment in order to promote sustainable development.”<sup>10</sup> In practice, however, the problem of striking a balance between the unique situations of developing countries and preserving environmental values appears, in WTO case law, to be insoluble.

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4. General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1153, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

5. World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations* iii-iv (1999).

6. Marrakesh Agreement, *supra* note 3, at pmb1. “Recognizing that [all parties’] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living . . . and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.” *Id.*

7. *Id.*

8. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 152, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S. – Shrimp*]. Compare “Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living . . . and steadily growing volume of real income and effective demand, *developing the full use of the resources of the world* and expanding the production and exchange of goods,” General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT 1947] (emphasis added), and “while allowing for the *optimal use* of the world’s resources in accordance with the *objective of sustainable development*,” Marrakesh Agreement, *supra* note 3, at pmb1. (emphasis added).

9. *U.S. – Shrimp*, *supra* note 8, ¶ 153.

10. World Trade Organization, *The Committee on Trade and Environment* (‘Regular’ CTE), [http://www.wto.org/english/tratop\\_e/envir\\_e/wrk\\_committee\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm) (last visited Oct. 25, 2009).

Historically, environmental regulations were viewed as a North-South divide between developed and developing countries (or between importing and exporting countries), whereby developing countries were restricted from market access based on environmental regulations. Initially, unilateral action by developed countries improperly overstepped the boundaries of domestic regulations and invaded national sovereignty.<sup>11</sup> Currently, politicians remark that unilateral environmentally friendly measures might even create environmentally harmful competitive advantages, such as pollution havens<sup>12</sup> in developing countries, where only through multilateral agreements could developing countries be brought up to international standards of environmental protection.

Though a World Environmental Organization (WEO)<sup>13</sup> or even an International Environmental Court (IEC)<sup>14</sup> might be a satisfactory forum to detangle the web of Multilateral Environmental Agreements currently in effect, a WEO or an IEC is an unnecessary addition to the global community. Instead, the WTO is adequately structured to accommodate environmental concerns, does reference environmental agreements, and is developing a greener jurisprudence, even with respect to the unique concerns of developing countries. As discussed below, the WTO is, in fact, the optimal system to reconcile environmental protection and development.

Part I explains the establishment of the adjudicating bodies of the WTO and discusses the sources of law from which adjudicators derive duties and responsibilities. Part II explores the textual rules of the WTO system, focusing primarily on GATT article XX(b), XX(g) and the article XX *chapeau*, as the primary exceptions to a Member's

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11. See, e.g., Panel Report, *United States – Restrictions on Imports of Tuna (Tuna I)*, DS21/R – 39S/155 (Sept. 3, 1991) (*unadopted*) [hereinafter *U.S. – Tuna I*].

12. But see Kevin C. Kennedy, *Implications for Global Governance: Why Multilateralism Matters in Resolving Trade-Environment Disputes*, 7 WIDENER L. SYMP. J. 31, 49 (2001) (“[E]conomic studies have shown that tough environmental standards at home do not, standing alone, cause companies to relocate abroad. As Professor Edith Brown Weiss points out, there is little empirical evidence to substantiate the claim that countries with lax environmental standards attract foreign industries that are heavily regulated. Environmental costs are just one factor among many that figure in the decision to make a foreign investment.”).

13. I have selected the acronym WEO, favored by Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323, 330–31 (2002). For a discussion on the World Environment Organization versus Global Environment Organization nomenclature see Sanford E. Gaines, *The Problem of Enforcing Environmental Norms in the WTO and What To Do About It*, 26 HASTINGS INT'L & COMP. L. REV. 321, 324 n.16 (2003). Though stylistic differences in terminology can be heavily debated, it is not within the scope of this paper.

14. See Audra E. Dehan, *An International Environmental Court: Should There Be One?*, 3 TOURO J. TRANSNAT'L L. 31, 52 (1992).

WTO obligations that are frequently invoked in defense of environmental regulations. Part III contextualizes the tensions between development and environmental protection and addresses several major concerns held by some developing countries. Finally, Part IV examines the latest jurisprudence concerning environmental regulations and developing countries, in particular the Appellate Body report of *Brazil – Measures Affecting Imports of Retreaded Tyres*.<sup>15</sup>

### I. WTO COURTS AND SOURCES OF WTO LAW

The WTO was created through contractual agreements among sovereign states, establishing a system of values embodied in rules (the GATT) and a mechanism through which trade disputes could be adjudicated (the courts). The General Agreement of the WTO provides for two adjudicating bodies—the Appellate Body (AB) and the panels.<sup>16</sup> The bodies are not referred to specifically as courts in the WTO agreements, but are “usually referred to in literature as quasi-judicial bodies”<sup>17</sup> with similar functions and bound by the same restrictions as traditional courts. In discussing what law WTO adjudicating bodies have used, there is a fine distinction between sources of law and interpretive elements that inform the parties and WTO courts in adjudication of disputes.<sup>18</sup>

Professor Petros Mavroidis of Columbia Law School clearly illustrated this distinction in the following chart (though it is by no means an exhaustive list):

#### **Sources of Law and Their Interpretative Elements**<sup>19</sup>

<b>Sources of Law</b>	<b>Examples</b>
Covered agreements:	DSU <sup>20</sup> Appendix 1
Incorporated international agreements:	Havana Charter

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15. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil – Tyres*].

16. Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT'L L. 421, 421–22 (2008).

17. *Id.* at 421 n.4.

18. *Id.* at 421.

19. *Id.* at 426.

20. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

	Agreements referred to in: TRIPS <sup>21</sup> Agreement SCM <sup>22</sup> Agreement
Secondary law:	Authoritative Interpretations Amendments Waivers Decisions Recommendations International agreements to which WTO is a party
Implied powers:	Allocation of burden of Proof Amici participation Extended third-party rights

### **Interpretive elements**

*Oxford English Dictionary*

*Travaux préparatoires* of the WTO Agreement

Practice/agreements subsequent to WTO Agreement

GATT panel reports

WTO panel and AB reports

International agreements not incorporated into the WTO Agreement

Acts adopted by various international organizations

Decisions by international courts

Domestic law and practice

Unilateral declarations by WTO members

Customary international law

General principles of law

Doctrine

Primary sources of law for the WTO adjudicating bodies are limited to the covered agreements in the Dispute Settlement Understanding (DSU) and explicitly refer to incorporated

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21. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

22. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [hereinafter SCM].

international agreements.<sup>23</sup> There is an implicit reference in the DSU that the adjudicating bodies are bound under the provisions of the Vienna Convention on the Law of Treaties (VCLT)<sup>24</sup> which “authorizes the use of extra-contractual . . . interpretative elements in order to interpret an international contract.”<sup>25</sup> Though the rules prohibit the Dispute Settlement Body (the body which adopts panel and AB reports) from “add[ing] to, or diminish[ing] the rights and obligations provided in the covered agreements,”<sup>26</sup> the VCLT explains that adjudicating bodies may use extra-contractual provisions and understandings to interpret GATT articles. In fact, the first AB decision under the WTO recognized article 31 of the VCLT “as customary or general international law of interpretation applicable also for WTO dispute settlement, stressing that WTO law should not be ‘read in clinical isolation from public international law.’”<sup>27</sup> Additional sources of general international law include judicial decisions issued by the International Court of Justice; and, though not binding on the parties in the WTO pursuant to VCLT 31.3, any relevant rules of international law are applicable to the contextualization of the obligations within the WTO system, including universally binding principles of customary international law.<sup>28</sup>

Prior to 1998, the panels and AB rarely invoked environmental principles in determining the obligations of states party to a dispute under the GATT. One major issue, however, did arise under GATT article XX(g):<sup>29</sup> whether living animals could be considered an “exhaustible natural resource.” In 1991, the unadopted panel report

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23. See Mavroidis, *supra* note 16, at 427.

24. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

25. Mavroidis, *supra* note 16, at 425; see also DSU, *supra* note 20, at art. 3.2. (“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.”).

26. Mavroidis, *supra* note 16, at 425 (quoting DSU, *supra* note 20, at art. 3.2).

27. Seventh Annual WTO Conference, WTO Dispute Settlement: Current Issues, The GMOs Dispute, May 22–23, 2007, *Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech*, 2 (quoting Appellate Body Report, *U.S. – Standards for Reformulated and Conventional Gasoline*, at 16, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S. – Gasoline*]) [hereinafter *EC-Biotech Conference Report*].

28. VCLT, *supra* note 24, art. 31.3(c) (“any relevant rules of international law applicable in the relations between the parties.”).

29. GATT 1994, *supra* note 4, at art. XX(g) (relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption).

in *U.S. – Tuna I* avoided this discussion altogether by considering instead the extraterritorial nature of the measures adopted by the United States and determined that the U.S. measures were not justified under article XX(g).<sup>30</sup> The panel held that the range of policy exceptions under the GATT should be negotiated through amendments or supplementary provisions to the GATT, not through unilateral measures that impair trade.<sup>31</sup> However, the panel and AB under the newly implemented system of rules and considerations reconsidered this issue in *U.S. – Shrimp* in October 1998.<sup>32</sup>

The AB in *U.S. – Shrimp* “note[d] that the generic term ‘natural resources’ in article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.”<sup>33</sup> It then turned to the 1982 United Nations Convention on the Law of the Sea<sup>34</sup> (UNCLOS) to define jurisdictional rights and determined that together with Agenda 21,<sup>35</sup> the Convention on Biological Diversity,<sup>36</sup> and the Resolution on Assistance to Developing Countries (adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals<sup>37</sup>), natural resources included non-living as well as living resources.<sup>38</sup> The AB also noted that the establishment of the CTE evidenced the intention of the Ministers at Marrakesh to reflect the principles of the Rio Declaration on Environment and Development<sup>39</sup>

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30. *U.S. – Tuna I*, *supra* note 11, ¶ 5.34.

31. *See id.* ¶ 6.3.

32. *US – Shrimp*, *supra* note 8, ¶ 152.

33. *Id.* ¶ 130 n.109 (*citing* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 31 (June 21) (explaining that treaty “interpretation cannot remain unaffected by the subsequent development of law”)).

34. *Id.* ¶ 130 n.110 (“Done at Montego Bay, 10 December 1982, U.N. Doc. A/CONF.62/122; 21 International Legal Materials 1261.”). The United States stated at oral hearing that with respect to fisheries law, the UNCLOS reflects international customary law.

35. *Id.* ¶ 130 n.112 (“Adopted by the United Nations Conference on Environment and Development, 14 June 1992, U.N. Doc. A/CONF. 151/26/Rev.1.”).

36. *Id.* ¶ 130 n.111 (“Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818.”).

37. *Id.* ¶ 130 n.113 (“Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p.15 . . . [and noting] that Malaysia, Thailand and the United States are not parties to the Convention.”).

38. *Id.* ¶ 131.

39. *Id.* ¶ 154 n.147 (“We note that Principle 3 of the Rio Declaration . . . states: ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs . . . .’ Principle 4 . . . states that: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’”).

and Agenda 21.<sup>40</sup> In interpreting article XX(g), the AB looked to several multilateral environmental treaties, including treaties which at least one party to the dispute had not signed or had signed but had not ratified.<sup>41</sup> In effect, *U.S. – Shrimp* confirmed that the WTO system is not self-contained and should not be read in isolation of international principles and developments in the law.

Despite the broader interpretive reach of *U.S. – Shrimp*, the dispute settlement panel in *EC – Measures affecting the Approval and Marketing of Biotech Products*<sup>42</sup> “limited the application of article 31(3)(c) [of the VCLT] to the rules of international law applicable in the relations between *all* the parties to the treaty being interpreted.”<sup>43</sup> The panel’s approach appears to deviate from previous jurisprudence but was not ultimately appealed.<sup>44</sup> Though the relevance of multilateral environmental agreements to WTO disputes is currently under debate, it is indisputable that states jointly-party to any bi- or multilateral agreements may not dodge their respective treaty obligations. Nevertheless, if principles of international environmental law crystallize into customary international law, the principles may be incorporated into the WTO system as a source of law or a strong interpretive element that the dispute settlement system may rely on for purposes of security and predictability.<sup>45</sup> However, even if the adjudicating bodies do not consider the extra-contractual obligations and interpretations, the GATT rules are independently well constructed to accommodate environmental exceptions.

## II. GATT 1994

The GATT provides general exceptions to the two core principles of international trade, article I (Most-Favored-Nation Treatment) and article III (National-Treatment Principle), through invocation of GATT article XX. Though necessary to preserve non-trade values, the general exceptions to GATT obligations are limited

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40. *Id.* ¶ 154.

41. *See, e.g., id.* ¶ 130 n.110•13.

42. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter *EC – Biotech*].

43. *EC-Biotech Conference Report*, *supra* note 27, at 2.

44. *See id.* at 12.

45. DSU, *supra* note 20, art. 3.2 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).



in scope and controversial. Specifically, article XX(b)<sup>46</sup> and article XX(g)<sup>47</sup> are subject to ample dispute and discussion in academic circles and have been the central issues of adjudication in many panel and AB decisions. Despite hammering upon the exceptions, WTO courts have forged a balancing mechanism to equitably weigh the rights and duties of states invoking article XX. While states are permitted to unilaterally enact environmental legislation, they may not mask arbitrary or unjustifiable discrimination or disguised restrictions on international trade in a green agenda.

*A. Article XX(b): Necessary to Protect Human, Animal or Plant Life or Health*

For a measure to fall within the scope of article XX(b), it need only satisfy a two-part analysis: (1) Is the substance of the policy or the measure in question the protection of human animal, or plant life or health? and (2) Is the measure for which the exception is being invoked *necessary* to protect human, animal, or plant life or health? For a measure to be *necessary* and qualify under article XX(b), the measure must be “among the measures *reasonably available* . . . , that which entails the least degree of inconsistency with the other GATT provisions.”<sup>48</sup> Additionally, “a panel must be satisfied that [the measure] brings about a material contribution to the achievement of its objective.”<sup>49</sup> In analyzing the degree of contribution, there is “no requirement under article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health,”<sup>50</sup> instead “[a] risk may be evaluated either in quantitative or qualitative terms.”<sup>51</sup>

In determining whether a measure is necessary within the meaning of article XX(b), “a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s

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46. GATT 1994, *supra* note 4 (“necessary to protect human, animal or plant life or health”).

47. *Id.* (“relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”).

48. GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, BISD 36S/345 (Jan. 16, 1989), available at <http://www.sice.oas.org/dispute/gatt/87tar337.asp>.

49. *Brazil – Tyres*, *supra* note 15, ¶ 151.

50. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 167, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos*].

51. *Id.*

objective, and its trade restrictiveness.”<sup>52</sup> If a measure is deemed necessary, it is then compared to alternatives that are reasonably available while still “providing an equivalent contribution to the achievement of the objective.”<sup>53</sup> article XX(b) provides broad discretion to states to determine what measures are important to protect human, animal, or plant life or health, but limits a State’s ability to unfairly prejudice international trade with overreaching and overly restrictive measures that are not necessary to the stated goals. The exception inherently captures some of the language of the *chapeau* in restricting unnecessary restrictions on trade by requiring the lesser restrictive alternative measures should any be reasonably available. The requirement does not prohibit a State from pursuing policy objectives, nor does it endanger human, animal, or plant life or health, but instead proscribes a State from breaching its general obligations to the GATT in order to economically harm other exporting states.

*B. Article XX(g): Relating to the Conservation of Exhaustible Natural Resources if Such Measures are Made Effective in Conjunction With Restrictions on Domestic Production or Consumption*

Interpreters of article XX(g) are required to look at the relationship “between the measure at stake and the legitimate policy of conserving exhaustible natural resources.”<sup>54</sup> For purposes of article XX(g), the protectionist measures should be “primarily aimed at” conserving exhaustible natural resources such that a “substantial relationship” exists between the rule and conservation.<sup>55</sup> However, “the phrase ‘primarily aimed at’ is not itself treaty language and was not designed as a simple litmus test” for article XX.<sup>56</sup> “Without abandoning the ‘primarily aimed at’ formula, [the WTO Appellate Body] has construed that as requiring only a ‘substantial relationship’ between means and ends.”<sup>57</sup>

The AB in *U.S. – Shrimp* determined that “[i]n its general design and structure . . . [the U.S. measure] is not a simple, blanket

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52. *Brazil – Tyres*, *supra* note 15, ¶ 178.

53. *Id.*

54. *U.S. – Shrimp*, *supra* note 8, ¶ 135.

55. *Id.* ¶ 136 (citing *U.S. – Gasoline*, *supra* note 27, at 19).

56. Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 278–79 (1997) (citing *U.S. – Gasoline*, *supra* note 27, at 19).

57. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739 n.61 (2001).

prohibition . . . imposed without regard to the consequences (or lack thereof) of the mode of harvesting . . . .”<sup>58</sup> It then focused on the design of the measure and determined that the “implementing guidelines . . . [are] not disproportionately wide in [their] scope and reach in relation to the policy objective of protection and conservation . . . . The means are, in principle, reasonably related to the end.”<sup>59</sup>

Furthermore, in citing *U.S. – Gasoline*, the AB held that article XX(g): “. . . is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported [products] but also with respect to domestic [products].”<sup>60</sup> Essentially, the clause requires *even-handedness* in the imposition of restrictions, in the name of conservation of exhaustible natural resources.<sup>61</sup>

The requirements under article XX(b) and (g) are necessarily broad and permit states to implement measures that deviate from the core obligations in the WTO. However, once a measure falls within the scope of one of the general exceptions, the measure must survive the scrutiny of the *chapeau*. “[T]he *chapeau* serves to ensure that Members’ rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under article XX, not as a means to circumvent one Member’s obligations towards other WTO Members.”<sup>62</sup>

### C. Article XX Chapeau<sup>63</sup>

While article XX(b) and (g) have been interpreted broadly, the *chapeau* acts as a sieve, preventing disguised restrictions on international trade from passing through the WTO rules and regulations as justified environmental regulations. The AB in *US – Gasoline* implemented a sophisticated and flexible analysis of article XX, and found that though the U.S. program for gasoline quality regulation was provisionally qualified under paragraph (g), the measures as applied resulted in unjustifiable discrimination.<sup>64</sup> The report

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58. *U.S. – Shrimp*, *supra* note 8, ¶ 141.

59. *Id.*

60. *Id.* ¶ 143 (citing *U.S. – Gasoline*, *supra* note 27, at 20-21).

61. *Id.*

62. *Brazil – Tyres*, *supra* note 15, at 215 (citing *U.S. – Gasoline*, *supra* note 27, at 22).

63. In international law, the *chapeau* is an introductory text appearing in a treaty that broadly defines its principles, objectives, and background.

64. Gaines, *supra* note 57, at 759.

would not turn on whether the trade measure addressed an environmental issue covered by article XX(b) or (g) (*Tuna – Dolphin I*), or even whether the effect of the measure on environmental quality was direct or indirect (*Tuna – Dolphin II*). The major issue would become whether the challenged government had applied a measure within the scope of (b) or (g) in a way that resulted in ‘arbitrary or unjustifiable discrimination’ contrary to the conditions in the *chapeau* to article XX.<sup>65</sup>

More importantly, the *chapeau* embodies the customary norm of good faith and permits a Member to act so long as that Member does not unreasonably abuse its rights under the WTO.<sup>66</sup>

The *chapeau* does not explicitly describe measures that constitute arbitrary, unjustifiable or disguised restrictions on international trade, but the AB has provided examples that do constitute impermissible restrictions on trade. The AB in *U.S. – Shrimp* explained that a uniform standard otherwise acceptable for domestic regulations breaches principles of international relations if one Member requires another Member to “adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.”<sup>67</sup> Additionally, the AB called for flexibility in a regulatory program and ultimately concluded that the U.S. certification program lacked transparency and violated principles of due process.<sup>68</sup>

Even though many protectionist measures may be provisionally justified under article XX(b) and (g), WTO courts have fashioned a counterweight to prevent overuse of the General Exception. The Court has stated that “the purpose and object of the introductory clauses of article XX is generally the prevention of ‘abuse of the exceptions . . . “<sup>69</sup> and do not permit states to cloak arbitrary or unjustifiable restrictions on international trade with protectionist measures otherwise permissible under article XX(b) and (g). In effect, the *chapeau* of article XX<sup>70</sup> reigns in broad and sweeping measures designed to preserve non-trade values that violate State WTO obligations.

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65. *Id.* at 759-60.

66. *U.S. – Shrimp*, *supra* note 8, ¶ 158.

67. *Id.* ¶ 164.

68. *Id.* ¶¶ 180-81.

69. *Id.* ¶ 151 (citing *U.S. – Gasoline*, *supra* note 27, at 22).

70. “Subject to the requirement that measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade . . . .” *Id.* ¶ 113.

However, this should not be viewed as an affront to non-trade values, but as an equitable balance of rights and duties preserved in the structure of article XX. Members are permitted to enact legislation and pursue regulations that have reasonable trade restrictive effects so long as the measures do not violate the *chapeau* of article XX. Nevertheless, many developed countries have attempted to conceal trade protectionist measures under green legislation, leading developing countries to challenge the measures in the WTO courts. It should not be assumed that developing countries do not share similar environmental ambitions, but instead that they rely on established WTO panels to determine whether “green legislation” is in fact an invasive or disguised restriction on international trade.

### III. TENSIONS BETWEEN DEVELOPMENT AND ENVIRONMENTAL PROTECTION

The majority of environmental regulation conflicts in WTO case law are initiated by developing countries against more restrictive measures adopted by developed countries. Developing countries are concerned that green protectionist measures are merely disguised barriers to international trade. The concerns of developing countries fall into three broad categories: Abuse of Power (unilateral measures “give governments greater power and opportunity in the free-trade era to protect their own industries against foreign competition”<sup>71</sup>); Sovereignty (conflicts between extraterritorial regulations and national sovereignty); and Economic and Social Costs (a lack of understanding in developed countries “of the domestic environmental, social, and economic context of developing countries . . .”<sup>72</sup>). Though the concerns are reasonable, the WTO system is well equipped to balance the interests of environmental protection and development and even encourages sustainable development as a primary objective in international trade.

#### A. Abuse of Power

A major concern held by many developing countries is that the ability to institute unilateral environmental measures gives greater

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71. Yuhong Zhao, *Trade and Environment: Challenges After China's WTO Accession*, 32 COLUM. J. ENVTL. L. 41, 62 (2007).

72. *Id.*

power to developed states. Eco-imperialism,<sup>73</sup> a term characterizing developed countries' imposition of environmental values upon developing countries, has become a rallying call against unilateral environmental measures. Because the measures frequently impose stricter standards for environmental protection, developing countries maintain that the gaps in environmental standards have resulted in "green barriers" to trade.<sup>74</sup>

To address the concern for divergent standards, the WTO implemented the Sanitary and Phytosanitary Agreement (SPS Agreement)<sup>75</sup> and the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>76</sup> The TBT and SPS Agreements "acknowledge the importance of harmonizing standards internationally so as to minimize the risk that sanitary, phytosanitary, and other technical standards will become trade barriers."<sup>77</sup> Standard harmonization not only benefits developing countries by introducing internationally sound research programs, but also strengthens the multilateral framework for solving global environmental problems.<sup>78</sup> Developing countries are no longer hindered by complicated atypical programs that would burden trade infrastructure and hamper international trade because a collection of reliable international standards will provide notice to states entering the international market. Because all countries will be limited to internationally recognized and approved standards, a State may not abuse the more vulnerable infrastructure and economy of a developing country.

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73. See generally John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992) (discussing various aspects of eco-imperialism).

74. See Zhao, *supra* note 71, at 56–57.

75. Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1994, 1867 U.N.T.S. 493 [hereinafter SPS].

76. Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter TBT].

77. Zhao, *supra* note 71, at 57. "Both agreements are included among the Multilateral Agreements on Trade in Goods annexed to the 1994 Marrakesh Agreement . . . . SPS Agreement Art. 3.1 states: 'To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement . . . . TBT Agreement Art. 2.6 states: 'With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they have either adopted, or expect to adopt, technical regulations . . . .' *Id.* at n.67.

78. See *id.* at 57.

TBT article 2.4 and SPS article 3.1 both require that Members base any technical, sanitary, or phytosanitary measures on international standards. article 3.1 of the SPS also limits the inquiry to existing international standards and article 3.2 explicitly states that any sanitary or phytosanitary measure that is based on an existing international standard shall be deemed necessary to protect human, animal, or plant life or health, and presumed consistent with the SPS Agreement and the GATT. However, note that the AB in *EC Measures Concerning Meat and Meat Products* cautioned that international standards and guidelines are not to be read as binding norms.<sup>79</sup>

The TBT, however, broadens the inquiry to any relevant international standards or parts thereof and includes standards which are not yet in existence so long as their completion is imminent. The AB in *EC – Trade Description of Sardines* determined that standards implemented by international standardizing bodies do not need to be based on consensus, because TBT Annex 1.2 omitted any requirement of consensus in the text.<sup>80</sup> The AB then went on to explain that in order to be relevant, the standards would have to bear upon, relate to, or be pertinent to the regulation.<sup>81</sup> Next, the relevant standard should be the main constituent or fundamental principle of the regulation imposed.<sup>82</sup> It is then incumbent upon the complainant to show that the standard relied on by the respondent Member is both ineffective and inappropriate.

Unlike GATT article XX, TBT article 2.2 imposes affirmative obligations on a contracting Member, requiring that technical regulations “not be more trade-restrictive than necessary to fulfil [sic] a legitimate objective, taking account of the risks non-fulfilment [sic] would create.”<sup>83</sup> The preamble of the TBT requires that no measure be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between [countries] where the same conditions prevail or a disguised restriction on international trade.”<sup>84</sup> Essentially, TBT article 2.2 constructs a similar framework embodied in the relationship between the GATT article XX listed exceptions

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79. Appellate Body Report, *EC Measures Concerning Meat and Meat Products*, ¶ 165, WT/DS26/AB/R (Jan.16, 1998) [hereinafter *EC – Hormones*].

80. Appellate Body Report, *EC – Trade Description of Sardines*, ¶ 227, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC – Sardines*].

81. *See id.* ¶ 232.

82. *Id.* ¶ 245.

83. TBT, *supra* note 76, art. 2.2.

84. SPS, *supra* note 76, pmb1.

and the *chapeau*. The legitimate objectives for the purposes of the TBT are not limited as they are in GATT article XX; though an objective pursued by any multilateral environmental agreement could arguably be considered legitimate within the context of the TBT.

Nevertheless, article 2 of the TBT will not govern a measure that is not a technical regulation but merely a technical standard. Under the TBT, a technical regulation is a document that identifies a group of products, stipulates or provides product characteristics (explaining that the characteristics of a product include any objectively definable feature or quality), and requires mandatory compliance.<sup>85</sup> Thus, technical regulations within the TBT receive stricter obligations than standards or conformity assessment procedures, because technical regulations require mandatory compliance and therefore result in a *de facto* trade embargo for noncompliance with the regulation.

Additionally, the TBT and SPS Agreements provide for technical assistance to facilitate the implementation of article provisions in the agreements. article 11 of the TBT explains that developing countries may request advice “on the preparation of technical regulations.”<sup>86</sup> article 4 of the SPS Agreement introduces the concept of “equivalence” as a reasonably acceptable alternative measure to complying with Sanitary and Phytosanitary Measures. Paragraph 8 of the Decision on Equivalence provides further that Members shall give “full consideration to requests by another Member, *especially a developing country Member*, for appropriate technical assistance to facilitate implementation of article 4.”<sup>87</sup> The supplemental agreements strengthen the WTO’s commitment to facilitating technological and intellectual capital investment in developing countries. Equivalence and technical assistance encourages technologically advanced and sustainable development whilst recognizing the special circumstances of developing countries.

*B. Extraterritorial Regulation & Sovereignty: U.S. – Restrictions on Imports of Tuna & U.S. – Import Prohibition of Certain Shrimp and Shrimp Products.*

A related concern to the abuse of power is the issue of national sovereignty. Trade restrictive measures for the purposes of

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85. *EC – Asbestos*, *supra* at note 50, ¶¶ 67-68.

86. TBT, *supra* note 76, art. 11.1.

87. SPS Comm., *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, ¶ 8, G/SPS/19 (Oct. 24, 2001) (emphasis added).



environmental protection may have extra-territorial effects and thus infringe on national sovereignty by imposing values of developed countries upon developing countries. The WTO courts are mindful of international law limitations on policy-based national legislation and have not disregarded the principle of sovereignty in dispute resolution.<sup>88</sup> However, the WTO Agreement is also committed to sustainable development and permits a State to implement legislation as part of national policy programs for the purpose of environmental protection. What the courts need to decide, therefore, is where to draw the line between policy-based exceptions to the general WTO obligations and invasive extra-territorial legislation that breach the rights of other member states. For measures based on environmental protection, the WTO courts have three significant but divergent opinions which address the issue.

1. U.S. – Tuna I & U.S. – Tuna II<sup>89</sup>

In the Pacific Ocean, yellowfin tuna often swim beneath schools of dolphins.<sup>90</sup> Frequently, while harvesting tuna with purse seine nets, dolphins are trapped in the nets and die (unless otherwise released).<sup>91</sup> The U.S. Marine Mammal Protection Act (MMPA) decreed that dolphins were entitled to protection from harmful fishing techniques and set standards for American fishing fleets and for countries whose fishing boats catch yellowfin tuna in the eastern tropical areas of the Pacific Ocean.<sup>92</sup> If a country exporting tuna to the United States could not prove to trade inspectors that the tuna fishing methods met standards set out in U.S. law, the United States would refuse entry of the tuna products.<sup>93</sup>

In January 1991, Mexico requested that the contracting parties of GATT 1947 establish a panel to address U.S. restrictions on tuna imports.<sup>94</sup> Mexico argued that “the embargo provisions in MMPA . . . were inconsistent with the general prohibition of quantitative restrictions under article XI . . .” and that the MMPA “established

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88. See, e.g., *U.S. – Tuna I*, *supra* note 11, ¶¶ 6.2-6.4.

89. Panel Report, *U.S. – Restrictions on Imports of Tuna (Tuna II)*, GATT Doc. DS29/R (June 16, 1994) [hereinafter *U.S. – Tuna II*].

90. WTO, Mexico etc. versus US: ‘tuna-dolphin’, [http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm) (last visited Dec. 23, 2009).

91. *Id.*

92. *Id.*

93. *Id.*

94. *U.S. – Tuna I*, *supra* note 11, ¶ 1.1.

discriminatory specific conditions for a specific geographical area, in violation of article XIII . . . .”<sup>95</sup>

Though the panel decision was not ultimately adopted (the panel was convened prior to the Marrakesh Agreement in 1994), the findings did acknowledge the deep concern for environmental protection. The panel accepted the conservation goals of the U.S. policy but found the import ban nevertheless violated core provisions of the GATT.<sup>96</sup> The panel held that articles XX(b) and (g) limited a State to protecting the environment within the jurisdiction of its government and not extra-territorially.<sup>97</sup>

In 1992, the European Union filed its own complaint in *U.S. – Tuna II*.<sup>98</sup> The second panel report addressed the same U.S. measures and the report was circulated in 1994. The second panel “found no basis in the GATT or its negotiating history for such a jurisdictional limitation on article XX . . . the panel concluded that the U.S. tuna embargo did not [violate GATT] . . . because it did not protect the dolphin resource directly but operated by putting trade pressure on other governments to change their policies with respect to dolphin protection.”<sup>99</sup>

The second panel abandoned the implied jurisdictional limitations for environmental measures in article XX but required that measures qualifying under article XX(g) must be ‘primarily aimed at’ the conservation of a natural resource.<sup>100</sup>

## 2. U.S. – Shrimp

Many species of sea turtles have been identified and are distributed around the world in subtropical and tropical waters. Though the turtles migrate between foraging and nesting grounds, much of their lives are spent at sea.<sup>101</sup> Because of increased human contact with sea turtles, many turtle populations have been directly (for their meat, shells, and eggs) or indirectly (through incidental capture, habitat destruction, or water pollution) harmed. In response,

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95. *Id.* ¶ 3.1(a).

96. *See U.S. – Tuna I*, *supra* note 11, ¶¶ 6.3-6.4.

97. *See id.* ¶ 5.28.

98. *U.S. – Tuna II*, *supra* note 90, § I.

99. Gaines, *supra* note 57, at 757.

100. *Id.* For a discussion on the current test under *GATT 1994*, art. XX(g), *see generally* Schoenbaum, *supra* note 57 (discussing the current test under *GATT 1994*, art. XX(g)).

101. WTO, India etc versus U.S.: ‘shrimp-turtle’, [http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm) (last visited Dec. 23, 2009).

the United States passed the U.S. Endangered Species Act of 1973<sup>102</sup> and listed five species of sea turtles that passed through U.S. waters as endangered or threatened. The Endangered Species Act prohibits the “taking” of protected sea turtles in U.S. territory. The Act specifically required U.S. shrimp trawlers to use “turtle excluder devices” (TEDs) in their nets to reduce the likelihood of unlawful “takings” of sea turtles during trawling expeditions. Section 609 of U.S. Public Law 101-102, enacted in 1989, directly addressed the importation of harvested shrimp that adversely affected protected sea turtles and prohibited their sale in the United States. Furthermore, section 609 required shrimp harvesting nations to certify a regulatory program that would either reduce their incidental taking rate to levels comparable to United States or prove that their harvesting did not threaten protected turtles.<sup>103</sup>

Between October 1996 and January 1997, India, Malaysia, Pakistan and Thailand issued a joint request to “establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products.”<sup>104</sup>

The AB in *U.S. – Shrimp* reaffirmed its rejection of the traditional GATT approach of *U.S. – Tuna I & II*, and relied on the *U.S. – Gasoline* report in recognizing the *chapeau* of article XX as the critical test for a trade measure to qualify as an exception to the general obligations.<sup>105</sup>

Neither the appellant nor the appellee asserted exclusive jurisdiction over the migratory turtles, at least not while the turtles were freely swimming in their natural habitat, but the endangered species of turtles at stake were known to pass through waters within the jurisdiction of the United States.<sup>106</sup> The Appellate Body concluded, without addressing the issue of jurisdictional limitations, by determining that there was a “sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of article XX(g).”<sup>107</sup> However, the AB noted that the United States had failed in good faith to negotiate

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102. Endangered Species Act of 1973, 16 U.S.C. §§ 1533–1544 (2006).

103. WTO, India etc versus U.S.: ‘shrimp-turtle’, [http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm) (last visited Dec. 23, 2009).

104. *U.S. – Shrimp*, *supra* note 8, ¶ 1.

105. *See id.* ¶¶ 118-19.

106. *Id.* ¶ 133.

107. *Id.*

multilateral solutions and compromises prior to enacting the legislation.<sup>108</sup>

But, when the implementation panel revisited the U.S. measure in *U.S. – Import Prohibition on Certain Shrimp and Shrimp Products, Recourse to article 21.5 of the DSU by Malaysia*,<sup>109</sup> the panel and AB found that the U.S. had in good faith attempted to negotiate an international agreement with Malaysia (the complainant party) and also included a flexible certification program that would have enabled the U.S. to consider the particular conditions prevailing in other member states.<sup>110</sup> The AB therefore concluded that the measure was neither arbitrary nor unjustifiable within the meaning of the *chapeau* of article XX,<sup>111</sup> and that the U.S. was under no obligation to conclude an international agreement but merely an obligation to negotiate with the parties in the dispute for the protection of sea turtles.<sup>112</sup>

In international law, sovereignty is no longer an impenetrable wall. The *U.S. – Shrimp* decision signifies the AB's decision to depart from heavy reliance on traditional international law rhetoric and clarifies the states' rights under the general exceptions to the obligations of the GATT. Because the WTO Agreement is an international contract among states, the WTO courts are increasingly reluctant to rely on national sovereignty as an absolute shield to the responsibilities of member states.<sup>113</sup> Measures may need to be enacted to deal with certain international concerns such as global climate change because some member states will be first to experience the consequences of significant atmospheric changes. Also, because many environmental measures are inherently trade restrictive, the WTO System cannot be seen as a suicide pact that prohibits Members from taking any precautionary measures or instituting any regulations; rather, the regulations must be properly constructed to prevent disguised or unnecessary restrictions on trade. In a time of global financial crisis, reactive and inflammatory rhetoric should not prompt protectionist legislatures to abstain from fulfilling their state's obligations to the international system—similarly with

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108. *Id.* ¶ 171.

109. Appellate Body Report, *U.S. – Import Prohibition on Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001).

110. *Id.* ¶ 153.

111. *See id.* ¶ 105.

112. *Id.* ¶ 123.

113. *See, e.g., U.S. - Shrimp, supra* note 8.

global climate change, a Member should rely on international negotiations and consensus before imposing restrictions that invade the domestic legislatures of another Member State. With an eye towards international negotiations or multilateral environmental agreements, WTO courts may properly weigh the rights and duties of member states to determine equitable but reasonable solutions to the trade disputes.

### *C. Economic and Social Costs*

It is debatable whether developed countries are the “proper arbiters [of] how social, economic, and environmental matters are to be dealt with . . . .”<sup>114</sup> In fact, WTO courts, as previously discussed, have discouraged unilateral efforts of environmental regulation, as have many international environmental bodies.<sup>115</sup> Unilateral implementation results in ineffective and disparate regimes for solving a global phenomenon. Additionally, unilateralism encourages a downward spiral where countries are free to individually invoke regulatory measures in the guise of environmental protection resulting in a tangled web of disparate regimes that do not actually address the problems of environmental degradation. Because the effects of environmental pollution are not necessarily felt immediately, nor are they always localized to the source of pollution, it is incumbent upon the international community to negotiate multilateral solutions to jointly combat environmental degradation.

Multilateralism is important for at least three reasons.<sup>116</sup> First, unilateralism is not legally viable under customary international law or under the GATT 1994 and the WTO multilateral trade agreements.<sup>117</sup> Second, multilateralism is optimal to protect resources in the global commons, as unilateral approaches rarely resolve the underlying problem.<sup>118</sup> And finally, “multilateralism, in contrast to unilateralism, is a rules-based, not power-based approach to international relations.”<sup>119</sup> Relying on multilateral negotiations and efforts will allow Members to properly proceed in the face of

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114. Zhao, *supra* note 71, at 62.

115. Most notable has been the adoption of principles featuring trade and the environment in the Rio Declaration on Environment and Development at the 1992 United Nations Conference on Environment and Development (UNCED). See UNCED, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992).

116. Kennedy, *supra* note 12, at 68.

117. *Id.*

118. *Id.*

119. *Id.*

uncertainty. Though Members are not required to wait for scientific certainty before acting, a Member should not hastily respond to environmental problems without some understanding of the economic and social costs of unilaterally imposed measures that could create a global patchwork of different environmental standards and essentially freeze international trade.

#### IV. RECONCILIATION THROUGH SUSTAINABLE DEVELOPMENT

The Preamble to the Marrakesh Agreement recognizes that all Members should be permitted to expand the production of and trade in goods and services, and allows for use of the world's resources, but explains that the use be “in accordance with the *objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . .*”<sup>120</sup>

The objective of sustainable development is the merging of environmental values and economic development—however, previous WTO cases suggested that environmental values did not accommodate the “needs and concerns” of developing countries.<sup>121</sup> In 2006, *Brazil – Tyres* became the first WTO dispute initiated by a developed country addressing a trade-restrictive measure introduced by a developing country that was also designed to achieve environmental goals. In previous cases, the AB restricted developed country WTO Members from imposing their environmental standards on developing country WTO Members without first considering the conditions of those members or their ability to comply with the standards in question.<sup>122</sup> “The Appellate Body has thus recognized that some environmental measures originate from states that have high standards of environmental protection, reflecting both the strength of those states’ economies and their corresponding technological and financial ability to adhere to such standards.”<sup>123</sup> In *Brazil – Tyres*, the critical issue is a mirror image of previous cases: a developing country sought to impose restrictions on developed countries for environmental and health concerns.

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120. Marrakesh Agreement, *supra* note 3, at 9 (emphasis added).

121. See, e.g., *U.S. – Tuna I*, *supra* note 11.

122. Kevin R. Gray, *International Decisions: Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/AB/R, *World Trade Organization Appellate Body, December 3, 2007*, 102 AM. J. INT’L L. 610, 612 (2008) (citing *U.S. – Shrimp*, *supra* note 8, ¶¶ 161-63).

123. *Id.*

The case involved a Brazilian import ban on used tires, leading to a challenge by the European Community (EC). The rationale underlying the ban prompted the EC to call for a WTO panel to determine whether the measures were an improper invocation of article XX and were unduly restrictive. As part of Brazil's obligations to fellow members of the Mercado Coman del Sur (Mercosur), Brazilian courts exempted member states of the Mercosur Agreement from the import ban.<sup>124</sup> The discretionary exemption and court injunctions were the basis for the AB's decision determining that the ban arbitrarily discriminated between Mercosur and non-Mercosur States. It concluded that the import ban could not discriminate between States and suggested that Brazil implement an absolute ban on imported retreaded tires to come into compliance with its WTO obligations.<sup>125</sup> The language of the decision suggests, however, that developing countries could implement internal regulations as part of a comprehensive plan of environmental protection and preservation.

The AB did agree, however, with the panel's conclusion that the measures were provisionally justified under article XX(b). The measures were necessary because Brazil identified health and environmental risks associated with used tire stockpiles because of environmental health dangers caused by fire (“[t]ire fires can produce massive quantities of mercury, benzene, and other cancer-causing poisons”<sup>126</sup>) and increased incidents of mosquito-borne diseases (discarded tire stockpiles are optimal mosquito breeding grounds because of water stagnation). On appeal, the EC argued that the accumulation of used tires was a matter of poor disposal and collection, and ultimately poor management.<sup>127</sup> The AB disagreed and reasoned that some “public health and environmental problems are so complex that they can be addressed only through numerous interacting measures, including an import ban . . . .”<sup>128</sup> In fact, substituting alternative measures “would undermine the total policy by ‘reducing the synergies between its components, as well as its total effect’ . . . .”<sup>129</sup> It concluded that trade measures could be part of a State's larger environmental management scheme, within the

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124. *Brazil – Tyres*, *supra* note 15, ¶ 242.

125. *Id.* ¶ 258.

126. Gray, *supra* note 122, at n.2.

127. *See Brazil – Tyres*, *supra* note 15, ¶ 157.

128. Gray, *supra* note 122, at 613 (citing *Brazil – Tyres*, *supra* note 15, ¶ 151).

129. *Id.* (citing *Brazil – Tyres*, *supra* note 15, ¶ 172).

sovereign discretion of the WTO Member, and outside the purview of WTO dispute settlement.<sup>130</sup>

Protection of the environment is a vital and important interest of WTO members. To determine the ability of a State to implement suggested alternative measures, the AB considered the unique characteristics of Brazil as a developing country and did not accept the EC's assertion that there are less restrictive alternatives reasonably available.<sup>131</sup> Because it would not be economically viable to implement the alternatives in Brazil, the suggested measures are not in fact available. "The Appellate Body ruled that a country's 'capacity . . . to implement remedial measures that would be particularly costly, or would require advanced technologies' . . . can be relevant to whether the alternatives are reasonably available."<sup>132</sup> The AB further clarified that an environmental regime does not require the elimination of risks but merely that the restrictive measure was "apt to produce a material contribution to the achievement of its objective."<sup>133</sup>

The *Brazil – Tyres* decision emphasized the Marrakesh Agreement's recognition of countries "at different levels of economic development" and their respective "needs and concerns" regarding pursuit of a comprehensive program of sustainable development.<sup>134</sup> This case effectively reconciled the tension between development and environmental protection specifically with respect to waste production. *Brazil – Tyres* signifies the WTO's commitment to sustainable development and its respect for individualized programs of environmental protection under broader multilateral agreements addressing environmental protection and preservation. The WTO is on its way to greening its jurisprudence with the assistance of the international community.

#### CONCLUSION: CONSOLING THE LORAX<sup>135</sup>

The Seussian paradigm in *The Lorax*<sup>136</sup> illustrates the friction between development and environmentalism.

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130. *Id.* at 613.

131. See *Brazil – Tyres*, *supra* note 15, ¶ 209.

132. Gray, *supra* note 122, at 613 (citing *Brazil – Tyres*, *supra* note 15, ¶ 171).

133. *Brazil – Tyres*, *supra* note 15, ¶ 151.

134. Marrakesh Agreement, *supra* note 3, at 9.

135. For a broader discussion, see generally Armin Rosencranz, *Lex & The Lorax: Enforcing Environmental Norms under International Law: The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT'L & COMP. L. REV. 309 (2003).



The Once-ler and Lorax each crusade for competing values, but this is not necessarily the world developing today. Though tensions exist between competing trade values, multilateral agreements are generally the accepted course of action to reconcile differences and encourage global response to environmental degradation. In order to effectively engage the international trade community, environmental interests should participate in national and international trade policy debates and should not ostracize governments or disregard the WTO system.<sup>137</sup> Establishing an independent body or court will not necessarily be internationally accepted, thereby limiting its jurisdiction, and may be seen as a competing body hampering development and trade.<sup>138</sup> Because any environmental regulations will inherently have trade restrictive effects, a multilateral environmental agreement should be conscious of the framework and obligations under the WTO System and work within that system to achieve desirable results; otherwise a measure that is provisionally justified under a multilateral environmental agreement may be struck down for wide-reaching economically unsustainable effects. Moreover, few environmental agreements have incorporated an enforcement mechanism or dispute settlement body that is already accustomed to the interwoven values and policy rationales underlying trade restrictive measures.

The WTO, because of its amenability and application of interpretive sources of law, including multilateral environmental agreements, is an optimal arena for encouraging sustainable development. Moreover, the reasonable concerns of developing countries are adequately addressed in the WTO system, and the GATT rules provide exceptions for environmental protection, but limit disguised restrictions to international trade. Finally, the WTO accounts for the conditions of developing countries and does not require installation of or investment in unreasonable measures in those countries. The WTO may not be the *most* protective organization of non-trade values, but it *is* the optimal system to integrate competing concerns and advocate on behalf of sustainable development.

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136. THEODOR SEUSS GEISEL (DR. SEUSS), *THE LORAX* (Random House 1999) (1971).

137. Gaines, *supra* note 13, at 384.

138. Current WTO membership is numbered at 150 States, encompassing nearly 95% of world trade. See Ian F. Fergusson, Congressional Research Service, CRS Report for Congress: The World Trade Organization: Background and Issues, at 2 (May 9, 2007), available at <http://www.nationalaglawcenter.org/assets/crs/98-928.pdf>.