Abstract

***Laffiteau, Charles A. "The WTO Appellate Body's Shrimp-Turtles Decision: A Great Leap Forward in the Protection of the Global Environment?"** This paper explores the World Trade Organization (WTO) as an institution of global governance, by analyzing the WTO Appellate Body's decision upholding an arbitration panel's ruling against the United States' (US) in the *Shrimp-Turtles* trade dispute. Rather than a setback for environmental protection, I argue this Appellate Body ruling charted a new course for future arbitration panels in making determinations regarding the legality of trade related environmental restrictions. Among other things, the decision opened the door for unsolicited environmental NGO legal filings and in fact upheld the US's right to ban shrimp and shrimp products from producers who used fishing methods that endangered sea turtles. This paper also identifies the modifications to principles of international law which came about as a result of this landmark WTO legal ruling. All of these modifications can be seen as advantageous for nations and environmental NGOs seeking to protect certain areas of their national and global environment or endangered species. The disadvantages of this decision in the view of less developed countries is also detailed prior to the conclusions section, which offers some suggestions as regards how nations can use trade related restrictions to foster improved compliance with environmental regulations.
*With acknowledgements to Ms Maria McDonald of the Dublin City University Socio-Legal Research Centre for her international trade law contributions.

"The WTO Appellate Body's Shrimp-Turtles Decision: A Great Leap Forward in the Protection of the Global Environment?"

By Charles Laffiteau*

*With acknowledgements to Ms Maria McDonald of the Dublin City University Socio-Legal Research Centre for her international trade law contributions.

Introduction

Was the WTO Appellate Body's October 12th 1998 *Shrimp-Turtles* decision: a great leap forward in the protection of the global environment? In contrast to the condemnation the WTO received from environmental NGOs, I contend that this ruling opened the door for NGOs filings and upheld the United States (US) right to ban shrimp and shrimp products from producers who did not use acceptable fishing methods to safeguard endangered sea turtles. The Appellate Body only upheld the arbitral panels ruling against the US, because the US had applied different standards to Caribbean producers than it applied to Asian shrimp importers. This essay identifies analyses and discusses the modifications to principles of public international law that were made by the WTO as a result of this decision. These modifications may be seen as advantageous for nations and (NGOs) seeking to protect the environment and endangered species. The disadvantages of this decision in the view of many less developed countries, as well as some suggestions for going forward, are also detailed.

Background

The issues surrounding the need to protect our global environment have only recently come to light over the last fifty years, dating to the 1962 publication of biologist Rachel Carson's groundbreaking book, *Silent Spring*[1], which detailed the global environmental effects of the use of a pesticide known as DDT. Now problems with the environment could no longer be avoided. As Antonio Cassese notes;

[1] Rachel L.Carson. *Silent Spring.* (New York, NY: Houghton Mifflin, 1962)

> "Before, the problem was not felt, for three main reasons. First, industrial developments had not spawned pollution and damage to the environment on a very large scale. Second, States still took a traditional approach to their international dealings: they looked upon them as relations between sovereign entities, each pursuing its self-interest.….and unmindful of general or community amenities. Third, public opinion was not yet sensitive to the potential dangers of industrial and military developments to a healthy (global) environment."[2]

Public awareness of environmental issues and our sensitivity regarding how they impact all nation states civil societies has risen dramatically since the 1960s. Environmental issues can have profound impacts on national and international political economy. While states officials are also aware of the problems caused by environmental degradation and abuse, they are often reluctant to take the steps needed to curb such abuses for fear of offending various business interests. The costs to business interests and multinational corporations (MNCs) of addressing the pollution problems they cause and or of adhering to new environmental regulations, are often seen as onerous with negative impacts on their current and future profitability. Many MNCs have moved their operations to other countries with lax environmental rules in an effort to avoid paying for these costs. "Likewise as governments and consumers in the (wealthier nations of the) North have restricted or banned a number of tobacco products, pharmaceuticals and pesticides, global marketing (by MNCs) has created new outlets for these goods in the (developing countries of the) South and East."[3] To further illustrate this point; "Nearly a third of pesticides exported from the North have been outlawed, unregistered or withdrawn in the country of manufacture."[4]

The reluctance of states to take action with respect to environmental issues (combined with the forces of globalisation that fuel these concerns) has led to the formation of numerous environmental NGOs, which lobby voters and officials in

[2] Antonio Cassese *International Law* (Oxford UK: Oxford University Press, 2001): 375
[3] Jan Aart Scholte *Globalization. A critical introduction*, (New York: St. Martins Press, 2000):213-214
[4] TWG, *Third World Guide 93/94.* (Montevideo: Instituto del Tercer Mundo, 1993)

nation states, in addition to petitioning judicial courts and international institutions, around the world to implement policies that are environmentally sensitive. These NGOs have been moderately successful to date, in terms of raising global awareness and generating international agreements to deal with certain issues such as ozone depletion. As Scholte pointed out; "we have developed some potentials for global governance of environmental matters. In this respect the ozone regime established through the 1985 Vienna Convention and the 1987 Montreal Protocol has proved particularly successful."[5] The success of international agreements to reduce chlorofluorocarbons (CFCs) shows what can be done when states become alarmed enough to take action on a global scale. For example; "in 1997 world production of most ozone-depleting substances had fallen to 76 percent of the 1988 level."[6]

Unfortunately, progress in other areas, such as cutting the greenhouse gas emissions which lead to global warming, has been slow to non-existent in many countries. The 1997 Kyoto Protocol aimed at cutting greenhouse gas emissions world wide, did not come into effect until 2005 because of the difficulty in getting enough states, which in total produced more than 50 percent of these gases, to ratify the agreement. In the interim, the United States (US), which is the largest producer of such greenhouse gases, has decided not to ratify the Kyoto Protocol, and China, which is the 2nd largest and fastest growing producer of carbon based emissions, has refused to take any steps to address its obligations under the treaty. BBC science analyst Tracey Logan notes that many experts believe that Kyoto will be largely ineffective as the world's two biggest emitters, the US and China, will not cut their outputs.[7]

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[5] Scholte:212
[6] Edwards, M. *Future Positive: International Co-operation in the 21st Century.* (London: Earthscan, 1999): 22
[7] BBC News / Europe/ *Russian MPs ratify Kyoto Treaty*. October 22, 2004

Nonetheless, the Kyoto Protocol was and is a positive step in the right direction. This environmental treaty has led to other steps by the European Union (EU) and Canada to implement greenhouse gas trading schemes which will complement those spelled out in the international treaty. The Kyoto Protocol was the most ambitious attempt yet, to address a major environmental issue on a global scale. But as is so often the case with large agreements involving many different countries with competing agendas, Kyoto required significant political compromises on the part of nations in both the developed world and developing countries. "Whereas the Kyoto example suggests that liberal environmentalism enables international environmental agreements that otherwise might have been more difficult to achieve, the irony may be that the kind of agreement created may be vastly inadequate to significantly forestall, let alone stop or reverse, current trends in greenhouse gas emissions."[8] In other words, is the Kyoto Protocol just another example of an international agreement which amounts to nothing more than 'too little, too late'?

There are significant differences between an international community reaching agreements on ozone depleting substances and making similar agreements covering greenhouse gases and other environmental concerns. Regarding the ozone protocol;

> "The successive negotiations and protocols of the 1970s and 1980s enabled a common international framework for negotiations to emerge, and aided the establishment of a scientific consensus in the face of uncertainty. On the basis of this it proved politically possible to transform the production and consumption of CFCs, first in the West (North), and then, through new financial mechanisms, in the South. However, the speed of negotiations, when measured against the pace of environmental degradation, looks alarmingly sluggish and the simplicity of the politics of ozone depletion (few producers, possible [economical] substitutes, many non-essential uses) is unlikely to be replicated in other environmental contexts."[9]

[8] Richard Stubbs and Geoffrey R. D. Underhill, (eds.) *Political economy and the changing world order*, (New York: Oxford University Press, 2006): 250

[9] David Held and Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture.* (Oxford UK: Polity Press 1999): 411

The political complexity of the problem involving greenhouse gases (many producers, few economical substitutes, and many essential uses) is such that it is hard to imagine any international agreement on this issue will be as successful as the agreement on ozone depletion.

The reality of the international situation surrounding climate change is that progress has been almost non-existent. "Half a dozen United Nations (UN) conferences through the 1990s on climate change have yielded limited concrete results. Nor has general backing yet developed for a World Environment Organization (WEO) that would work on a par with the WTO and other global governance organizations."[10] The "Earth Summit" convened by the UN General Assembly and commonly referred to as the 1992 Rio Conference, was widely viewed as a success for those concerned about the environment, but in reality only established a "framework" for future negotiations on the environment among member states of the United Nations.

> "Non-governmental organizations had their own parallel conference in Rio, but (for the first time) were also entitled to attend the intergovernmental meetings. The Rio Declaration (27 general principles to guide action on environment and development), Article 21 (promoting sustainable development), and the Declaration of Forest Principles were all agreed, and the conventions on climate change and biodiversity were respectively signed by 154 and 150 governments. The Convention on Desertification was not ready in time and was not agreed to until June 1994."[11]

Environmental NGOs came away from the 1992 Rio Conference with an enhanced international stature which they began using as leverage to push individual nation states to both ratify the Declaration and the Rio conventions as well as begin implementing new environmental reforms and regulations. The more developed

[10] Scholte:213
[11] John Baylis and Steve Smith, *The Globalization of World Politics: An Introduction to International Relations*, (Oxford, Oxford University Press, 2001):404-406

Western countries in Europe and North America, also known as "states in advanced capitalist societies" (SIACS) were particularly sensitive to this pressure from the NGOs, many of which were founded and based in their countries. "Among SIACS the unpalatable implications of many environmental policies for key groups of producers and consumers, and the enmeshment of problematic environmental practice with the basic routines of everyday life, are such that few governments, if any, have shown themselves willing to accept the political costs of policies – coercive or catalytic – which might bring economic and social practices into line with the requirements of global environmental sustainability."[12] In other words, persuading individual nations to adopt environmental reforms is as slow and tedious a process as it is getting nations to agree to international accords governing environmental practices.

Many scholars and environmental groups, as well as governments on opposite sides of environment and trade issues, are displeased with the way in which the WTO currently deals with environmental issues and their impact on world trade disputes. Sabrina Shaw and Risa Schwartz write that;

> "The relationship between trade and environment in the World Trade Organization, according to some, is being created through disputes because of the lack of recommendations from the (WTO) Committee on Trade and Environment on trade and environment issues and because of the delay in launching a new round of trade negotiations."[13]

Many multi-national corporations (MNCs) and developing countries want the WTO to either confine itself strictly to trade disputes or to negotiate any linkages between environmental issues and trade, within the framework of broader trade negotiations and concessions by developed countries in areas of concern to developing countries. On the other hand, environmental NGOs and states in advanced

[12] Held et al: 410
[13] Sabrina Shaw and Risa Schwartz, "Trade and Environment in the WTO State of Play". *Journal of World Trade*, Vol. 36 Issue 1 (February 2002): 129

capitalist societies (SIACS) want the WTO to allow them to use trade sanctions to force other states to comply with regulations designed to protect the environment and endangered plant and animal species (without waiting for another round of trade negotiations and or concessions).

For its part, the WTO has tried to steer a middle course in between these opposing positions, in part because it recognizes that both sides have valid arguments. The WTO also wants to maintain existing trade agreements between the SAICS and the developing countries of the world, while it conducts negotiations to expand these agreements and facilitate trade in goods and services worldwide. Environmental issues were a "fly in the ointment" that the WTO would rather see handled by some other International body. This desire of the WTO to focus primarily on reducing trade restrictions and tariffs is perhaps one of the reasons why the WTO Committee on Trade and Environment has yet to make any recommendations to the governing body.

Case Analysis

In the successor agreement to GATT, the WTO Preamble added three new elements; "expanding production in trade and services (as well as goods), seeking sustainable development by protecting and preserving the environment, and recognizing the need for positive efforts to distribute the benefits of economic development to all developing countries."[14] In addition to the WTO Preamble, article XX (g) is also extremely important because it is the section that allows for measures that deviate from GATT and WTO rules for the purpose of environmental protection. Peter van den Bossche explains how Article XX(g) is applied writing that;

> "Article XX(g) sets out a three-tier test requiring that a measure;
> • relate to the *conservation of exhaustible natural resources*
> • *relate* to the conservation of exhaustible natural resources; and

[14] Robertson, David. "Civil Society and the WTO". In *The World Economy: Global Trade Policy 2000.* Peter Lloyd and Chris Milner (eds). (Oxford UK: Blackwell Publishers, 2001): 29

> • be made effective *in conjunction with restrictions on domestic production or consumption*."[15]

Peter van den Bossche also notes that trade related measures under article XX(g) must not discriminate by noting its anti-discrimination caveat; "For a measure to be justified under Article XX, the application of that measure, pursuant to the chapeau of Article XX, should *not* constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'."[16] However, despite the WTO Preamble's provision for sustainable development by protecting and preserving the environment, previous rulings by WTO panels in similar *Tuna-Dolphin* cases involving the US, neatly side stepped environmental concerns. Joel Trachtman notes;

> "Both the 1991 and the 1994 panels had found that the U.S. measure, as a regulation of a process rather than a product, was not exclusively covered by art. III of GATT, and so was subject to the prohibition of embargoes under art. XI. The 1991 panel found that the U.S. measures did not qualify for an exemption under art. XX because that provision did not permit the protection of animals outside the territory of the state adopting the relevant measure."[17]

The WTO panel used the same reasoning used by the two prior *Tuna-Dolphin* case arbitration panels [i.e. that article XX(g) didn't allow the US to protect sea turtles outside of its territorial boundaries] in making its decision in the *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case, once again side stepping the environmental issues raised by the US in defence of its position. All three panels rejected briefs file by NGOs in these cases because it had not asked these NGOs to submit them. All three previous arbitration panels also denied US claims of

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[15] Bossche, Peter van den. *The Law of the World Trade Organization.* (Cambridge UK: Cambridge University Press, 2005): 295

[16] Bossche, Peter van den., N. Schrijver, & G. Faber *Unilateral Measures addressing Non-Trade Concerns*. A study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods. (The Hague: Ministry of Foreign Affairs of The Netherlands, 2007): 121

[17] Joel P. Trachtman. "Decisions of the Appellate Body of the World Trade Organization, United States—Import Prohibition of Certain Shrimp and Shrimp Products". *The European Journal of International Law,* Vol. 10 No. 1 (1999): 192-194

justification for these embargoes under Article XX on the grounds that permitting such bans undermined the trading system it was trying to protect and maintain. But in the *Shrimp-Turtles* case the arbitration panel specifically addressed the US claims under Article XX by stating that, "While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a non-discriminatory basis."[18]

In the case of *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* the WTO Appellate Body, subsequently rejected a number of the arbitration panels' findings as well as the reasoning the panel used in making its determinations. The breadth of the Appellate Body's rejection of the panel's reasoning for its rulings made this a historic case in terms of opening up new areas of international trade law to the consideration of the environmental concerns of trading partners. The Appellate Body also accorded international legal standing to NGOs for the first time, opening the door for future arbitration panels to consider NGO briefs filed in conjunction with international trade disputes, irregardless of whether or not the arbitration panel had asked for their opinions in such cases.

Public international law often involves conflicting norms and principles and the WTO is the key player in an important area of globalisation and public international law. The WTO acts as a vital mechanism for advancing globalisation in the economic sphere, because it makes the rules which govern trade and commerce between nations around the world. International trade in goods and services is the

[18] WTO Panel Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (98-1710), 15 May 1998 paragraph 7.42

engine of globalisation, which is fuelled by increasing international capital flows and technological advances in communications and computers. Joost Pauwelyn notes;

> "That WTO rules are legally binding rules part of international law must, indeed, stand beyond doubt. They derive from a treaty and, pursuant to Article 26 of the Vienna Convention on Treaties, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith' (that is, the *pacta sunt servanda* principle)."[19]

In this way, the WTO functions as a type of global governance mechanism in an important branch of public international law. Nations must abide by WTO rules, regardless of what their own internal domestic politics or policies may be, or suffer the consequences from an economic standpoint.

The fact that the WTO Appellate Body considered the legal briefs filed by environmental NGOs and chastised the arbitration panel for not doing so in *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* underscores the growing influence of NGOs on international institutions such as the International Monetary Fund (IMF) and the WTO. The NGO are not party to the proceeding and "although not influencing the policies of these bodies much, yet [the WTO is] broadening their agendas to include social (human, labour, environmental rights etc,) issues more regularly, this increasingly institutionalized participation by NGOs undermines the nation state's claim to be the sole legitimate representative of the public interest in its country. Many developing countries, and especially weaker nations in the southern hemisphere, oppose such widening consultation and representation to unelected NGOs on these grounds. But these examples of global governance may be considered a further indication of the operation of globalization at the political level, and (one) which incorporates increasingly growing numbers of

[19] Joost Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law.*(New York: Cambridge University Press, 2003): 27

international social groups (non-state actors) in key multilateral institutions. "[20]However, it is worth noting that the WTO is required in its Preample and its articles to have regard to human, labour, environmental rights. More importantly, the WTO is not above international law and therefore in making any decisions, they must take account of norms of international law relating to these issues whether they involve developing or developing countries.

Many scholars agree with developing countries, in so far as this broadening of the mandates of international institutions like the IMF and WTO to include a wide range of social issues is, in fact, moving beyond the intended purpose(s) which were initially used to justify the creation of these institutions. Arguments as regards these international institutions "creeping" acquisition of control over other areas of international governance, at the expense of individual nation states authority in such matters, are not without merit. Given the fact that genocide and other breaches of grave human rights can be prosecuted universally by individual sates or by the International Criminal Court, there is some justification for doing so with respect to environmental issues, since these are sometimes linked with human and or labour rights violations and concerns. While human and labour rights abuses are no more justifiable than environmental abuses, they have fairly limited impacts on other nation states civil societies. Their impacts are generally confined to the nation states and civil societies where they are occurring and are rarely felt beyond the states and regions near its borders. On the other hand, environmental issues have much broader impacts on other nation states and sometimes result in global repercussions. The effects of ozone depletion, air and water contamination, deforestation and species extinctions

[20] King and Kendall : 171

are felt globally as well as within the nation states and regions where such environmental abuses are occurring.

Because of the difficulty in achieving and implementing national policies and international environmental agreements in a timely manner (during the years following the 1992 Rio conference), environmental NGOs have come to the conclusion that the fastest way to address their environmental concerns is through existing international agreements and public international law. International trade agreements under the auspices of the WTO are one of the avenues that NGOs would like to pursue because of the economic consequences countries are likely to suffer should they decide to ignore WTO decisions. The difficulty for NGOs in pursuing this course of action has been persuading the WTO to agree to link environmental issues with trade disputes pursuant to Article XX (g), which permits states to embargo goods "as a measure related to the conservation of exhaustible natural resources."[21] Prior to the WTO Appellate Body's ruling in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, (aka *Shrimp-Turtles dispute*) WTO arbitration panels had refused to recognize such measures as permissible under the Article XX(g) by stating that "they were unjustifiable under the 'chapeau' of Article XX."[22] NGOs had also been stymied by previous arbitration panels' refusal to accept their "third party" briefs and filings in trade disputes involving environmental issues.

The WTO Appellate Body's decision in the *Shrimp-Turtles dispute* represented a significant departure from the WTO's previous use of "traditional law" in deciding trade disputes involving environmental issues. Given the fact that WTO decisions are integral to public international law, this WTO Appellate Body decision

[21] Gregory Shafer "United States-Import Prohibition of Certain Shrimp and Shrimp Products.". *The American Journal of International Law*, Vol. 93 No. 2 (April 1999): 510
[22] Shafer : 510

represented a modification to certain traditional law principles of public international law. Antonio Cassese writes that;

> "Significant evidence of this traditional stand can be found in two cases brought before international courts before the late 1950s: the *Pacific Fur Seal* case (1893) and the *Trail Smelter* case (1938 and 1941. The former concerned a dispute between the USA and Britain over some issues relating to jurisdiction in the Behring Sea and – what is more relevant to our subject – the question whether the USA had a right of property and protection of fur seals outside of its three-mile territorial waters. The latter case concerned relations between two industrialized States, the USA and Canada. The USA accused Canada of damaging, through the industrial activities of a factory situated on its territory, the environment of the American State of Washington,"[23]

International court rulings in these cases upheld certain principles of traditional law and helped provide a precedent under public international law. In the *Pacific Fur Seal* case "the Arbitral Court upheld the British view, holding that the USA had no 'right of protection or property in the fur-seals'. It thus implicitly dismissed, among other things, the concept of 'trust for the benefit of mankind'."[24] However in the *Trail Smelter* case the Arbitral Court held that "every State has a duty at all times to protect other States against injurious acts by individuals within its jurisdiction….under the principles of international law….Consequently the Court held Canada responsible for the conduct of the *Trail Smelter* and enjoined it to pay damages to the USA."[25] Both of these decisions were made within the framework of traditional public international law and were guided by the accepted principles of law governing state to state relations. It wasn't until a later ruling in 1957, that an international court first recognized the need to address the 'common interests of everybody'. "Thus, in the *Lac Lanoux* case (1957) the Arbitral Tribunal, while (still) taking a traditional view of international law regulating relations between

[23] Cassese: 375
[24] Cassese: 376
[25] Cassese: 377

neighbouring States, alluded to the **possibility** of natural resources such as the water of a lake being exploited 'in the common interests of everybody'."[26]

Thus far, according to Cassese only five general principles concerning the role of environmental protection have evolved under public international law.

> "The first (first set out in the *Trial* Smelter case) and more general one is that *enjoining every State not to allow its territory to be used in such a way as to damage the environment of other States or of areas beyond the limits of national jurisdiction.* Another (second) general principle is that *imposing upon States the obligation to co-operate for the protection of the environment.* A (third) less vague principle is that requiring every State to immediately *notify other States of the possible risk that their environment may be damaged or affected* by an accident that has occurred on its territory or in an area under its jurisdiction. Another (fourth) general principle is that enjoining States *to refrain from causing massive pollution of the atmosphere or the seas.* The last of these five principles doesn't have as broad of an impact as the previous four, but is important nonetheless. This (fifth principle) was spelled out in a decision by the Rotterdam Tribunal in 1983 that read 'the upstream users of an international river are no longer entitled to the unrestricted use of (the waters) of such a river, and are bound, when taking decisions concerning its use, to take reasonable account of the interests of other users in downstream areas.'"[27]

In recent years it has been decisions by the WTO Appellate Body, rather than WTO arbitration panels, which have opened the door to consideration of demands by NGOs and other sympathetic nation states that, in some cases, environmental concerns were legitimate justifications for trade restrictions imposed by states on trading partners. In an earlier ruling in 1996, the WTO Appellate Body had upheld the US government's right to apply US Environmental Protection Agency (EPA) standards for cleaner burning fuels to imported gasoline products from Venezuela, so long as these regulations were not applied in a discriminatory manner. While the US lost this case because the EPA rules for re-formulated gasoline were clearly favourable to US domestic refineries, a precedent was set nonetheless, legitimizing

[26] Cassese : 377
[27] Cassese: 381-382

the rights of nations to force their trading partners to adhere to their environmental regulations (so long as their were applied in a non-discriminatory fashion).

In the *Shrimp–Turtles dispute,* the WTO Appellate Body went even further in its decision to overturn portions of the arbitration panels ruling against the US. The arbitration panel in the *Shrimp–Turtles dispute* interpreted Article XX in the same way previous panels in *Tuna-Dolphin cases* had. "By selecting a limited "object and purpose," the Panel predetermined that measures having an environmental object and purpose could not be justified under art. XX. The Panel concluded that derogations from other provisions of GATT are permissible under art. XX only so long as they 'do not undermine the multilateral trading system.'"[28] The WTO Appellate Body firmly rejected this line of reasoning and in so doing effectively rejected the reasoning used in the previous *Tuna-Dolphin cases* as well. The Appellate Body rejected the panel's decision to interpret the *chapeau* of Article XX so narrowly that it was effectively rendered useless by virtue of the panel's decision that the US import ban was "not within the scope of measures permitted under the *chapeau* of Article XX."[29] The Appellate Body interpreted and viewed the *chapeau* of Article XX in a completely different context than the panel, by "finding that it is intended to prevent abuse of the exceptions listed in art. XX,"[30] The *Shrimp-Turtle* panel (as had previous arbitration panels) had interpreted the *chapeau* from a much different perspective, reasoning that it was meant to severely limit the use of Article XX's exceptions.

Trachtman also points out that;

> "The Appellate Body further criticized the panel for examining compliance with the *chapeau* prior to determining compliance with any of the following exceptions. It is not possible to determine whether an exception is being abused without first determining whether the exception is otherwise available In fact,

28 Trachtman: 192-194
[29] WTO Panel Report, WT/DS58/R (98-1710), 15 May 1998 paragraph 7.62
[30] Trachtman: 192-194

> the Appellate Body completely rejected the panel's line of reasoning (stating that: "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."[31]

With these rulings the WTO Appellate Body significantly modified existing international trade law (as well as the public international law it is a part of) by establishing a new interpretation of Article XX for the purpose of guiding future arbitration panels' reasoning in trade disputes involving environmental issues.

The WTO Appellate Body not only validated the use of Article XX's (a) to (j) exceptions to justify individual nation state trade restrictions based on environmental considerations, but it also broadened the definition of "exhaustible natural resources" which could be protected by environmental regulations and restrictions. Gregory Shafer notes this distinction writing that;

> "Rather than analyze the original intent or drafting history of Article XX, the Appellate Body affirmed that the term 'exhaustible natural resources' is not static in its context or reference, but is rather by definition, evolutionary….that it must be read….in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. The Appellate Body stated that 'it is too late in the day' to limit coverage under Article XX (g) to 'the conservation of exhaustible mineral or non-living resources'….(and) 'in the absence up to now of any agreed amendments or modifications to the substantive provisions of GATT 1994' the Appellate Body amended prior GATT analysis in light of contemporary perspectives."[32]

Therefore, based on this legally binding interpretation by the WTO Appellate Body, living animal and marine species could henceforth be regarded as an 'exhaustible natural resource' within the exceptions permissible under Art. XX.

[31] Trachtman: 192-194
[32] Shafer : 511

Conclusions and Recommendations

Many of the environmental activists and NGOs who were highly critical of this WTO decision, "couldn't see the forest for the trees", because they focused on the fact that the panels ruling against the US was essentially upheld by the Appellate Body. But a careful analysis of the elements of the panels decision which were overturned and or reversed by the Appellate Body, leads to a far different conclusion. For the first time living animal and marine species were defined under international trade law (and thus public international law) as an "exhaustible natural resource" subject to (extraterritorial) conservation measures undertaken by states outside their respective territorial waters and boundaries. Earlier rulings by the Appellate Body in the *US-Venezuela* gasoline case had added 'clean air' to the list of "exhaustible natural resources" covered by the exceptions permitted under Article XX. This was an extremely significant modification to existing public international and trade law.

Furthermore, environmental NGOs were even bigger winners in the *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case, because of the Appellate Body's decision to set another precedent and welcome unsolicited (by the WTO arbitration panels) future briefs and filings on their behalf. Indeed the first action taken by the Appellate Body in this case "overruled the panels holding that 'accepting non-requested information from non-governmental sources is incompatible with the provisions of the Dispute Settlement Understanding (DSU). In the appeal, the Appellate Body not only accepted 'for consideration' three NGO briefs attached as exhibits to the US submission; it also accepted a revised version of one of these briefs independently submitted by a group of NGOs."[33] While the Appellate Body did not go so far as to define procedures for the filings of such "*amicus*" (or friend of the

[33] Shafer : 509-510

court, third party) briefs, by accepting them, it nonetheless went beyond the language used in Article 13 of the DSU which "refers to a panels *'right to seek information'*, and the panel clearly did not '*seek'* "non-requested information."[34]

It would also appear that the Appellate Body may have not only opened the door for NGOs to file such briefs, but, in so doing, may have provided other non-state actors such as multinational corporations (MNCs), supraterritorial institutions like the European Union (EU) and international institutions such as the World Bank and International Monetary Fund (IMF) an avenue for un-solicited *amicus* filings as well. These other non-state actors (principally MNCs) may have a vested interest in particular trade disputes brought before the WTO and may wish to influence future arbitration panel decisions thru the use of their own business, trade and financial data as well as their own legal arguments. Wealthy and powerful MNCs can afford to assemble vast amounts of information and high powered legal teams to press their arguments much more readily than non-profit environmental (human and labour rights) NGOs are able to.

As for the developing countries who were the complainants in the *Shrimp-Turtles* case, they might "win this battle, but (in the process) lose the war"[35]. Lax environmental standards are often viewed as one of the few comparative advantages producers in these countries possess. They often can't afford to implement the technologies required to address environmental strictures being imposed on their means of production by other nations. As I alluded to earlier, "Many developing countries, and especially weaker nations in the southern hemisphere, oppose such widening consultation and representation to unelected NGOs on these grounds."[36] They would prefer to address environmental issues within the framework of broader

[34] Shafer : 510
[35] Roilo Golez. Member House of Representatives from Paranaque City, Phillipines 2nd District, 1988
[36] King and Kendall: 171

trade negotiations with (and other trade concessions by) more developed countries. Previous WTO arbitration panel rulings had generally been favourable to the interests of the developing countries. These arbitration panels rather technical interpretations of environmental exceptions allowed under Article XX , coupled with the panels narrow definitions of terms like "exhaustible natural resources" (as applying only to non-living resources) were viewed favourably by developing countries. The decision by the WTO Appellate Body to reject previous interpretations of allowable exceptions, broaden the definition of "exhaustible natural resources and to allow NGOs un-solicited *amicus* briefs to become a part of WTO dispute settlement proceedings has been construed as disadvantageous to the interests of developing countries and is very worrisome to them.

While the influence of NGOs is growing around the world in many nation states and within international institutions like the WTO, many scholars question just how much of an impact they can really have given the realities of an increasingly globalized market place. One such view is that "there are limits to the degree of support and acceptance their agendas are likely to secure…. the power of the free market ideal remains strong." [37] Another suggestion that has been made to address environmental issues within the framework of WTO trade policies is "to open a new negotiation to conclude an environmental code that would set out minimum levels of pollution control and environmental quality with respect to certain key economic sectors such as import sensitive industries."[38] Such a negotiation would allow developing countries to head off more expensive environmental restrictions by developing countries which may be allowable under the exceptions in Article XX.

[37] Richard Devetak and Richard Higgott, "Justice Unbound? Globalization, States and the Transformation of the Social Bond" *International Affairs*, Vol. 75, (July 1999): 493

[38] Thomas J. Schoenbaum "Free International Trade and Protection of the Environment: Irreconcilable Conflict?" (in Agora; Trade and Environment) *The American Journal of International Law*, Vol. 86, No. 4. (Oct., 1992): 723

Whether such a negotiation is still feasible given the impasse between developed and developing countries in the Doha Round of trade negotiations is an open question.

The fact remains though, that in the absence of any other world body, such as the oft suggested World Environment Organization, the only existing international institution within the framework of public international law that is in a position to mediate and adjudicate environmental issues and global trade disputes, is the WTO. While one may question the WTO's enforcement capabilities, their rulings still carry the force of law. Michael Weinstein and Steve Charnovitz suggest that;

> "The WTO must strike a balance between two extremes. Cracking down too hard on the use of environmental trade restrictions invites environmental damage. But excessive leniency in imposing sanctions invites two other abuses: pressure on poorer countries to adopt standards that are ill suited to their strained economies, and suppression of trade that will lead to higher prices and stunted growth."[39]

Going forward, Weinstein and Charnovitz also have some suggestions for environmental NGOs in industrialised and developing countries;

> "Defer to multilateral environmental agreements.
> Invite legal briefs from outside experts.
> Mediate before litigating disputes.
> Monitor the environmental impacts of proposed trade agreements.
> Allow eco-labeling.
> Promote technology transfer and trade in environmental services.
> Curb environmentally damaging subsidies."[40]

Environmental activists and citizens around the world are waiting for countries to pick up the ball and address the CO_2 pollution which underlies the world's looming climate change crisis. Instead of regarding the WTO as an impediment in addressing these concerns, environmentalists should recognize that the WTO could actually help those countries and environmental NGOs who want to use the article XX exceptions.

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[39] Michael M.Weinstein and Steve Charnovitz. "The Greening of the WTO" *Foreign Affairs*, Vol. 80 No. 6 (2001): 148

[40] Weinstein and Charnovitz. : 155

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