Redefinition and Elaboration of an Obligation to Pursue International Negotiations for Solving Global Environmental Problems in Light of the WTO Shrimp/Turtle Compliance Adjudication between Malaysia and the United States

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INTRODUCTION

In contrast to two previous Tuna/Dolphin disputes1 resolved under the auspices of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization's (WTO) jurisprudence in the 1998 Shrimp/Turtle decision2 demonstrated its willingness to embrace common environmental concerns based on the mandate of sustainable development. The WTO Appellate Body acknowledged that U.S. environmental legislation banning shrimp products harvested in a manner harmful to sea turtles may qualify for the paragraph (g) exception clause in

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Article XX\(^3\) of the GATT 1994.\(^4\)

The Appellate Body's decision was not a complete victory for the United States, however. In spite of recognizing that the U.S. trade restriction was a justified national environmental policy, the Appellate Body found that the manner in which the United States had applied its import ban was inconsistent with its obligations under the WTO.\(^5\) Specifically, the Appellate Body found that the trade embargo did not meet the requirement in the chapeau of Article XX\(^6\) forbidding unjustifiable or arbitrary discrimination, mainly because the United States failed to engage in international negotiations with shrimp exporting countries in Southeast Asia before imposing the embargo.\(^7\) Therefore, although the U.S. trade embargo on shrimp products was considered consistent with paragraph (g), the failure of the United States to prevail in the Shrimp case seemed to indicate that the WTO would not accept the use of unilateral trade measures aimed at environmental protection if they were unaccompanied by multilateral efforts directed at the same end.

The concept regarding a duty for countries to seek international negotiations is not new. The Appellate Body incorporated this mandate into the Shrimp case by equating the failure of the United States to pursue negotiations with Asian nations with unjustifiable discrimination. The extent of such a mandate to negotiate, however, remained undefined. For instance, the Appellate Body did not specify whether the U.S. import ban should be terminated immediately or could be maintained pending its fulfillment of further obligations to remove unjustified or arbitrary discrimination. Additionally, given the dynamic and con-

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3. General Agreement on Tariffs and Trade, Oct. 30, 1947 [hereinafter GATT], art. XX, 55 U.N.T.S. 194, 262. Paragraph (g) pertains to the preservation of natural resources.

4. Shrimp AB Report, supra note 2, at paras. 125–45. See text accompanying notes 21–33 infra (discussing the major legal arguments presented in the case).

The Appellate Body's flexible interpretation of this provision was welcomed by the United States and most environmental non-governmental organizations (NGOs), but predictably upset shrimp exporting countries in South-East Asia. See Sabrina Shaw & Risa Schwartz, Trade and Environment in the WTO: State of Play, 36 J. WORLD TRADE 129, 147–49 (2002).


6. GATT art. XX, supra note 3. The elements specified in the chapeau of Article XX of the GATT 1994 are designed to prevent a member from abusing or misusing the exception clauses provided in the same provision. See also notes 34–51 infra and accompanying text for legal analysis on the linkage of a duty to pursue international negotiations with the avoidance of unjustifiable discrimination set in the chapeau of GATT Article XX.

7. See Shrimp AB Report, supra note 2, at paras. 166–72.
tinuing character of negotiations, it was unclear when the U.S. duty to negotiate could be said to be fulfilled.

These issues were raised by Malaysia in a subsequent complaint to the WTO requesting an examination of U.S. compliance with the Appellate Body rulings in the Shrimp case.\(^8\) Malaysia contended that since the United States should have negotiated with relevant members before imposing the trade ban in the first place, it should now lift its embargo pending completion of the international trade talks.\(^9\) By contrast, the United States took the position that its action was justifiable and thus could be maintained as long as it had fulfilled the obligation provided in the chapeau of Article XX.\(^10\) Malaysia's complaint against the United States in the Shrimp 21.5 case proved a good opportunity for the WTO to define and elaborate the legal implications of the duty to negotiate, in view of the progress made between the United States and shrimp exporting countries of South-East Asia in the conservation and management of sea turtles.

Part I of this Article discusses how an obligation to seek multilateral negotiations and consensus in dealing with transboundary environmental problems has been fairly confirmed in the GATT/WTO regime. Part II reviews the secondary dispute between Malaysia and the United States. Part III aims to evaluate the legal reasoning delivered in the WTO's compliance decisions, particularly those illuminating the relations between the duty to negotiate and a provisionally justified trade measure. Part IV analyzes how a country imposing the trade ban should comply with the obligation to engage in international negotiations and cooperation.

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10. See id. at para. 3.102(c).
I. THE RECOGNITION OF A DUTY TO SEEK INTERNATIONAL NEGOTIATIONS IN DEALING WITH TRANSBOUNDARY ENVIRONMENTAL ISSUES UNDER THE WTO/GATT'S JURISPRUDENCE

The requirement to enter into cross-boundary negotiations in dealing with global environmental problems is not novel. In terms of the consistency of unilateral trade measures for environmental purposes under the GATT rules, the concept was substantially employed in the 1991 GATT Tuna/Dolphin decision. In deciding, inter alia, whether the U.S. import ban against Mexico's tuna products met the "necessity" requirement specified in the exception paragraph (b) of GATT Article XX, the GATT panel found the measure unnecessary mainly on the ground that the United States failed to pursue other alternatives reasonably available to it. The panel indicated that rather than trade restrictions, the preferred course would have been to seek international negotiations with a view toward engaging in concerted efforts to protect dolphins whose activities have a transboundary nature. Such an idea reflected a fundamental mandate in contemporary international law governing the environment, namely the principle of international cooperation in coping with global environmental issues. As Professor Kiss observed, "the whole of international environmental law is based on this principle." The duty to cooperate, indeed, is a customary element of international law that is reflected in a variety of instruments.

11. See generally Tuna I, supra note 1.
12. See id. at para. 5.28.
13. See id.
Although the GATT did not adopt the Tuna/Dolphin decision, that decision's preference for multilateral solutions over unilaterally imposed trade-related measures has either influenced or been incorporated into subsequent international instruments. The influence can best be witnessed in some of the principles expressed in the 1992 Rio Declaration on Environment and Development. In response to increasing concern over the conflict between free trade and environmental protection, Principle 12 of the Rio Declaration demanded mutual support between trade and environmental regimes. In addition, it embraced a preference for multilateral solutions in dealing with transboundary environmental problems. The text provides:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

The legal implications embodied in the Principle, irrespective of its soft-law character, proved to be a beneficial reference in supplementing later disputes that needed to take into account the best interests of global community over environmental concern.

Faced with a wave of criticism over the GATT's promotion of trade liberalization at the expense of environmental merits,
the WTO, the successor of the GATT, found it necessary to incorporate environmental concerns into its system. As a result, the Preamble to the Marrakesh Agreement not only addressed the significance of free trade and market access, but also highlighted the value of sustainable development. Apart from the GATT 1994, Article XX (b) and (g), several WTO agreements, including the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Subsidies and Countervailing Measures (SCM), also provide certain exceptions for national policy in pursuing legitimate environmental goals.

Nevertheless, whether the trade regime would pay due regard to environmental interests, however, could not be determined until a relevant dispute occurred. Then, in 1996, the United States invoked its national legislation, Section 609 of Public Law 101-162, prohibiting the importation of the shrimp products from Southeast Asian countries whose shrimp harvesting methods led to an incidental killing of marine turtles. Certain countries challenged the U.S. embargo at the WTO, alleging unfair trade practices. This dispute provided an excellent opportunity to examine the extent to which the newly created multilateral trade organization can achieve harmony in upholding free trade rules for exporting members on the one hand, while showing its respect for national environmental policy on the other.

Like the previous Tuna dispute, the main battlefield in the Shrimp cases rested on the interpretation of GATT Article XX, focusing on the environmental exceptions in paragraphs (b), (g), and its chapeau. Again, the dispute focused on whether there was a geographic or jurisdictional limitation on paragraphs (b)

and (g), or whether a member could invoke those exceptions to protect environmental interests beyond its territory. The shrimp-exporting countries adopted the same strategy as that of Mexico in the 1991 Tuna case, arguing that those exception clauses could only be invoked for protecting national interests. Since the sea turtles to be killed by Southeast Asian fishing practices were located beyond the borders of the United States, they maintained that the U.S. import restrictions did not qualify for an exception under either paragraph (b) or (g). By contrast, the United States insisted that these provisions contained no such geographic limitation. The Appellate Body eventually avoided dealing with the justification of extraterritorial application of environmental trade measures by the United States. Rather, considering the highly migratory nature of sea turtles that may be under the jurisdiction of the United States, the tribunal recognized that there was a sufficient linkage between the species and the United States. In effect, the trade ban on shrimp products based on Section 609 was considered to be a measure of “conserving natural resources” under Article XX (g).

Since the U.S. trade measure survived the test of paragraph (g), the Appellate Body moved to an examination of the consistency of the application of Section 609 with the requirements embodied in Article XX’s chapeau. In contrast with the Tuna cases, a duty to negotiate was not invoked in dealing with the validity of the U.S. shrimp import ban under the respective clauses. Rather, the requirement became a useful tool for illuminating the chapeau’s implications. In pondering whether the ecological trade restrictions constituted unjustified discrimination, the Appellate Body delivered the message that seeking international negotiations on a bilateral, regional or multilateral basis should play a critical role in such a judgment. The message is evident from the following passage:

27. See Tuna I, supra note 1.
29. See id. at paras. 3.176, 3.179, 3.181.
30. See id. at paras. 3.184–186.
31. See Shrimp AB Report, supra note 2, at para. 133.
32. See id. at para. 133.
33. Id. at paras. 125–45.
34. See id. at para. 134.
35. See id. at paras. 146–86.
Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.36

According to the Appellate Body's observation, the connection of the U.S. failure to negotiate with the element of unjustifiable discrimination has three components. First, although Section 609 requires the Executive Branch to engage in negotiations,37 the WTO dispute settlement organ found that "[a]part from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles . . . which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress."38 Second, it fully recognized that the nature of the conservation of marine turtles that requires multilateral cooperation should guarantee the linkage of an obligation to negotiate with the determination of an alleged unjustifiable discrimination.39 It also noted that a number of relevant international instruments, in particular Principle 12 of the Rio Declaration,40 have mandated such obligations.41

36. Id. at para. 166 (emphasis added).
39. See id. at para. 168.
41. See Shrimp AB Report, supra note 2, at para. 168. The Appellate Body declared:

[T]he protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations . . . Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development . . .
Third, the practices of the United States regarding the differential implementation of negotiations were an indication of unjustifiable discrimination. The evidence showed that the United States did not make serious efforts to negotiate and conclude any international mechanisms with those Asian nations that export shrimp products to the United States before imposing the import ban.\textsuperscript{42} By contrast, it had negotiated seriously with five South and Central American countries and reached a regional treaty (known as the Inter-American Convention) for the protection and conservation of sea turtles.\textsuperscript{43} In summary, the Appellate Body concluded:

The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.\textsuperscript{44}

Overall, the Appellate Body's ruling has arguably demonstrated that the normal rule requiring negotiations with respect to international environmental law has been squarely applied in the context of the Article XX chapeau condition forbidding unjustifiable discrimination.\textsuperscript{45} It may also be inferred by the above jurisprudence that, in order to avoid unjustified discrimination, a duty to seek negotiations aimed at reaching consensual and multilateral solutions has to be fulfilled.\textsuperscript{46}

The WTO's jurisprudence may not be appreciated by authors who deem it unreasonable to link the avoidance of unjustifi-
fiable discrimination to multilateral actions, disfavoring the use of other non-trade elements in interpreting the chapeau's provision. For example, Sanford Gaines asserts that "[t]here is no inherent connection between unilateralism and discrimination. Establishing international negotiations as a precondition to the invocation of Article XX unreasonably stretches the concept of "justifiability" into sensitive areas of national policy discretion. Multilateralism may be preferable, but it is not obligatory."47

Nevertheless, the Appellate Body's eagerness to adopt international environmental rules should be consistent with the provisions on treaty interpretation in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that require taking into account customary norms of international law,48 as stipulated in the Vienna Convention on the Law of the Treaties.49 Further, there seems no ground for prohibiting the trade regime from using other non-WTO/GATT rules, which may be beneficial to the illumination of its norms.

Subsequently, the WTO Panel, in assessing the conformity of the U.S. implementation measures with the Appellate Body's original rulings in its recent Shrimp Recourse Report, also endorsed the applicability of the environmental mandate to the disputes between the parties. By reference to the Vienna Convention regarding the interpretation of treaties, it observed:

We also have evidence in the context of Article XX showing that preference must be given to a multilateral approach in terms of protection of the environment. In this respect, we note the content of the 1996 Report of the CTE, where the CTE endorsed and supported "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature." Insofar as this report can be deemed to embody the opinion of the WTO Members, it could be argued that it records evidence of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3(b) of the Vienna Convention) and as such should be taken into account in the interpretation of the provisions concerned. However, even if it is not to be considered as evidence of a subsequent practice, it remains the expression of a common opinion of Members and is therefore relevant in assessing the scope of the chapeau of Article XX.

48. See DSU, supra note 8, art. 3.2.
Finally, we note that the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to this dispute. Article 31.3(c) of the Vienna Convention provides that, in interpreting a treaty, there shall be taken into account, together with the context, "any relevant rule of international law applicable to the relations between the parties". We note that, with the exception of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body in paragraph 168 of its Report.50

The Panel's tendency actually proves to be in line with the general views of most writers who are in favor of a broader approach of applying non-trade rules as long as the practice is in conformity with the Vienna Convention.51

In addition, it is submitted that there seems to be no reasonable basis that prevents the WTO from applying other areas of norms as long as they prove supportive and helpful in solving the dispute that is required to take into account non-trade interests, such as environmental concerns. As the Appellate Body observed in the Gasoline case, the device of the chapeau is to ensure that exceptions in GATT Article XX are not to be abused or misused.52 It also mentioned in the Shrimp ruling that "[t]he location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary as the facts making up specific cases differ."53 In its Recourse Report, the Panel correctly added, "the position of the line itself depends on the type of measure imposed and on the particular circumstance of this case."54

50. Shrimp 21.5 Panel Report, supra note 8, at paras. 5.56–57 (citations omitted) (emphasis added).
53. Shrimp AB Report, supra note 2, at para. 159.
54. Shrimp 21.5 Panel Report, supra note 8, at para. 5.51.
Therefore, the method of interpretation of the chapeau's requirements should be as flexible and dynamic as possible. The legal implications embodied in the chapeau of GATT Article XX should also be analyzed in a way that conforms to specific situations in individual cases. In the writer's opinion, the approach adopted by the WTO jurisprudence can be generally upheld and honored.

II. OVERVIEW OF THE FURTHER DISPUTE REGARDING THE IMPLEMENTATION OF THE APPELLATE BODY'S RULINGS OF SHRIMP/TURTLE DECISION

In the original Shrimp dispute, the Appellate Body finally concluded that the U.S. shrimp embargoes, though provisionally justified under Article XX (g), nonetheless failed to meet the requirements of the chapeau of Article XX and therefore were not justified under Article XX of the GATT 1994. It recommended that the Dispute Settlement Body (DSB) request the United States to bring its trade policies into conformity with the obligations of the United States under that Agreement. In order to comply with the recommendations and rulings of the DSB, under a mutually agreed upon thirteen-month reasonable period of time, the United States started to take certain actions. These included revising its Guidelines for Implementation of Section 609, and some efforts to engage in consultations with Asian shrimp exporting nations. These latter actions prove most relevant to this study.

On the other hand, the United States still maintained its shrimp import prohibition pursuant to Section 609, and there was no sign that the ban would be removed. Malaysia argued that the continuation of the trade restrictions was not consistent with the DSB's rulings, and requested the DSB to establish a Panel to examine the legality of the U.S. implementation. It requested the Panel to find that the import restrictions should be lifted and that the United States should allow the importation of shrimp products in an unrestricted manner.

56. Id. at para. 188.
57. Shrimp 21.5 Panel Report, supra note 8, at para. 1.2.
58. Id. at paras. 2.22–32.
59. Id. at paras. 3.68–75.
60. Id. at para. 1.4.
61. Id.
sponse, the United States argued that this proceeding was to decide whether it had already complied with the rulings and recommendations of the DSB in light of its modification of the application of Section 609.62

Since the main argument relates to whether and to what extent the U.S. modification and adjustment met the conditions set in the chapeau of Article XX, it is clear that the fulfillment of a duty to negotiate then becomes one of the key arguments raised by both parties. For better or worse, the nature and application of such mandate has been further illuminated by the compliance reports of the Panel and the Appellate Body.63 In view of the contentions by both parties and the rulings of the WTO organs, some relevant issues relating to international negotiations are worth examining.

III. THE STATUS OF AN OBLIGATION TO NEGOTIATE FOR ENVIRONMENTAL PURPOSE IN THE CONTEXT OF ARTICLE XX OF THE GATT 1994 AND ITS RELATIONSHIP WITH A PROVISIONALLY JUSTIFIED MEASURE IMPOSED UNILATERALLY

As mentioned above, the Appellate Body considered the application of Section 609 to be unjustified discrimination mainly because the United States failed to fulfill the mandate to conduct international negotiations with the complaining nations before imposing the import prohibition on shrimp products on a unilateral basis.64 How this finding will be interpreted, specifically the term “before,” will influence the outcome regarding whether the provisionally justified import ban must be removed at the first stage. The issue also involves the relationship between the efforts to seek multilaterally negotiated solutions and unilaterally applied trade embargoes. It is beyond doubt that, in the general sense, WTO jurisprudence in dealing with transboundary environmental problems such as dolphin or turtle conservation favors multilateral solutions over unilateral meas-

62. Id. at para. 3.4.
64. Shrimp AB Report, supra note 2, at para.166.
The legal effects that would be produced by such an approach, however, cannot easily be found in the ruling. The overall comprehension of the Appellate Body's findings may lead to four possible propositions, which underline differential relations and interactions between multilateral and unilateral actions. The following order is based on the degree of supremacy of the multilateral approach over unilateral measures:

No unilateral measure should be taken or maintained without first resorting to international negotiations. Before the unilateral imposition of an import ban, efforts to negotiate must be undertaken or even exhausted. Upon the violation of the mandate, a previously imposed measure should be removed accordingly.

Before an international consensus or agreement has been attained, states should refrain from taking unilateral measures to address transboundary environmental problems.

Any unilateral measure should be based on an international consensus. In effect, a multilateral consensus may subsume or override a unilateral one. The unilateral measure may be deemed illegal upon inconsistency with the will of international decisions.

Unilateral measures may operate in tandem with international negotiations. The measure may be maintained as long as international negotiations can be engaged later or eventually. As a result, the term "before," as spelled out in the Appellate Body's ruling, carries virtually no legal consequence.

The first three arguments highlight the priority, or even superiority, of multilateral approaches over unilateral ones, but generate different legal effects. In contrast, the last proposition does not consider international efforts superior to nationally imposed measures. Consequently, such measures may continue to survive even though efforts to negotiate multilaterally were not pursued in advance of imposing the unilateral action.

In its argument in the Shrimp 21.5 dispute, Malaysia's strategy was to persuade the Panel to accept the first proposition—the one that is most skeptical of unilateral actions. Malaysia urged the Panel to accord great weight to the mandate to pursue negotiations—so much weight, in fact, that the United States's provisionally-justified trade ban could not be maintained because the measure contravened an obligation to pursue

65. See Ni, supra note 16, at 28–32; Shrimp 21.5 Panel Report, supra note 8, at para. 5.58.
international negotiations in advance. Malaysia further contended that subsequent efforts made by the United States could not alter the existence of an import prohibition being imposed before new actions were taken by the United States.

Malaysia also advanced arguments that mirror the second possible proposition indicated above: that states should refrain from taking unilateral measures to address transboundary environmental problems before an international consensus or agreement has been attained. Referring to a variety of international instruments and declarations cited by the Appellate Body, Malaysia maintained it was a "corollary" to the belief of the need for a preliminary international consensus that:

No unilateral actions to deal with environmental measures may be imposed before any international consensus is reached. ... In the absence of any mutually agreed international standard to conserve and protect sea turtles, recognition of each country's sovereign right to manage and maintain its own conservation programme for sea turtles should be respected. This is consonant with the principle of national sovereignty which is accorded recognition in several multilateral environmental treaties. ... 68

The United States, however, disagreed vehemently with Malaysia's contentions. If the rule proposed by Malaysia were

66. Shrimp 21.5 Panel Report, supra note 8, at paras. 3.99–100. As Malaysia pointed out, another reason to support the lifting of the import prohibition was that "an alternative course of action was reasonably open to the United States for securing the policy goal of its measure." Id. at para. 3.99. Malaysia based this argument on the fact that the United States has participated in the development of an Indian Ocean and Southeast Asian Regional Agreement on the Conservation of marine turtles. Australia, in its third-party submission, also expressed the view that alternatives to the U.S. import prohibition were available. See id at para. 4.6. Overall, more than half of third-party submissions were of the view that the U.S. import ban should be lifted in order to comply with the recommendation of the DSU. Id. at paras. 4.26, 4.32, 4.64, 4.110.

The United States, for its part, may take the position that such a trade restriction may be instrumental in urging Malaysia to negotiate and honor international programs seriously. This view is supported by some scholars, who argue that unilateral trade measures are able to serve as powerful leverage aimed at changing environmental practices of other nations. Sanford Gaines, for example, examines the case of the successful Inter-American Convention and concludes that the unilateral and non-consensual nature of Section 609 was an impetus for "changing policy preferences in the targeted countries and fostering the political climate for a successful international negotiation." Gaines, Disguised Restriction, supra note 47, at 816; see also Sanford Gaines, Foreword: Integrating Environmental Considerations into the World Trading System, 13 STAN. ENVTL. L.J. I, xiv (1994). See generally Edith Brown Weiss, Environment and Trade as Partners in Sustainable Development: A Commentary, 86 AM. J. INT'L L. 728, 732 (1992).

67. Shrimp 21.5 Panel Report, supra note 8, at para. 3.100.

68. Id. at para. 3.104.
sustained, the United States argued, the consequence would be the evisceration of the Article XX(g) exception.69 The United States further recalled that Section 609's import ban has provisionally met the requirement of Article XX(g), even though at that point no negotiations had been initiated.70

The United States, for its part, articulated a position that corresponded with the fourth possible proposition: that unilateral measures may operate in tandem with international negotiations. It rejected Malaysia's argument that internationally negotiated efforts must be conducted prior to the imposition of an import ban, arguing instead that it should be allowed to maintain its previously imposed prohibition on shrimp imports.

First, since the import ban had already taken effect, the United States pointed out that it had become impractical (and indeed, impossible) for it to travel back in time to conduct negotiations with the complaining countries before resorting to the unilateral measure.71 On this point, the European Community (EC), in its third-party submission, agreed with the United States.72 Second, the DSU set a thirteen-month reasonable period of time during which the United States had to comply with the recommendations of the DSU. The United States was of the opinion that it was its right under the DSU to maintain the import restrictions during such a period.73 Finally, the United States asserted that the Appellate Body's report did not specifically request the lifting of the import prohibition, but rather simply directed the United States to apply Section 609 in a manner that avoided unjustified discrimination.74 The United States claimed it had addressed the discriminatory aspects of its implementation of the ban and thus was not required to remove the ban itself.75

Australia adopted a position in the Shrimp 21.5 case that reflected the third possible proposition: that a multilateral consensus may subsume or override a unilateral one, and that the unilateral measure may be deemed illegal upon inconsistency with the will of international decisions. Impressed with the progress of international negotiations which produced the

69. Id. at para. 3.105.
70. Id. at para. 3.106.
71. Id. at para. 3.102(a).
72. Id. at para. 3.103.
73. Id. at para. 3.102(b).
74. Id. at para. 3.102(c).
75. Id. at para. 3.100.
Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of Indian Ocean and South-East Asian Region (MOU), Australia was of the opinion that international efforts would generate better and more comprehensive results than unilateral trade embargoes. Further, Australia's overall reading of the Appellate Body's rulings led it to conclude that measures based on "consensual and multilateral procedures" are consistent with the United States's obligation to conform to the prohibition against unjustified discrimination. The United States opposed Australia's assertions by saying that the Appellate Body had made no such finding. Further, it replied that from a practical point of view, "such conclusions would be illogical and untenable, since, depending on the position of the Parties to the negotiation, it may not be possible to reach consensus."

Of the four possible propositions regarding the interaction between multilateral and unilateral approaches, the Panel seemed inclined to favor the fourth proposition, the one which is least skeptical of unilateral actions taken to promote conservation. The Panel did acknowledge that, pursuant to paragraph 166 of the Shrimp Appellate Body Report, the United States had an obligation to seek international negotiations "before" the enforcement of a unilaterally designed import prohibition. Nevertheless, instead of clarifying the legal implications of the term "before," the Panel in the Shrimp 21.5 decision simply endorsed the U.S. understanding, stating that:

This does not mean that, in terms of implementation, the United States would have to go back in time to correct the original error, something obviously impossible. The question of the conformity with the DSB recommendations and rulings has to be assessed on the basis of the actions taken by the United States subsequent to the adoption of the Panel and the Appellate Body reports.

In doing so, the Panel missed a chance to clarify the meaning of "before." Indeed, the critical issue facing the Panel was whether or to what extent it should conduct an interpretation of the word "before" specified in the original Appellate Body Re-

76. Id. at paras. 3.88, 4.5.
77. Id. at para. 4.6.
78. Id. at para. 4.21.
79. Id. at para. 3.110.
80. Id. at para. 3.111.
81. Id. at para. 5.63, citing Shrimp AB Report, supra note 2, at para. 166.
82. Shrimp 21.5 Panel Report, supra note 8, at para. 5.66 n.211 (emphasis added).
port. The previous ruling arguably generated some legal implications, assuming the Appellate Body deliberately employed the term. This question did not relate to the feasibility of the “travelling back” problem, but whether, in the Appellate Body’s decision, it had intended to confirm the priority of international negotiations over unilateral measures even when the unilateral measure had been applied before multilateral actions were conducted. If the Appellate Body did have such an intention, the implication would be that a previously imposed import ban cannot be maintained until international negotiations have been pursued.

Using a technical problem as the vehicle for interpreting the term may obscure the Panel’s real task and make its determination less convincing and irresponsible. Even if the term “before” did not, in fact, carry any legal substance, it remained the responsibility of the Panel to explain why the term was a redundancy in its original context. So far, it has failed to do so.

Further, the Panel seemed not to support propositions two and three, under which unilateral measures would be more subject to multilateral controls. This implies that unilateral measures might run independently of international frameworks, considering that “if the Appellate Body had intended to imply that no measure could be adopted outside the framework of an international agreement on the protection and conservation of sea turtles, it would not have continued with its review of the unilateral measure applied pursuant to Section 609.”83

Overall, the Panel was relatively sympathetic to the United States’s contentions. As such, it declined to confirm the superiority of multilateral approaches over unilateral means, despite considering unilateral measures less acceptable.84 Unfortunately, the Appellate Body did not expressly deal with this critical issue in its review of the Panel Report, probably because the Appellant, Malaysia, did not explicitly appeal the ruling of the Panel concerning the interpretation and application of the term “before.”85

From another perspective, however, it seems reasonable to assume that the WTO should have honored the supremacy of a multilateral approach to the extent that the import prohibition should be lifted if a plain interpretation of the DSB’s ruling of the 1998 Shrimp decision had been adopted. The logical proce-

83. Id. at para. 5.64.
84. Id. at para. 5.59.
dure for U.S. compliance might involve three steps. First, it should have terminated the embargo. Second, it should have started to engage in international negotiations. Finally, after the fulfillment of this obligation, it enjoyed the discretion to decide whether the imports ban should be reinstated or not. Then, the provisionally justified measure may have secured eventual justification under the GATT. Since more comprehensive programs have marched toward maturity and should be more effective in addressing the conservation of sea turtles, it seems difficult to understand why the ban that merely deals with a limited problem in the overall picture of sea turtle conservation, namely the method of shrimp harvesting, must be maintained at any cost.

IV. THE OBLIGATION TO SEEK INTERNATIONAL NEGOTIATIONS: HOW FAR SHOULD IT GO?

A. OBLIGATION TO NEGOTIATE VS. OBLIGATION TO CONCLUDE AN INTERNATIONAL AGREEMENT

The work of international negotiations for a particular purpose is a dynamic task, involving a continuous process in which a number of parties are bound to participate and to share the burden or even the risk in order to secure a satisfactory result. Normally, an ideal accomplishment would be the conclusion of an international agreement, either in the form of a non-binding instrument or a binding treaty or convention. For instance, the Inter-American Convention was the result of successful multilateral negotiations for the conservation and management of marine turtles on a regional basis.

86. Apart from the element of international negotiations, however, the United States must meet other obligations such as the removal of arbitrary discrimination in order to be in full compliance with the conditions set forth in the GATT's Article XX chapeau. See id. at paras. 5.26–37.
87. See Australia's third party submission in id. at paras. 4.1–26.
88. As Australia noted, international solutions have started to "address the wide range of threats to sea turtles, including habitat destruction, direct harvesting and trade, fisheries by-catch, pollution and other man-induced sources of mortality." Id. at para. 4.5.
89. See Shrimp 21.5 Panel Report, supra note 8, at para. 5.67.
90. See BIRNIE & BOYLE, supra note 15, at 10–11.
91. The Inter-American Convention entered into force on May 2, 2001. See Shrimp 21.5 Panel Report, supra note 8, at para. 5.71. As of May 15, 2001, nine countries have become parties, including Brazil, Costa Rica, Ecuador, Honduras,
In the context of the *Shrimp* decision, however, it was unclear whether the Appellate Body intended to require the conclusion of an international agreement in order for the U.S. import ban to be valid, or whether the United States was merely obliged to make good faith efforts to negotiate with the complaining members. The Appellate Body's decision states, in pertinent part, that "the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles" was the reason why the U.S. trade measure was found to be in violation of the chapeau of Article XX.92

Malaysia favored an expansive construction of the mandate to negotiate, arguing that the original Appellate Body's ruling on the fulfillment of conditions of the chapeau of Article XX demand the conclusion of such an international agreement before any trade-restricting measure could be imposed.93 Such a construction would have imposed a greater burden on the United States when implementing trade-restricting measures. Malaysia did not, however, specify a solid legal ground for sustaining its contention. It simply claimed that the argument was "[a] corollary to its submissions on the need for preliminary international consensus. . . . particularly borne out by the references cited by the Appellate Body to the various international instruments and declarations."94 From Malaysia's perspective, each country should retain the sovereign right to follow its own conservation plan until an international consensus can be reached.95

The United States responded to Malaysia's claim by presenting several arguments. First, with regard to the general design and structure of Section 609, the United States argued that the Appellate Body had not objected to a construction of the law that merely mandates the initiation of sea turtle conservation negotiations with other countries, but "does not contemplate the completion of such negotiations . . . ."96 Second, in reading the

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Footnotes:
94. Id. at para. 3.104.
95. Id.
96. Id. at para. 3.106.
ruling of the Appellate Body specified above, the United States continued to argue that it only had to "pursue" negotiations and "nowhere did the Appellate Body purport to impose a requirement that the parties to such negotiations must reach an agreement." Finally, the United States made a powerful claim in justifying a narrow interpretation of such ruling:

The United States can control, and is responsible for its actions. Thus, the United States can take steps to meet the requirements of the cha-paeu by expending efforts to negotiate. However, the United States cannot control, and cannot be held responsible, for the actions of its negotiating partners. It would not make sense if the issue of US compliance turned on the actions of other WTO Members, including the complaining parties. This would be the precise result if, as Malaysia suggests, the United States must reach agreement with other parties before applying the measure.

The Panel in the Shrimp 21.5 decision did not devote too much ink to its justification of why the United States was not required to conclude an agreement in order to comply with the ruling of the Appellate Body. Rather, it favored the position of the United States simply by examining the plain meaning of the text of the Shrimp decision. It found that

From the terms used, it appears ... that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms 'with the objective'; it would have simply stated that an agreement had to be concluded.

The Appellate Body in the Shrimp 21.5 decision generally upheld the Panel ruling, elaborating upon the Panel's original finding and developing additional reasons for crediting the United States's argument. The Appellate Body recognized the nature of concluding a multilateral agreement, an obligation which could not be achieved through the efforts of a single country. Instead, the Appellate Body ruled that the task "[r]equires the cooperation and commitment of many countries." Hence, to require the conclusion of a multilateral agreement as a condition of avoiding unjustifiable discrimination, in its view, would result in an unreasonable consequence. It correctly found that such requirement "would mean that any country party to the

97. Id. at para. 3.114 (emphasis added).
98. Id. at para. 3.117 (emphasis added).
99. See supra note 92 and accompanying text.
100. Shrimp 21.5 Panel Report, supra note 8, at para. 5.64 (emphasis added).
101. Id. at para. 123.
negotiations with the United States, whether a WTO Member or not, \textit{would have, in effect, a veto} over whether the United States could fulfill its WTO obligations.\footnote{Id. (emphasis added).} In addition, it managed to reinforce the conviction that no requirement for concluding an agreement had been imposed upon the United States, although it did find that the character of the tasks to protect and conserve the highly migratory species of sea turtles needs concerted and cooperative efforts. The Appellate Body recalled the significance of Principle 12 of the Rio Declaration, which proclaims, \textit{"[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus."}\footnote{Id. at para. 124 (citing Rio Declaration, supra note 15).} Nevertheless, the Appellate Body was not convinced that such a mandate had the effect of requiring that a multilateral agreement be concluded:

\begin{quote}
Clearly, and \textit{"as far as possible"}, a multilateral approach is strongly preferred. Yet it is one thing to prefer a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the conclusion of a multilateral agreement as a condition of avoiding \textit{"arbitrary or unjustifiable discrimination"} under the chapeau of Article XX. We see, in this case, no such requirement.\footnote{Shrimp 21.5 AB Report, supra note 63, at para. 124; cf. Gaines, \textit{Disguised Restriction}, supra note 47, at 820. Although Gaines generally agrees with the position of the Appellate Body on the extent of such negotiations, he questions the necessity of adding the phrase \textit{"in this case."} Id. \textit{"That last qualifier, \textit{in this case}, leaves one with the uneasy feeling that the preference for multilateralism remains so strong that unilateral measures affecting transnational or global resources outside the context of any systematic effort to promote a multilateral solution, will, \textit{ipso facto}, not qualify under Article XX."} Id.}
\end{quote}

\section*{B. Serious Negotiations in Good Faith}

According to the Panel, the obligation to pursue international negotiations does not go so far as to require the conclusion of an agreement. This decision may inevitably lessen the burden on the United States in order to comply with the rulings of the DSB. Nevertheless, the Panel struck a balance by incorporating some flavor and substance into such duty. It considered that serious good faith efforts should be an essential standard in determining the fulfillment of such mandate.

The introduction of the concept of good faith\footnote{The concept of good faith consists of the following elements: \textit{"(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of rea-}} into the task

\begin{thebibliography}{9}
\footnotesize
\item 102. \textit{Id.} (emphasis added).
\item 103. \textit{Id.} at para. 124 (citing Rio Declaration, \textit{supra} note 15).
\item 104. \textit{Shrimp 21.5 AB Report, supra} note 63, at para. 124; \textit{cf.} Gaines, \textit{Disguised Restriction, supra} note 47, at 820. Although Gaines generally agrees with the position of the Appellate Body on the extent of such negotiations, he questions the necessity of adding the phrase \textit{"in this case."} \textit{Id.} \textit{That last qualifier, \textit{in this case}, leaves one with the uneasy feeling that the preference for multilateralism remains so strong that unilateral measures affecting transnational or global resources outside the context of any systematic effort to promote a multilateral solution, will, \textit{ipso facto}, not qualify under Article XX."} \textit{Id.}
\item 105. \textit{The concept of good faith consists of the following elements: \textit{"(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of rea-}
\end{thebibliography}
of international negotiations represents a peculiar contribution of the Panel in the elaboration of the substance of the mandate. The Panel in the Shrimp 21.5 case was of the view that the concept could be embodied in the alleged "serious efforts" mainly by referring to the finding of the Appellate Body that "the chapeau of Article XX is but one expression of the principle of good faith." As to how the concept can be applied in the task of serious efforts, the Panel particularly considered the application of good faith as a process of conducting dynamic and continuous efforts. Overall, the Panel stressed the significance of good faith as follows:

The notion of good faith, in relation to the issue under examination in this section, implies a continuity of efforts which, in our opinion, is the only way to address successfully the issue of conservation and protection of sea turtles through multilateral negotiations, as demonstrated by the circumstances of this case. We therefore consider that, even though the Appellate Body only refers to "serious efforts", the notion of good faith efforts implies, inter alia, that the seriousness of the United States' efforts in this case must be assessed over a period of time. It is this continuity of efforts that matters, not a particular move at a given moment, followed by inaction.

This approach signaled that the fulfillment of such efforts to negotiate cannot simply be evaluated at a single moment, but rather must be analyzed from a long-term perspective which considers both the nature and duration of respective multilateral negotiations.

As mentioned above, the United States did engage in negotiations with some American countries, resulting in the formation of the Inter-American Convention. Impressed with such an achievement, the Panel was convinced that it could provide a vivid model for any further negotiations on similar issues. It used the term "benchmark" in describing the status of the Con-

sonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." BLACK'S LAW DICTIONARY 701 (7th ed. 1999).

106. Shrimp 21.5 Panel Report, supra note 8, at para. 5.60; see also Shrimp AB Report, supra note 2, at para. 158. The Appellate Body regarded the principle of good faith as a general principle of law or a general principle of international law, which should be taken into account in the interpretation of the requirements in the chapeau of Article XX according to the Vienna Convention on the Law of Treaties, Article 31(3)(c)).

107. Shrimp 21.5 Panel Report, supra note 8, at para. 5.60 (emphasis added); see also paras. 5.66 n.212, 5.67, 5.88, 6.1 (emphasizing the continuing nature of serious good faith efforts, which should be conducted continuously and reassessed at any time until the satisfactory conclusion of the negotiations).

108. See supra note 43 and accompanying text.
vention in relation to other ongoing negotiations. It further pointed out that the Convention was not required "in the field of protection of sea turtles, but as an example of an action which would meet the criteria of the chapeau of Article XX . . . " The benchmark, the Panel contended, would help gauge whether U.S. efforts to conduct further negotiations with South-East Asian nations met the requirement of serious good faith. Irrespective of differential situations embodied in the process of individual multilateral negotiations, the Panel, while agreeing that factual circumstances could "influence the duration of the process or the end result," concluded that "any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention." It is true that, under the Panel's jurisprudence, a member is not necessarily required to conclude an agreement during the process of engaging in negotiations to avoid unjustified discrimination. In the present case, however, the element of good faith that had been displayed in the conclusion of Inter-American Convention did imply that the United States was obliged to take the benchmark as a model in further negotiations, which should aim at reaching a binding agreement.

The Appellate Body generally approved the approach of the Panel, which invoked the Inter-American Convention as a useful reference with respect to making serious good faith efforts in negotiation. The organ further specified the reasons why it endorsed the equation of the negotiation resulting in the Inter-American Convention with serious good faith efforts. In contrast to the Panel, the Appellate Body made a relatively in-depth analysis on the significance of the Convention:

First, we used the Inter-American Convention to show that "consensual and multilateral procedures are available and feasible for the establishment of programmes for the conservation of sea turtles." In other words, we saw the Inter-American Convention as evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States. Second, we used the Inter-

110. Id. at para. 5.74 (emphasis added).
111. Shrimp 21.5 Panel Report, supra note 8, at para. 5.71.
112. Id.
113. Id. at para. 5.67.
114. According to the Panel, "[t]he Inter-American Convention is evidence that it is feasible to negotiate a binding agreement imposing the adoption of measures comparable to those applied in the United States." Shrimp 21.5 Panel Report, supra note 8, at para. 5.75.
American Convention to show the existence of "unjustifiable discrimination." The Inter-American Convention was the result of serious, good faith efforts to negotiate a regional agreement on the protection and conservation of turtles, including efforts made by the United States. In the original proceedings, we saw a clear contrast between the efforts made by the United States to conclude the Inter-American Convention and the absence of serious efforts on the part of the United States to negotiate other similar agreements with other WTO Members. We concluded there that such a disparity in efforts to negotiate an international agreement amounted to "unjustifiable discrimination."\(^{116}\)

On the other hand, the Appellate Body, in response to Malaysia's complaints over the term "benchmark," did recognize that such terminology might not be appropriate.\(^{117}\) Yet the term, it believed, should not obscure the true implications of the Panel's approach that the treaty was not deemed as an absolute legal standard as Malaysia presumed.\(^{118}\) Rather, it served as a basis for a comparison between the efforts of the United States to negotiate the Inter-American Convention and negotiations with other groups of exporting members.\(^{119}\)

It was true that the Appellate Body in its original Shrimp decision repeatedly pointed out the failure of the United States to take into account the situation of each exporting country in the application of Section 609.\(^ {120}\) The Panel thus contended that the standard of taking into account the circumstance prevailing in the other negotiating countries should be included in examining whether the United States's efforts on negotiations met the requirement of serious good faith. The Panel recognized "[t]he very raison d'être of a negotiation is to allow all parties to try to have their situations taken into account and that adding such a requirement could seem to be superfluous."\(^{121}\) Nonetheless, the Panel based the inclusion of the requirement on the following perception:

We consider, however, that this requirement is essential in the particular context at issue. We note that Section 609 has been applied to the whole world since 1996. Since then, any country exporting shrimp to the United States and entering into negotiations has done so while being subject to the requirements of Section 609. The Appellate Body noted that the original measure, in its application, was more concerned

\(^{116}\) Id. at para. 128 (footnotes omitted).
\(^{117}\) Id. at para. 130.
\(^{118}\) Id.
\(^{119}\) Id. (emphasis added).
\(^{120}\) Shrimp AB Report, supra note 2, at paras. 161, 163–64, 172, 177.
\(^{121}\) Shrimp 21.5 Panel Report, supra note 8, at para. 5.73.
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. We consider that, in that context, negotiators may have found themselves constrained to accept conditions that they may not have accepted had Section 609 not been applied. Even if Section 609 as currently applied takes more into account the existence of different conservation programmes, it can still influence the outcome of negotiations. *This is why the Panel feels it is important to take the reality of international relations into account and considers that the standard of review of the efforts of the United States on the international plane should be expressed as follows: whether the United States made serious good faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries.*

As previously mentioned, a lack of sufficient negotiation by the United States with those South-East Asian countries, although such an omission had constituted unjustified discrimination, may not result in a ruling that the provisionally justified import ban on shrimp products must be lifted. Nevertheless, it remains a continuing obligation for the United States to make serious good faith efforts in the negotiation of an agreement. Although the United States would be provisionally entitled to implement the measure, namely the trade restriction, the Panel’s ruling was inclined to condition the eventual justification of maintaining the import prohibition on the satisfaction of making ongoing serious good faith efforts to reach a multilateral agreement. Moreover, the Panel concluded that the ongoing obligation may be subject to further control under Article 21.5 of the DSU. This suggests that if efforts at negotiation cease, any complaining party may have further recourse to Article 21.5 of the DSU for examination of the legitimacy of the trade ban. Such an approach may enhance a country’s obligation to engage in international negotiations so long as its national trade measures dealing with transboundary environmental problems remain in place.

122. *Id.* at para. 5.73 (emphasis added) (citation omitted).
123. *Id.* at para. 5.87.
124. The United States’s efforts seemed quite satisfactory to the Panel, especially considering “its active participation and its financial support to the negotiations.” *Id.* at para. 5.84.
125. *Id.* at paras. 5.87, 6.1(b).
126. See *Shrimp 21.5 Panel Report*, *supra* note 8, at para. 6.2.
CONCLUSION

As the WTO's involvement in trade-linkage issues such as the environment and human rights becomes increasingly unavoidable and more essential, the introduction of non-typical trade rules seems to be necessary in assisting the settlement of disputes that involve considerations beyond pure trade norms. Applying the Vienna Convention's rules on treaty interpretation to the WTO agreements, there is no indication that invoking non-trade considerations in WTO jurisprudence is impermissible.

Pursuing international cooperation and negotiations following consensual and multilateral procedures with the aim of creating an international agreement has been generally recognized as the preferable means of addressing global environmental issues.\(^{127}\) Surely, this mandate applies to the conservation and management of natural resources, including marine life such as sea turtles and dolphins.

With respect to the relationship between multilateral solutions and unilateral trade measures, the Appellate Body in its original Shrimp decision found that members are required to pursue negotiated solutions based on an international consensus before resorting to unilateral methods in order to avoid unjustified discrimination.\(^{128}\) A plain meaning interpretation of the rulings seems to support the priority of multilateral negotiations over unilateral measures.\(^{129}\) A violation might lead to the effect that such a provisionally justified unilateral measure will be terminated until the mandate to negotiate is fulfilled. Such a result, perhaps, was what Malaysia expected the WTO to request the United States to do.

Irrespective of confirming the preferred status of a multilateral approach, however, the WTO judicial organs remained reluctant to honor international solutions at the expense of unilateral ones. Rather, the WTO Panel and Appellate Body were inclined to situate unilateral measures with international negotiations on a parallel basis. This tendency may render the term "before" somewhat meaningless. Regrettably, in reviewing the U.S. implementation of the original Shrimp rulings, the WTO

\(^{127}\) See, e.g., Shrimp AB Report, supra note 2, at paras. 154, 166, 168; see also supra note 40 and accompanying text (listing various international instruments that express a preference for negotiated settlements).

\(^{128}\) Id. at para. 166.

\(^{129}\) See Ni, supra note 16, at 32.
did not clarify the legal meaning of the word “before.” As a result, it appears that any trade measure that is provisionally justified can remain in place while international negotiations are being pursued.

The ruling seems to suggest that failure to engage in such negotiations may be fixed by a later action. This is likely to encourage parties to resort to unilateral measures in the first stage even though international negotiations have not yet been pursued. Further, the WTO substantially reduced the burden of the country that was required to seek international negotiations by deciding that the fulfillment of such a mandate does not extend to the stage of concluding an agreement. On the other hand, in order to urge the country to take the mandate seriously and to appease the possible criticism that the WTO may be ready to embrace unilateral measures at any cost, it finally decided that the previously imposed trade embargoes might be maintained as long as serious negotiations to reach a multilateral agreement continue in good faith.

On the basis of the recent WTO decisions described in this Article, it is probably premature to conclude that the WTO will respect member states' unilateral environmental protection initiatives without reservation, even at the expense of blocking a certain degree of market access. Indeed, WTO tribunals have repeatedly emphasized the merits of a multilateral approach. Yet according to recent WTO jurisprudence, a unilateral measure can be provisionally sustained as long as parallel international negotiations are underway. Hence, it may be fair to assume that WTO jurisprudence seems increasingly inclined to acknowledge that nationally-imposed trade restrictions may serve as useful and effective leverage in protecting the global environment.

The debate on the general issues of trade and the environment will not only continue, but will become more complicated

130. It is important to note that some issues regarding the eventual permissibility of a unilateral measure in the framework of multilateral solutions must be addressed. For example, de La Fayette poses the following question: “If a unilateral measure is imposed in an emergency situation, must it be lifted once a multilateral agreement addressing the problem has been reached or has come into force?” de La Fayette, supra note 46, at 691; see also Ni, supra note 16, at 33 (pointing out some unsolved issues regarding the interaction between unilateral measures and multilateral process that is honored by Principle 12 of the Rio Declaration).

131. Nevertheless, it has been observed that the Appellate Body's pro-environment stand might be changed by future legislative activities, particularly in the new Doha round of negotiations or under the influence of WTO representatives. See de La Fayette, supra note 46, at 691.
in the wake of the development of new technology. As international movements of genetically modified organisms and other products involving bio-technology arouse controversy in the WTO system,132 it will be interesting to observe how the institution addresses new disputes.133 Certainly, this line of jurisprudence needs further study in order to strike a proper balance between the preservation of trade liberalization and due regard for national legislation that aims to fulfill public policy on protecting domestic health or environmental interests.


133. See, e.g., Shaw & Schwartz, supra note 4, at 143-44 (discussing several WTO agreements, including the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the WTO Agreement on Technical Barriers to Trade, that may govern the dispute over genetically modified organisms (GMO's). The authors imply that the settlement of the dispute cannot reach a satisfactory result without taking into account the merits of the Biosafety Protocol.); see also Joanne Scott, European Regulations of GMOs and the WTO, 9 Colum. J. Eur. L. 213-39 (2003).