

# An Analysis of the Relationship between WTO Trade Disciplines and Trade-Related Measures Used to Promote Sustainable Fisheries Management

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**Abstract.** This paper presents a critical analysis of the provisions of the WTO agreements and jurisprudence as they relate to the use of trade-related measures in support of cooperative fisheries management arrangements. The interpretation given to WTO agreements by successive Panels and Appellate Bodies has provided guidance regarding how such measures may be used without violating WTO obligations. As a result, if certain criteria are followed in their development, then multilateral fisheries management agreements can implement trade-related measures that would not be in conflict with their WTO commitments.

**Keywords:** Market access; Trade and Environment; GATT Article XX; Multilateral Environmental Agreements; fisheries management.

## 1. INTRODUCTION

The problem of overfishing is well recognized, as is the need to find a multilateral solution to this problem. Achieving a cooperative fisheries management arrangement is not, however, the end of the road. An agreement that seeks to sustain such cooperation needs to be self-enforcing.<sup>2</sup> In order to ensure that measures taken are enforceable, as well as to encourage non-parties to take similar conservation measures, some regional fisheries management organizations (RFMOs) are turning to the use of trade-related measures.

Notwithstanding the admirable objectives of such practices, the use of trade measures to promote environmental objectives is not without controversy. In part, this friction stems from the choice of forum for resolving such disputes. Given that most countries are members of the World Trade Organization (WTO), and given that the *General Agreement on Tariffs and Trade* (the GATT),<sup>3</sup> including its accompanying Dispute Settlement Understanding (DSU), is the only major international agreement of general application that deals with the enforcement of trade and environment issues, the WTO has proven to be the forum of choice for challenging these trade measures as not being in compliance with existing WTO trade obligations.

This therefore has led to a conflict between the use of trade measures by RFMOs and the commitments contained in the GATT. The GATT promotes trade by eliminating restrictions and promoting non-discrimination, while multilateral environmental agreements (MEAs) protect the environment through control and regulation,<sup>4</sup> two seemingly conflicting approaches to the trade and environment question. This paper therefore seeks to provide a critical assessment of the principles of law at play and provide an analysis of the factors that the WTO will take into account in adjudicating disputes in such situations.

## 2. RELEVANT WTO COMMITMENTS

The three principal WTO commitments are to be found in Articles I, III, and XI of the GATT. Article I commits WTO members to accord “most-favoured nation” (MFN) treatment to other members, i.e., each member must treat imported products from any other member no less favorably than like products from another WTO member. Similarly, Article III obligates WTO members to accord national treatment to other members, that is to say, imported products must be treated no less favorably than like domestic goods once they enter the importing country. It should be noted that the process by which a product is made, however, is not a distinguishable characteristic of the product.<sup>5</sup> Finally, Article XI prohibits quantitative restrictions such as quotas, bans, and licenses on imported and exported products. Certain limited exceptions to the general rule are associated with fisheries products, but these relate to restrictions necessary for international commodities trade, not for environmental or conservation measures.<sup>6</sup>

The WTO, however, does not ignore the environment. The preamble of the Agreement Establishing the WTO recognizes that trade liberalization should allow for the “optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”<sup>7</sup> It further recognizes the differing abilities to care for the environment between developing and developed countries:

members are encouraged to enhance the means for protecting and preserving the environment in a manner that is “consistent with their respective needs and concerns at different levels of economic development.”<sup>8</sup>

These environmental objectives are also recognized in the general exceptions contained in Article XX of the GATT, which reads in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article XX therefore places limits on the Article I, III and XI commitments by permitting the imposition of domestic measures to protect the environment. However, the negotiators of the GATT were careful to prevent abuse of these exceptions by inserting the chapeau of Article XX, which places specific limits on the application of the general exceptions.

### **3. WTO CASE HISTORY**

#### **3.1 Forum**

Because there is no “general agreement” on the environment establishing a dispute mechanism that would allow for the interpretation and enforcement of environmental commitments, it has fallen to the WTO to become the principal instrument for interpreting and resolving conflicts between trade and the environment.<sup>9</sup>

#### **3.2 WTO Disputes**

It has been recognized that there is no inherent conflict between trade and the environment, but that there is a conflict between the GATT rules and environmental protection.<sup>10</sup> This has not, however, prevented disputes from arising regarding trade restrictions imposed in order to further environmental objectives. The importance of the relationship between trade-related measures under fisheries management agreements and WTO trade disciplines is emphasized by the fact that of the four major disputes dealing with the relationship between trade measures used to promote conservation or environmental protection and international trade obligations under the GATT, three (including the most recent and important decision) deal with fish or seafood products.

##### **3.2.1 Early GATT Panel Decisions**

In order to respond to public concerns over the quantity of dolphins being killed by tuna fishers, the United States amended the Marine Mammal Protection Act (MMPA) in 1988 so that an embargo would be imposed on imports of yellowfin tuna harvested in the Eastern Tropical Pacific Ocean by any country that lacked a regulatory program and dolphin kill rate comparable to that of the United States.<sup>11</sup> These amendments also required a secondary embargo on imports of yellowfin tuna from any intermediary nation.<sup>12</sup>

In January 1991, Mexico filed a GATT challenge to the U.S. embargo on shrimp not caught in accordance with the precepts of the MMPA (“Tuna-Dolphin I”).<sup>13</sup> The Panel in Tuna-Dolphin I found that the U.S. embargo violated Article III of the GATT because it discriminated against tuna products from other countries based on their fishing methods.<sup>14</sup> It then rejected U.S. attempts to justify the embargo using Article XX(b) and (g).

In July 1992, the European Economic Community and the Netherlands requested a second GATT Panel to review the U.S. restrictions on tuna imports from intermediary countries (“Tuna-Dolphin II”).<sup>15</sup> The Panel in Tuna-Dolphin II found that the embargo on tuna from intermediary nations violated the GATT and was not justified under Article XX.<sup>16</sup>

Because the GATT parties adopted neither Tuna-Dolphin I or Tuna-Dolphin II, and because Panel decisions, even if adopted, do not have precedential value,<sup>17</sup> these two decisions are only of limited importance in describing the current state of law in the WTO. However, they are useful to show where the GATT has been, and therefore to highlight the important of the two subsequent WTO Appellate Body decisions.

### 3.2.2 WTO Appellate Body Decisions

The Reformulated Gasoline Case<sup>18</sup> was the first case considered by the WTO that involved the environment. This case was decided under the new WTO dispute settlement rules,<sup>19</sup> the most important of which was that Panel reports are adopted automatically unless opposed by a consensus of DSB members.<sup>20</sup> Nonetheless, the new rules continue the line of GATT decisions because the underlying GATT framework remains identical.<sup>21</sup>

In Reformulated Gasoline, Venezuela and Brazil challenged gasoline import standards imposed by the U.S. Environmental Protection Agency (EPA). In accordance with the Clean Air Act,<sup>22</sup> the EPA's so-called Gasoline Rule<sup>23</sup> set standards for reducing pollution from vehicle emissions, especially with regard to ozone. As part of the Gasoline Rule, the EPA required that imported gasoline meet statutorily-determined baselines, but allowed most domestic refiners to use their own "individual" baselines.

The Appellate Body (AB) in Reformulated Gasoline<sup>24</sup> held that there was a "substantial relationship" between the baseline establishment rules and the conservation of clean air,<sup>25</sup> and that the measures were therefore provisionally justified by Article XX(g). However, the AB concluded that the measure did not meet the requirements of the *chapeau* of Article XX. It concluded that the United States had other, less trade-restrictive options available to it, and therefore it had frustrated the legal rights of other members.<sup>26</sup> It also chastised the U.S. for failing to attempt to enter into cooperative arrangements prior to taking unilateral actions.<sup>27</sup>

The latest dispute to consider the relationship between trade measures used to promote conservation objectives and the provisions of the GATT is the Shrimp-Turtle Dispute. In order to protect five species of sea turtles, the U.S. enacted Section 609 of *Public Law 101-162* (hereafter "Section 609"),<sup>28</sup> which established a prohibition on the import of shrimp caught using methods that threaten sea turtle populations.<sup>29</sup> Section 609 also called on the U.S. Secretary of State, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with governments engaged in commercial fishing operations likely to have a negative impact on sea turtles.<sup>30</sup>

The original implementation guidelines provided for the application of Section 609 only to countries of the Caribbean and the Western Atlantic ocean. However, as of May 1, 1996, the U.S. Department of State, at the direction of the U.S. Court of International Trade (CIT),<sup>31</sup> required that all U.S. shrimp imports be accompanied by a declaration that the shrimp or shrimp product had been harvested either under conditions that do not adversely affect sea turtles (i.e., that the country of origin required the use of Turtle Excluder Devices – TEDs – in the harvest of shrimp), or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609.<sup>32</sup>

In January 1997, Malaysia and Thailand requested the establishment of a GATT panel to resolve a dispute (to which Pakistan and India subsequently joined as co-complainants), naming the United States as defendant. In its report,<sup>33</sup> the AB in the Shrimp-Turtle dispute held that it was first necessary to determine if the measure fell under one of the enumerated paragraphs of Article XX prior to analyzing whether the measure satisfied the limits set out in the Article XX *chapeau*. Applying this approach, the AB concluded that Section 609 qualified for provisional justification under Article XX(g), in that it "related" to the "conservation of an exhaustible natural resource." However, the AB found that Section 609 failed to meet the standards of the Article XX *chapeau* because it was applied in a manner that constituted "unjustifiable" and "arbitrary" discrimination.

In order to comply with the AB decision, the United States issued revised guidelines for the implementation of Section 609 in July 1999.<sup>34</sup> Malaysia did not agree that these revised guidelines were justified under Article XX, and in October 2000, Malaysia requested the establishment of a Panel pursuant to Article 21.5 of the WTO Dispute Settlement Understanding to find that "the United States has failed to comply with the 6 November 1998 recommendations and rulings of the Dispute Settlement Body" (Recourse under Article 21.5).<sup>35</sup>

As a result of a finding that Section 609 (on which the revised implementation guidelines were based) had not changed since the original Shrimp-Turtle decision, it was not necessary to reconsider whether the measure was provisionally justified by Article XX(g).<sup>36</sup> The AB concluded that, because the United States had made serious efforts at negotiating a cooperative agreement with Malaysia,<sup>37</sup> and because revised guidelines did allow for countries using "comparable" measures to be certified,<sup>38</sup> Section 609 was now being applied in such a way that it did not violate the *chapeau* of Article XX. This constitutes therefore the first time that the AB has found that the use of unilateral trade measures to support environmental objectives is justified.

## 4. INTERPRETATIONS OF GATT ARTICLE XX

Recent AB decisions have applied a two-tiered test in interpreting the provisions of Article XX: first, it is necessary to determine whether the measure is justified under Article XX(g), and second, it must be ascertained whether the measure is justified under the provisions of the *chapeau* of Article XX.<sup>39</sup> This sequence is the result of the fundamental structure and logic of Article XX, not a random choice.<sup>40</sup> If the specific exception were not to be first ascertained and investigated, then an almost insurmountable obstacle to interpreting the *chapeau* would arise,<sup>41</sup> and most, if not all, of the Article XX exceptions would be rendered ineffectual and the principles of interpretation would be breached.<sup>42</sup>

### 4.1 GATT Article XX(b)

Both Panels in the two Tuna-Dolphin disputes concluded that, to justify a measure as “necessary” to animal health under Article XX(b), a WTO member had to demonstrate that it had exhausted all other options available<sup>43</sup> – i.e., that it was applying the measure that was the least trade-restrictive. Further, according to the Panel in Tuna-Dolphin II, under Article XX(b), measures necessary to protect the life or health of animals may not include measures that are taken to force other countries to change their policies within their own jurisdictions and that require such changes to be effective.<sup>44</sup>

The AB in Reformulated Gasoline signaled a shift away from the least-trade-restrictive standard under Article XX(g) towards a more liberal and deferential standard of review. In this case, the AB held that the use of different introductory words for each of the Article XX paragraphs called for different standards of review.<sup>45</sup> With regard to Article XX(b), the AB reiterated the notion that the “necessary” language called for a least-trade-restrictive test. In contrast to the earlier GATT Panel decisions, the AB concluded that “relating to” under Article XX(g) called for a different standard than Article XX(b), and suggested that justification for the measure turned on whether it was “primarily aimed at” the “conservation of exhaustible natural resources.”<sup>46</sup> Instead of focusing on the measure’s impact on trade, the AB looked to whether the measure’s objective was supported by the trade restriction.<sup>47</sup>

As a result, any country seeking to justify trade measures applied in order to promote the conservation objectives of a regional fisheries management agreement is likely to employ the lower threshold under Article XX(g) rather than that under Article XX(b). This was in fact born out by the United States’ choice of the specific Article XX exception it chose in seeking to justify the Section 609 restrictions on trade in shrimp and shrimp products, namely, the U.S. sought justification under Article XX(b) only if its Article XX(g) justification failed. The U.S. would doubtlessly have regarded the threshold test for Article XX(b) in Reformulated Gasoline as still requiring that a measure be shown to be “necessary” and least trade-restrictive in order for it to be provisionally justified. The U.S. may therefore have deemed that Article XX(b) constituted an obstacle that is more difficult to overcome than the “substantial relation” analysis under Article XX(g). For these reasons, claiming that a trade-related measures under a fisheries management agreement is justified under Article XX(g) will likely prove to be the preferred (and more fruitful) approach to take in the future.

### 4.2 GATT Article XX(g)

Article XX(G) contains three elements: “exhaustible natural resources,” “relating to the conservation” (of exhaustible natural resources), and (such measures must be made effective) “in conjunction with restrictions on domestic production or consumption.”<sup>48</sup>

#### 4.2.1 “exhaustible natural resources”

This first criterion is the easiest for a defendant to corroborate. Starting with the GATT Panel decision in the 1987 Herring and Salmon case,<sup>49</sup> the WTO has consistently found that fish are an “exhaustible natural resource” within the meaning of Article XX(g).<sup>50</sup> However, neither this decision nor most that followed provide much detail as to what would constitute an “exhaustible natural resource.”

The analysis does not end here. A further issue arises regarding whether “exhaustible natural resources” would include only those fish that are harvested in waters subject to the jurisdiction of the country imposing the trade measure, or whether the term would also encompass fish that are located outside a country’s EEZ.

In Tuna-Dolphin I, the Panel limited the application of Article XX(g) to fish within a member’s own jurisdiction.<sup>51</sup> However, the Panel in Tuna-Dolphin II found that Article XX(g) can apply to exhaustible natural

resources outside the territory of the party invoking Article XX(g).<sup>52</sup> Although the AB in the Shrimp-Turtle dispute explicitly stated that it did not address the question of whether there is a jurisdictional limitation in Article XX(g), it did note that “in the specific circumstances of the case before [them], there [was] a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).”<sup>53</sup> It has consequently been pointed out that the AB decision can be interpreted so as to derive a rule that, at a minimum, a sufficient connection between the protected subject and a country can be shown to exist when the natural resource is only temporarily within the jurisdiction of the country that seeks to invoke the Article XX exception, even though the damaging activity takes place outside its territory.<sup>54</sup>

It is unfortunate, however, that this decision does not address the situation of high seas fisheries, where there is no geographical nexus between the country seeking to invoke Article XX and the resource that it is trying to protect, as that is the case in many MEAs (e.g., in CITES). Similarly, it is unclear what would happen where a fish stock does not enter the EEZ of either party to a dispute (but does enter the EEZs of non-parties to the dispute). While the country implementing the trade measure would not have any jurisdiction over the resource, neither would the country complaining about the trade measure.

#### **4.2.2 “relating to”**

In deciding whether a measure related to the conservation of exhaustible natural resources, the early GATT Panels interpreted “relating to” to mean “primarily aimed at.” The Panel in Tuna-Dolphin I found that the tuna embargo could not be considered to be “primarily aimed at” the conservation of dolphins, because the embargo was unpredictable.<sup>55</sup> The Panel in Tuna-Dolphin II held that measures “taken so as to force other countries to change their policies” could not be found to be “primarily aimed at” conserving exhaustible natural resources.<sup>56</sup>

The decision of the AB in Reformulated Gasoline shifted the focus of the Article XX(g) exception. While it still interpreted “related to” as meaning “primarily aimed at,” instead of examining the discriminatory effects of the measure, it concluded that it was necessary to look at the provisions of the measure itself.<sup>57</sup> In so doing, the AB concluded that a “substantial relationship” had to be demonstrated between the baseline requirements and the conservation of clean air for the purposes of Article XX(g).<sup>58</sup>

The AB also applied this “substantial relationship” approach in the Shrimp-Turtle dispute.<sup>59</sup> In this case, the AB highlighted the need to explore the relationship between the general structure of the measure and the policy goal it purports to serve. More specifically, it concluded that the means used must be reasonably related to the objectives of the measure, and the relationship between the two must be “a close and real one.”<sup>60</sup>

These decisions show an important evolution in the interpretation of the Article XX(g) exception for trade measures used in support of conservation objectives. While the two Tuna-Dolphin Panels may have been correct in concluding that the U.S. embargo on tuna imports was unjustifiable because it was unpredictable and forced other countries to change their policies, it has become evident that doing so under Article XX(g) was not the appropriate approach to apply. Instead of focusing on whether the objectives of the measure were “related to” or “primarily aimed at” the conservation of tuna, the Panels focused on the effects of the measure being challenged. More properly, the discriminatory effects of a measure should be assessed under the *chapeau* of Article XX, which deals with unjustifiable and arbitrary discrimination.

In the context of fisheries management, the approach taken by the AB demonstrates that it is necessary to establish a link between the objective of the sustainable harvest of a fishery and the trade measure used to promote that goal. It will not suffice to simply assert that a measure was taken in order to promote sustainable fisheries management; a WTO member will have to demonstrate what actions are necessary to promote sustainable fisheries management, and how the trade restriction is an effective tool in achieving that objective.

#### **4.2.3 “in conjunction with restrictions on domestic production or consumption”**

The Panels in Tuna-Dolphin I and II both interpreted “in conjunction with” to mean “primarily aimed at.”<sup>61</sup> As with their conclusions about “relating to the conservation of exhaustible natural resources,” both Panels found that the effects of the tuna embargo made it impossible to find that the embargo was “primarily aimed at” restrictions on domestic production or consumption.

In interpreting whether the baseline requirements were made effective “in conjunction with restrictions on domestic production or consumption,” the AB in the Reformulated Gasoline dispute again applied the “ordinary or natural meaning” of this term and held that it should be understood to mean “‘together with’ or ‘jointly

with.”<sup>62</sup> In both Reformulated Gasoline and Shrimp-Turtle, the test that the AB applied was whether the measure concerned was even-handed and imposed restrictions, not just in respect of imports, but also with respect to domestic products.<sup>63</sup>

Once again, a shift away from the effects of the measure towards the objectives of the measure itself is apparent. The WTO AB decisions both suggest that the measures applied to domestic producers and foreign exporters need only to be similar, not identical. They do not, however, provide much in the way of detail as to how future dispute settlement mechanisms will determine whether measures are similar. The Reformulated Gasoline decision would nonetheless seem to indicate that a rather expansive approach will be utilized.

### 4.3 *Chapeau* of GATT Article XX

The *chapeau* of Article XX constitutes the second part of the two-tier analysis. Its purpose is generally the prevention of abuse of the specific exceptions under Article XX, thereby emphasizing that these specific exceptions ought not to be applied so as to nullify the obligations of that WTO member under the substantive rules of the GATT.<sup>64</sup> In order to prevent their abuse, the *chapeau* addresses not so much the measure being challenged or its contents, but rather the manner in which that measure is applied.<sup>65</sup>

Applying the ordinary meaning to the words of the *chapeau*, the AB in Shrimp-Turtle found that the *chapeau* encompassed three standards: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade.<sup>66</sup> While the text of the *chapeau* distinguishes between “arbitrary” and “unjustifiable” discrimination, the interpretations of the *chapeau* made by the WTO AB have themselves not made much of a distinction between the two terms, focusing instead on whether a measure constituted “unjustifiable” discrimination.

#### 4.3.1 “unjustifiable discrimination”

In determining whether a measure constitutes “unjustifiable discrimination,” two principal criteria have been applied. First, serious efforts must be made at negotiating a multilateral arrangement to deal with the resource that needs conservation, and second, the measure must be sufficiently flexible to be able to take into account the different conditions in other countries.

##### 4.3.1.1 Multilateral Negotiations

All of the decisions dealing with trade and environment conflicts have noted a need for international cooperation. The AB in Reformulated Gasoline held that it is necessary to pursue the possibility of entering into cooperative arrangements with other countries prior to implementing a trade-related measure.<sup>67</sup> The AB in Shrimp-Turtle similarly concluded that before unilaterally imposing the import ban, a country must engage in “serious, across the board negotiations” with the objective of concluding bilateral or multilateral agreements for the conservation of exhaustible natural resources.<sup>68</sup> It again cited a preference for a multilateral approach in the Recourse under Article 21.5, noting that effective protection and conservation of a highly migratory species required cooperative efforts, and that the WTO itself had recognized the need for multilateral solutions.<sup>69</sup>

The Panel in the Recourse under Article 21.5 dispute provides a four-part test that will assist in determining whether multilateral negotiations undertaken in pursuit of a regional fisheries management agreement are sufficient to satisfy the provisions of the *chapeau*.<sup>70</sup> First, the parties to the regional fisheries management organization must demonstrate that they took the initiative to include the non-party in negotiations. Second, the negotiations must be open to all interested parties (i.e., “across the board”). Third, “serious efforts” to negotiate must be made. Finally, these serious efforts must be undertaken in good faith before the implementation of a trade-related measure.

What is necessary to satisfy the first, second and fourth elements is evident from the description of the element itself. It is the third element, namely, that “serious efforts” to negotiate must be made, that requires further elaboration.

The standard for what will constitute “serious good faith efforts” is not rigid or invariable. No single standard may be appropriate, and the particular factual circumstances prevailing in a specific set of negotiations may

change the degree of achievement which may be expected.”<sup>71</sup> However, the Panel in the Recourse under Article 21.5 only provided an example of what may constitute “serious efforts.” In this instance, it appears that the development of a Memorandum of Understanding with most countries involved was sufficient.<sup>72</sup> Consequently, one might deduce from this that the existence of a fisheries management agreement, particularly if most countries involved in the particular fishery that it purports to regulate are party to the agreement, would be deemed satisfactory evidence that serious efforts had been made to negotiate a multilateral agreement.

The AB in the original Shrimp-Turtle decision established the need for a “line of equilibrium” between the right of a member to invoke an exception under Article XX and the rights of other members under the substantive provisions of the GATT.<sup>73</sup> The location of this “line of equilibrium” is not static; it moves according to the kind and the shape of the measures at stake, and according to the facts of the specific case.<sup>74</sup> In addition to the measure’s factual context, its legal framework will influence the interpretation to be given to the notion of unjustifiable discrimination.<sup>75</sup>

In order to demonstrate that serious efforts were made, parties to an agreement must also demonstrate that they made good faith efforts over a period of time to include the non-parties in the negotiations.<sup>76</sup> Consequently, it is not enough to simply attempt once to negotiate a cooperative arrangement; sustained attempts at negotiations are what is required. It is not clear, however, for how long the pursuit of negotiations must be maintained or how many times a party must be approached in order to demonstrate that the efforts made were serious.

However, it is clear that only the negotiation, not the conclusion, of an agreement is required.<sup>77</sup> The standard set by the AB in Reformulated Gasoline implied that all that was necessary was for negotiations to be pursued by a country to the point where it encountered governments that were unwilling to cooperate.<sup>78</sup> The AB in the original Shrimp-Turtle decision criticized the United States for failing to negotiate an agreement;<sup>79</sup> no mention was made of a failure to conclude an agreement.<sup>80</sup> The Panel in the Recourse under Article 21.5 recognized that the *demandeur* in negotiations need not be held exclusively responsible for reaching an agreement,<sup>81</sup> and cannot be held liable for the fact that unanimity cannot be reached.<sup>82</sup> The AB went even further, and noted that requiring a multilateral agreement to be concluded in order to demonstrate that the measure did not constitute unjustifiable or arbitrary discrimination would “mean that any country party to the negotiations with the United States... would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable.”<sup>83</sup>

Consequently, to justify a trade measure applied by a member in order to carry out its obligations under a regional fisheries management agreement under Article XX, it is not necessary to reach an agreement with all parties involved; rather, all that is required is pursuing negotiations with all parties that have an interest in the particular fishery.

It has also been made apparent that the negotiations do not need to be completed before implementing a trade-related provision. A provisional trade-related measure taken for emergency reasons, if taken in conjunction with serious good faith efforts to reach a multilateral agreement, will be deemed not to constitute unjustifiable discrimination.<sup>84</sup>

Where separate negotiations are undertaken, they need not be identical; it is sufficient that they be “comparable.”<sup>85</sup> More specifically, comparable efforts must be made, comparable resources invested, and comparable energies must be devoted to securing a multilateral agreement.<sup>86</sup> Nonetheless, the AB also held that comparing the various negotiations is a “central element of the exercise to determine whether there is ‘unjustifiable discrimination.’”<sup>87</sup>

Taken together, these decisions therefore highlight the need for multilateral negotiations to deal with environmental concerns. While no decisions have yet been made that deal with trade measures implemented under MEAs, the fact that Panels and the AB have placed such strong emphasis on the need for multilateral cooperation, including in early cases that took a more stringent (some might say more anti-environment) approach to dealing with the Article XX exceptions, leads to the conclusion that trade-related measures taken by regional fisheries management organizations are less likely to be considered “unjustifiable” under the *chapeau* of Article XX. If a Panel or AB were to find otherwise, then such a decision would appear to be in conflict with previous decisions and would represent an unexpected step backwards in effecting an evenhanded balance between the interests of trade and the environment.

### 4.3.1.2 Flexibility

In determining whether a measure constitutes “unjustifiable discrimination” in violation of the *chapeau* of Article XX, it is necessary to examine the “coercive effect” of the measure.<sup>88</sup> In particular, where a WTO member implements a measure that makes it mandatory for other WTO members to adopt “essentially the same” regulatory program as that member, it has the effect of establishing a “rigid and unbending standard” in violation of the *chapeau* of Article XX.<sup>89</sup> Instead, a WTO member ought to take into consideration the different conditions that occur in the territories of other members.<sup>90</sup> Such measures need to be flexible enough in practice to allow for measures of “comparable effectiveness” to be taken by other countries.<sup>91</sup>

While a WTO member might not impose measures that force other members to change their policy to conform with their own policies or rules, a member may justifiably require, as a condition of access for certain products to its market, that exporting countries commit themselves to a regulatory program deemed comparable to its own.<sup>92</sup> Conditioning market access on the adoption of a program comparable in effectiveness would allow for sufficient flexibility in the application of the measure so as to avoid “arbitrary” or “unjustifiable” discrimination.<sup>93</sup>

It is to be noted that the Panel in the Recourse under Article 21.5, in determining whether a measure was sufficiently flexible to allow for other countries to implement measures “comparable effectiveness,” emphasized the need to not only examine the provisions of the measure itself, but also whether the actual application of the measure permitted such flexibility.<sup>94</sup> The AB found that “Article XX of the GATT 1994 does not require a member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* member.”<sup>95</sup> In other words, a measure has to be generally flexible enough to take into account the conditions prevailing in any exporting country, but it need not specifically address the conditions in each.

In addition to addressing the conditions prevailing in a WTO member, flexibility may also need to be shown at the individual shipment level. The AB in the original Shrimp-Turtle decision found that Section 609 was not sufficiently flexible because it prohibited the importation of shrimp and shrimp products from countries not certified under Section 609 even when the shrimp was harvested by vessels using TEDs.<sup>96</sup> Accordingly, the Panel in the Recourse under Article 21.5 found that since the revised guidelines allowed for the importation of shrimp harvested by vessels using TEDs, even if the exporting nation had not been certified pursuant to Section 609, it complied with the earlier AB ruling.<sup>97</sup>

### 4.3.1.3 Other Factors

A third factor in whether a measure will result in “unjustifiable discrimination” is whether a member accords different treatment to different WTO members. This has already been discussed above with regard to the need for similar negotiations to be undertaken with all members, but it is also applicable with respect to the terms of implementation periods.<sup>98</sup> The AB agreed with the arguments of the Appellees in the Shrimp-Turtle case, who pointed out that while most Caribbean and South American WTO members were given three years to implement the TED requirement, other members faced an implementation period of only four months.<sup>99</sup> The AB also rejected the U.S. argument that improvements and increased experience with TED technology made such long implementation periods unnecessary.<sup>100</sup> As a result, RFMOs must provide for a comparable period for the implementation of new and established measures for original parties, new parties and non-parties to the agreement under which it was established.

Similarly, if an RFMO is going to provide any technical assistance to a member, then it must ensure that similar assistance is available to other members and to prospective members as well. The AB in the original Shrimp-Turtle decision found that far greater efforts were made to transfer TED technology to certain exporting countries than to others, including the Appellees.<sup>101</sup> Presumably, however, there is a limit on the number or type of countries to which such assistance would have to be rendered. In all likelihood, a developed country would not be expected to lend the same degree of technical assistance to another developed country as it would to a developing country.

Finally, it is not clear whether the measure implemented in order to promote fisheries conservation must be the least trade-restrictive option available. The WTO AB cases do not specifically address this point, but in Reformulated Gasoline, the AB held that to argue, as did the USA, that a less trade-restrictive option was more difficult to enforce, was not sufficient grounds to justify the imposition of the more trade-restrictive option.<sup>102</sup> This may imply that, for the purposes of the *chapeau*, the measure must be the least trade-restrictive option.



### 4.3.2 “arbitrary discrimination”

The AB in Shrimp-Turtle found that s. 609 also constituted “arbitrary discrimination,” as it relied on the same rigid and inflexible implementation of the measure as discussed above regarding “unjustifiable discrimination,”<sup>103</sup> and on the certification process’ failure to meet the minimum standards of transparency and procedural fairness in the administration of trade regulations required by the GATT.<sup>104</sup> In discussing the latter, the AB noted that when an application for certification is denied, notice of the denial is not given, the grounds for this denial are not provided, and there is no procedure to appeal this denial, all of which were “contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.”<sup>105</sup>

The other distinguishing element of “arbitrary discrimination” is that it may be violated if due process is denied. RFMOs ought therefore to provide written reasons for their decisions when they seek to impose a trade restriction. The AB decision in Shrimp-Turtle, however, is not clear whether due process itself is required, or whether only a similar degree of due process must be provided to all parties.

### 4.3.3 “between countries where the same conditions prevail”

In the Shrimp-Turtle decision, the AB noted that three elements needed to exist with regard to discrimination under the *chapeau* of Article XX. The third of these elements was that “this discrimination must occur between countries where the same conditions prevail.”<sup>106</sup> This therefore emphasizes the importance of this element in determining whether a measure conflicts with the provisions of the *chapeau*. Despite such an explicit reference highlighting this qualifier, little analysis has been provided with regard to whether the same conditions prevail in both parties to the dispute.

The AB decision in the Shrimp-Turtle case muddies the water on this issue. While it underscores the significance of the need for the same conditions to prevail in both countries, it goes further and holds that “discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”<sup>107</sup> The AB did not provide any grounds, however, for expanding the definition of what constitutes discrimination beyond the specific language contained in the text of the *chapeau*.

As a result, it does not appear that it is necessary to limit arbitrary or unjustifiable discrimination to only those countries where the same conditions apply; rather, it seems only that the conditions in the country against which the trade restrictions is being imposed must be taken into account (and the measure must be flexible enough to respond to these conditions).

### 4.3.4 “disguised restriction on international trade”

Because most decisions have found that a measure constituted not only “unjustifiable” or “arbitrary” discrimination, very little has been written about disguised restrictions on international trade. However, the AB in Reformulated Gasoline read “disguised restriction” to include restrictions “amounting to arbitrary or unjustifiable discrimination in international trade.”<sup>108</sup> Consequently, the same sort of considerations as have been referred to above regarding the need for multilateral negotiations and flexibility in the implementation of the measure may also be taken into account in determining whether a measure presents a “disguised restriction” on international trade.

The Panel in the Recourse under Article 21.5 found that because the revised guidelines were not discriminatory, it had to examine whether they constituted a disguised restriction on trade. The Panel applied the conclusion of the AB in the Asbestos case, namely, it determined whether the compliance with Article XX(g) was “in fact only a disguise to conceal the pursuit of trade-restrictive objectives.”<sup>109</sup> In making such a determination, the Panel noted that the design, architecture and “revealing structure” of the measure must be assessed.<sup>110</sup> The Panel, however, relied on the flexible approach to certification used in the revised guidelines (as outlined in its analysis of whether the measure constituted unjustifiable discrimination), as well as the offer of technical assistance to developing countries, in order to find that Section 609 did not constitute a disguised restriction on trade.<sup>111</sup>

## 5. CONCLUSIONS

While most of the decisions cited above may have resulted in trade measures relating to environmental objectives being declared in violation of WTO commitments, the facts also show that these were perhaps not the

best-implemented measures. In particular, all the measures were unilateral and had not been subject to international negotiation, which is the best way to ensure that common resources such as dolphins or turtles are preserved. Further, less trade-restrictive options were available. Just as trade obligations need to take into account environmental considerations and make a conscious effort to ensure that trade measures minimize their effects on the environment, so must environmental regulation take steps to ensure that its provisions have the least possible impact on international trade. Achieving an effective and equitable balance between environmental and trade concerns is a two-way street, and no matter how noble the objective of the measure, it cannot justify the imposition of a measure that is more trade-restrictive than necessary.

Nonetheless, the WTO has made significant progress in its interpretation of the Article XX exceptions for measures necessary for animal health and those related to exhaustible natural resources. The decisions, culminating in the two AB decisions in the Shrimp-Turtle dispute, have demonstrated that to survive a WTO challenge, future trade restrictions implemented in support of fisheries sustainability would have to take into account several factors.

First, a member of an RFMO must be able to show that the fish species in question is an exhaustible resource. Next, the measures must be demonstrably related to the conservation of fish – this would require some (preferably scientific) evidence that the measures pursuant to which the trade-related measure was taken should result in sustainable harvests of a given fish species. Third, member states of the RFMO must show that they have taken domestic measures in conjunction with the same issue. Fourth, serious, good faith efforts at multilateral negotiations to address the policy objectives that the trade measure is attempting to support are required. Parties to an RFMO must demonstrate that they took the initiative to include all interested parties in the negotiations.

Fifth, the measure contemplated should be sufficiently flexible to allow for other countries to take measures that are comparable in effectiveness. Sixth, an RFMO must meet the minimum standards of transparency and procedural fairness, and due process must not be denied. These can be met by providing written reasons of why a particular decision involving the use of trade measures has been reached. Seventh, if a State provides technical assistance to another State in order to assist in the implementation of a particular measure (in order to avoid a trade restriction being imposed under the RFMO), then such technical assistance must be generally available to interested parties. Finally, in order to withstand a challenge, it would be advisable for an RFMO to keep a written record of the reasoning for decisions it takes, in order that they can demonstrate that the measure does not constitute a disguised restriction on trade.

In the end, there may certainly be reason to be concerned about how the WTO deals with the conflict between trade and the environment, and there is much that the WTO can learn from the environmental community. While progress might not be achieved as quickly as some might hope, the fact remains that the WTO remains the only international forum where decisions balancing trade and environment, including the sustainable harvest of fish stocks, can be made. The WTO has demonstrated that it is learning and is capable of integrating environmental concerns into its decisions. It can only be hoped that WTO members will build on this momentum and use the upcoming negotiations called for at the November 2001 WTO Trade Ministers Conference in Doha, Qatar, and that they will make serious, good-faith efforts towards further clarifying “the relationship between WTO rules and specific trade obligations set out in [MEAs].”<sup>112</sup>

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<sup>1</sup> The opinions expressed herein are solely those of the author and ought not to be interpreted as representing the positions of Fisheries and Oceans Canada or the Government of Canada.

<sup>2</sup> Barrett, Scott, *Fourth Annual Cummings Colloquium on Environmental Law – Global Markets for Global Commons: Will Property Rights Protect the Planet? – International Environmental Agreements: Compliance and Enforcement*, 10 Duke Envtl. L. & Pol’y F. 131 (1999) at 131-32.

<sup>3</sup> *General Agreement on Tariffs and Trade 1947*, as found at the WTO website at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47.pdf).

<sup>4</sup> Cheyne, Ilona, *Environmental Treaties and the GATT*, 1 Rev. Eur. Community Int’l Envtl. L. 14 (1992) at 14.

<sup>5</sup> Wold, Chris, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 Envtl. L. 841 (1996) at 849.

<sup>6</sup> GATT, above note 3, Article XI:2(c).

<sup>7</sup> Id., Preamble.

<sup>8</sup> Id., Preamble.

<sup>9</sup> Schoenbaum, Thomas, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 Am. J. Int’l

L. 268 (1997) at 271.

<sup>10</sup> Charnovitz, Steve, *The Environment vs. Trade Rules: Defogging the Debate*, 23 *Env'tl. L.* 475 (1993), at 475.

<sup>11</sup> *Marine Mammal Protection Act*, 16 U.S.C. § 1371 (1998).

<sup>12</sup> I.e., countries which did not catch but in which tuna was received and processed - *id.*, 2(D).

<sup>13</sup> *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna* (TD I), 30 I.L.M. 1594 (1991).

<sup>14</sup> *Id.*, paras. 5.14-15.

<sup>15</sup> *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna* (TD II), 33 I.L.M. 839 (1994).

<sup>16</sup> *Id.*, para. 6.1.

<sup>17</sup> There is no *de jure* concept of *stare decisis* in the WTO Agreements. However, powerful arguments have been made that there exists a *de facto* practice of *stare decisis* for Appellate Body decisions – see Bhala, Raj, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 *J. Transnat'l L. & Pol'y* 1 (1999), in which Prof. Bhala argues that “a *de facto* doctrine of *stare decisis* operates in Appellate Body jurisprudence” (p. 4).

<sup>18</sup> *World Trade Organization: Report of the Panel in United States -Standards for Reformulated and Conventional Gasoline Treatment of Imported Gasoline and Like Products of National Origin* (RG), 35 I.L.M. (1996) 274.

<sup>19</sup> The negotiations of the Uruguay Round led to the development of a new Dispute Settlement Understanding.

<sup>20</sup> *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994), Article 16.4. Previously, reports had to be adopted by all members by consensus.

<sup>21</sup> I.e., the GATT 1947 is an integral part of the GATT 1994 – Article 1(a) of the *General Agreement on Tariffs and Trade 1994*, as found on the WTO website at [http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf).

<sup>22</sup> *Clean Air Act*, 42 U.S.C. § 7401-7671q (1994). See specifically the 1990 amendment, 42 U.S.C. § 7545(k).

<sup>23</sup> *Regulation of Fuels and Fuel Additives--Standards for Reformulated and Conventional Gasoline*, 40 C.F.R. § 80 (1996).

<sup>24</sup> *World Trade Organization Appellate Body: Report of the Appellate Body - Standards for Reformulated and Conventional Gasoline* (RG-AB), (1996) 35 I.L.M. 603.

<sup>25</sup> *Id.*, p. 623.

<sup>26</sup> *Id.*, p. 629.

<sup>27</sup> *Id.*, p. 632.

<sup>28</sup> *Endangered Species Act* s. 609, 16 U.S.C. 1537 (1998)

<sup>29</sup> *Id.*, s. 609(b)(1).

<sup>30</sup> *Id.*, s. 609(a)(1).

<sup>31</sup> *Earth Island Institute v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995) and *Earth Island Institute v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996)

<sup>32</sup> *Earth Island Institute v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996), at 617.

<sup>33</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (ST-AB), WT/DS58/AB/R (adopted October 12, 1998).

<sup>34</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia, Report of the Panel* (ST/21.5-P), WT/DS58/RW, adopted June 15, 2001, at para. 2.22.

<sup>35</sup> *Id.*, para. 1.4.

<sup>36</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia, Report of the Appellate Body* (ST/21.5-AB), WT/DS58/AB/RW (adopted October 22, 2001), para. 82.

<sup>37</sup> ST/21.5-P, above, note 34, para. 134.

<sup>38</sup> *Id.*, para. 148.

<sup>39</sup> RG-AB, above, note 24, p. 626. The Panel thereby implied that the Panel in this dispute had correctly found that clean air was an “exhaustible natural resource.”

<sup>40</sup> ST-AB, above, note 33, para. 119.

<sup>41</sup> *Id.*, para. 120.

<sup>42</sup> *Id.*, para. 121.

<sup>43</sup> TD I, above, note 13, para. 5.28; TD II, above, note 15, para. 5.35.

<sup>44</sup> TD II, above, note 15, para. 5.39.

<sup>45</sup> RG-AB, above, note 24, p. 621.

<sup>46</sup> *Id.*, p. 622.

<sup>47</sup> The AB found that without the baseline rules, the objective of the Gasoline Rule would have been frustrated - *id.*, p. 623.

<sup>48</sup> Dividing thusly the analysis of Article XX(g) replicates the analysis undertaken by the AB in Shrimp-Turtle (see the headings under Article XX(g) of ST-AB, above, note 33, p. i).

<sup>49</sup> *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (WTO Document L/6268 - 35S/98 (1988) – may be found online at [http://www.wto.org/english/tratop\\_e/dispu\\_e/87hersal.wpf](http://www.wto.org/english/tratop_e/dispu_e/87hersal.wpf)) – the Panel found that salmon and herring stocks are “exhaustible natural resources” - para. 4.4.

<sup>50</sup> For example, the Panel in Tuna-Dolphin II cited the decision in the Unprocessed Herring and Salmon dispute (TD II, above, note 15, para. 5.15), as did the AB in Reformulated Gasoline (RG-AB, above, note 24, p. 619) and in Shrimp-Turtle (ST-AB, above, note 33, para. 131.).

<sup>51</sup> TD I, above, note 13, paras. 5.32 and 5.33.

- <sup>52</sup> TD II, above, note 15, para. 5.20.
- <sup>53</sup> ST-AB, above, note 33, para. 133.
- <sup>54</sup> Bree, Axel, *Article XX GATT – Quo Vadis? The Environmental Exception after the Shrimp/Turtle Appellate Body Report*, 17 Dick. J. Int'l L. 99 (1998), at p.112.
- <sup>55</sup> TD I, above, note 13, para. 5.33.
- <sup>56</sup> TD II, above, note 15, para. 5.27.
- <sup>57</sup> RG-AB, above, note 24, p. 620.
- <sup>58</sup> Id., p. 623.
- <sup>59</sup> RG-AB, above, note 24, p. 523; cited in the ST-AB, above, note 33, para. 136.
- <sup>60</sup> ST-AB, above, note 33, para. 141.
- <sup>61</sup> TD I - above, note 13, para. 5.31; TD II – above, note 15, para. 5.22.
- <sup>62</sup> RG-AB, above, note 24, p. 624.
- <sup>63</sup> Ibid. – the AB also noted, however, that this did not require that domestic products to be treated exactly the same as imports – p. 625; also cited in ST-AB, above, note 33, p. 55, para. 143
- <sup>64</sup> Id., p. 626. The AB in Shrimp-Turtle also cited this passage - ST-AB, above, note 33, paras. 151 and 159.
- <sup>65</sup> RG-AB, above, note 24, p. 626.
- <sup>66</sup> ST-AB, above, note 33, para. 150. This is the same test that the AB applied in Reformulated Gasoline (RG-AB, above, note 24, p. 627), and it was reconfirmed by the AB in the Shrimp-Turtle Recourse dispute (ST/21.5-AB, above, note 36, para. 118).
- <sup>67</sup> RG-AB, above, note 24, p. 631.
- <sup>68</sup> ST-AB, above, note 33, para. 166.
- <sup>69</sup> ST/21.5-AB, above, note 36, para. 124.
- <sup>70</sup> ST/21.5-P, above, note 34, para. 5.66.
- <sup>71</sup> Id., para. 5.76.
- <sup>72</sup> Id., para. 5.82.
- <sup>73</sup> Id., para. 5.50.
- <sup>74</sup> ST-AB, above, note 33, para. 159.
- <sup>75</sup> ST/21.5-P, above, note 34, para. 5.51.
- <sup>76</sup> ST/21.5-P, above, note 34, para. 5.60.
- <sup>77</sup> Id., para. 5.63; also, ST/21.5-AB, above, note 36, paras. 122 and 124. In particular, the AB noted that “it is one thing to *prefer* a multilateral approach in the application of a measure... it is another to require the *conclusion* of a multilateral agreement” – para. 124.
- <sup>78</sup> RG-AB, above, note 24, p. 631.
- <sup>79</sup> ST-AB, above, note 33, para. 172.
- <sup>80</sup> ST/21.5-P, above, note 34, para. 5.64.
- <sup>81</sup> Id., para. 5.78.
- <sup>82</sup> Id., para. 5.83.
- <sup>83</sup> ST/21.5-AB, above, note 36, para. 123.
- <sup>84</sup> ST/21.5-P, above, note 34, para. 5.88. It is to be noted, however, that the extent to which serious good faith efforts continue to be made may be reassessed at any time.
- <sup>85</sup> ST/21.5-AB, above, note 36, para. 122.
- <sup>86</sup> Ibid.
- <sup>87</sup> Id., para. 131.
- <sup>88</sup> ST-AB, above, note 33, para. 161.
- <sup>89</sup> Id., para. 163.
- <sup>90</sup> Id., para. 164; also, ST/21.5-P, above, note 34, paras. 5.46 and 5.69.
- <sup>91</sup> ST/21.5-P, above, note 34, para. 5.93.
- <sup>92</sup> Id., para. 5.103.
- <sup>93</sup> ST/21.5-AB, above, note 36, para. 144.
- <sup>94</sup> ST/21.5-P, above, note 34, paras. 5.94 and 5.100.
- <sup>95</sup> ST/21.5-AB, above, note 36, para. 149.
- <sup>96</sup> Id., para. 165.
- <sup>97</sup> ST/21.5-Panel, above, note 34, para. 5.111.
- <sup>98</sup> ST-AB, above, note 33, para. 173.
- <sup>99</sup> Id., para. 173.
- <sup>100</sup> Id., para. 174.
- <sup>101</sup> Id., para. 175.
- <sup>102</sup> RG-AB, above, note 24, p. 630-31.
- <sup>103</sup> ST-AB, above, note 33, para. 177.
- <sup>104</sup> Id., para. 183.
- <sup>105</sup> Ibid.

<sup>106</sup> ST-AB, above, note 33, para 150.

<sup>107</sup> ST-AB, above, note 33, para. 165.

<sup>108</sup> RG-AB, above, note 24, p. 629.

<sup>109</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products: Panel Report*, adopted on 5 April 2001, WT/DS135/R, para. 8.236, as quoted in ST/21.5-Panel, above, note 34, para. 5.142.

<sup>110</sup> ST/21.5-P, above, note 34, para. 5.142.

<sup>111</sup> *Id.*, para. 5.143.

<sup>112</sup> Ministerial Conference, Fourth Session: Ministerial Declaration, WTO/MIN(01)/DEC/1 (2001) at para. 31(i).