

A STATE'S SOVEREIGN RIGHTS AND OBLIGATIONS IN THE WTO TO HARMONIZE ENVIRONMENTAL POLICIES

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ABSTRACT

Harmonizing policies toward a specific State's environmental policies or the World Trade Organization (WTO)'s economic policies can affect States' rights to implement and enforce national environmental or economic policies. The State harmonization requirement, which restricts trade unless another State adopts a uniform environmental policy, has the potential to infringe on another State's right to determine and enforce its own environmental policy. One State's right to take measures must be balanced with another State's right to choose national policies under the state sovereignty principle of international law. Meanwhile, WTO harmonization, which requires compliance with obligations under WTO rules and the rulings of WTO Dispute Settlement Bodies (DSBs), considers diversity of States' value preferences and the authority of States to make their own policy choices. In this context, the WTO requires a balance between a State's desire to avoid distortion in international competition and another State's right to enforce environmental policies. In sum, in modern state sovereignty principle, a State is more influenced by other States' actions or international institutions' activities because of increased interdependence. Accordingly, both the State and WTO harmonization requirements must be implemented in a way that protects States' rights of environmental policy choice and enforcement.

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INTRODUCTION

Environmental problems cannot be resolved “in isolation” because environmental considerations are intertwined with social and cultural values and economic development.¹ A nation’s environmental regulations and policies may differ from other countries’ policies on the basis of that nation’s pollution level, technical and economic capacity, and value preference.² Thus, environmental problems are dealt with more efficiently

1. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 275 (7th ed. 2008).

2. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 157 (1994). *Cf.* John H. Jackson, *Comments on Initial Draft of Chapter, in ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM* 599, 600 (Alan V. Deardorff & Robert M. Stern eds., 1994)(discussing techniques for managing interdependence) [hereinafter Jackson 1994]; Org. for Econ. Co-operation & Dev. (OECD), *Environmental Standards: Definitions and the Need for International Harmonization* ¶¶ 6, 9, 21-27 (1974) [hereinafter OECD 1974]; David Robertson, *Trade and the Environment: Harmonization and Technical Standards, in INTERNATIONAL TRADE AND THE ENVIRONMENT* 309, 312 (Patrick Low ed., 1992).

within a state's own policy objectives.³ International relations require these value preferences to be respected within each country due to the principle of state sovereignty.⁴

Harmonizing environmental policies toward a specific set of domestic environmental policies or international rules would be contrary to the principle of state sovereignty. When a State exercises its right unilaterally to coerce another State to adopt uniform environmental policies, one State's right can constrain another State's right to implement and enforce its own environmental policies.⁵ This State harmonization requirement can threaten the other State's sovereignty. The State harmonization requirement can also conflict with the World Trade Organization (WTO) harmonization requirement, which tries to balance rights between States. The State harmonization requirement needs to balance a State's right to implement and enforce environmental policies and obligation to respect other States' rights.

Harmonizing regulations toward WTO rules can also hurt States' sovereign rights to determine and enforce their environmental policies. The WTO requires a Member State to abide by WTO obligations⁶ and to implement the ruling of the WTO Dispute Settlement Bodies (DSBs) when it is a party to the dispute.⁷ This WTO harmonization requirement is criticized for overwhelming its Member States' sovereignty over their domestic economic or environmental policies.⁸ WTO harmonization requires a State to balance its own rights and its obligations under the WTO.

The State sovereignty principle grants a State absolute discretion over its implementation of policies within its jurisdiction.⁹ Thus, when a State's

3. Jagdish Bhagwati, *Trade and Environment: The False Conflict*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 159, 165 (Durwood Zaelke et al. eds., 1993) [hereinafter Bhagwati 1993].

4. Brownlie, *supra* note 1, at 289.

5. Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 505, 522 (2009).

6. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS 95, 116-17 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) [hereinafter Hudec 1996b]; Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.26, WT/DS58/R (May 15, 1998) [hereinafter US-Shrimp Panel Report].

7. See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 341 (2000); John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 60 (1997) [hereinafter Jackson 1997a]; DAN SAROOSHI, INTERNATIONAL ORGANIZATION AND THEIR EXERCISE OF SOVEREIGN POWERS 96-97 (2005).

8. See Steve Charnovitz, *Competitiveness, Harmonization, and the Global Economy*, in AGRICULTURE, TRADE, AND THE ENVIRONMENT: DISCOVERING AND MEASURING THE CRITICAL LINKAGES 47, 56 (Maury E. Bredahl et al. ed., 1996).

9. Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 1 RECUEIL DES COURS 9 (1964); Brownlie, *supra* note 1, at 289.

environmental policies are significantly challenged by another State's policy requirement or a WTO institutional requirement, it is critical for the State to argue for respect its sovereignty. Both the State and WTO harmonization requirements can affect States' rights to implement and enforce national environmental policies. The State harmonization requirement would justify a State's intervening in other States' sovereign rights based on the common concern of environmental protection;¹⁰ the WTO harmonization requirement requires Member States to introduce a homogenized trading system, and conform their domestic economic policies to WTO rules.¹¹

Neither the State nor WTO harmonization necessarily implies explicit harmonization in international trade. A State does not necessarily enact explicit harmonization requirement under its legislation. Mostly, a State's regulations do not require foreign producers to adopt the same environmental policies, but a State can take trade measures when its trading partner does not meet requirements under its environmental policies or regulations. The State's trade measures on the basis of environmental policies can result in the same economic effects as the harmonization requirement. In this context, the State's trade measures are led by not direct or *de jure* harmonization, but rather by an indirect or *de facto* harmonization requirement.¹² Further, this State harmonization requirement will only work "if a country requiring harmonization has a large market" that is big enough to influence the export of other countries.¹³ Thus, throughout this paper, the State harmonization discussion largely refers to the *de facto* harmonization requirement, but also includes the *de jure* one as a possibility.

Similarly, the WTO does not require its Member States to adopt explicitly the same economic policies and laws.¹⁴ WTO rules do not cover Member States' harmonization of regulations or standards, but rather provides Member States with a framework for economic policies and rules in international trade.¹⁵ What the WTO requires its Member States to do is to implement their national economic policies and law in accordance with their commitments and obligations under the WTO. Accordingly, throughout this paper, WTO harmonization implies that the WTO Member States implement their economic policies and laws to comply with their concessions or commitment under the WTO.

10. See Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A commentary*, 86 AM. J. INT'L L. 728, 732 (1992).

11. David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?: ECONOMIC ANALYSIS 41, 41 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996); Robertson, *supra* note 2, at 312.

12. Interview with Padideh Ala'i, Professor, American University Washington College of Law, in Washington D.C. (Jun. 11, 2012) [hereinafter Ala'i interview].

13. *Id.*

14. Robertson, *supra* note 2, at 310-11.

15. Jackson 1994, *supra* note 2, at 600; Ala'i Interview, *supra* note 12.

This paper discusses these two different scenarios of when and how the State or the WTO harmonization requirement affects a State's sovereignty to implement and enforce its own domestic environmental policies. This paper is organized as follows: section two discusses the principle of state sovereignty in international law; section three examines a State's unilateral action affecting other States' sovereign right to legislate and enforce its environmental policies and laws; and, section four analyzes the WTO harmonization requirement and States' sovereign right to make environmental policies.

1. THE STATE SOVEREIGNTY PRINCIPLE IN INTERNATIONAL RELATIONS

Sovereignty is a State's "internal power or constitutional capacity."¹⁶ State Sovereignty represents three aspects: exclusive jurisdiction, state equality, and non-intervention.¹⁷ A State has "absolute power over its subjects," for example, its population and territory internally.¹⁸ Sovereignty grants States equality in international relations so a State is not constrained by any other higher powers.¹⁹ Thus, no State can intervene in the area of another States' sovereignty.²⁰ However, this traditional concept of state sovereignty is not entirely acceptable in modern international relations. The absolute character of sovereignty is challenged in certain circumstances related to human rights violations, war crime or terrorism.²¹ Therefore, States or international organizations can justify intervention into the sovereign territory of another State on the ground of resolving global concerns.

Globalization has also helped change the traditional doctrine of exclusive state sovereignty²² because it has increased political, legal, and economic

16. See Mann, *supra* note 9, at 9. See also Brownlie, *supra* note 1, at 289.

17. John H. Jackson, *Sovereignty: Outdated Concept or New Approaches*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 3, 4 (Wenshua Shan et al. eds., 2008) [hereinafter Jackson 2008]. See also Vaughan Lowe, *Sovereignty and International Economic Law*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 77, 83 (Wenshua Shan et al. eds., 2008); BROWNLIE, *supra* note 1, at 289.

18. See BROWNLIE, *supra* note 1, at 289. See also Jackson 2008, *supra* note 17, at 11; JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 369 (2000) [hereinafter JACKSON 2000].

Original one: John Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, in THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 367, 369 (2000) [hereinafter Jackson 2000].

19. See BROWNLIE, *supra* note 1, at 289; Jackson 2008, *supra* note 17, at 4, 11.

20. See BROWNLIE, *supra* note 1, at 289; Jackson 2008, *supra* note 17, at 4; *c.f.* Lowe, *supra* note 17, at 83 (generally discussing limits of sovereignty).

21. See Jackson 2008, *supra* note 17, at 13, 20; Lowe, *supra* note 17, at 80.

22. See Jackson 2008, *supra* note 17, at 6-10. See generally JACKSON 2000, *supra* note 18. See also Lowe, *supra* note 17; Ernst-Ulrich Petersmann, *State Sovereignty, Popular Sovereignty, and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?*, in REDEFINING SOVEREIGNTY IN

limitations.²³ Greater interdependence through globalization increases the influence by other States' actions and the obligations of international institutions.²⁴ International institutions may play an important role in coordinating international matters, which are difficult for a nation-state to resolve on its own.²⁵ This international interdependence engenders tension between traditional state sovereignty and the international regime.²⁶

A State's economic regulatory decisions can come into conflict with the mechanisms for international cooperation when a State's national policies do not comply with its obligations under the international institutions.²⁷ For a State to cooperate in international relations, it must concede some of its state sovereignty.²⁸ For example, States consent to be bound by international legal constraints that arise out of treaties.²⁹ As such, accepting any treaty reduces a national government's freedom of action because some actions may be inconsistent with the treaty and, thus would be a violation of international law.³⁰ WTO Member States' rights also are constrained because they gave up some of their sovereignty by conferring their rights to the WTO to achieve important policy results.³¹

However, these modern aspects of sovereignty do not necessarily prevail over States' sovereign rights. A State's obligations under international law must be recognized to the extent that the State consents.³² An international organization must exercise its power in a way that is based on each State's sovereign values because the meaning of sovereignty differs in different States.³³ When an intervention overwhelms State sovereignty to address issues of the global commons, it must be exercised only under international

INTERNATIONAL ECONOMIC LAW 27, 28 (Wenshua Shan et al. eds., 2008); Michael W. Dunleavy, *The Limits of Free Trade: Sovereignty, Environmental Protection, and NAFTA*, in *NAFTA AND THE ENVIRONMENT* 265 (Seymour J. Rubin & Dean C. Alexander eds., 1996).

23. Petersmann, *supra* note 22, at 28. The author defines sovereignty from the human rights perspective. According to the author, modern sovereignty reallocates power from the government to individuals or people. Respect for individuals includes diversity and regulatory competition in international trade. From the perspective of human rights, the free trade system must be supported because the sovereignty to engage in free trade can help ensure human rights. The GATT and the WTO are based on the liberalization and regulation of welfare-reducing trade barriers, and thus the WTO is the mechanism through which individuals can gain sovereign rights. *Id.* at 28-32. *See also* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT AND H. 866 (1990).

24. Jackson 2008, *supra* note 17, at 10.

25. *Id.* at 6.

26. *Id.*

27. *See id.* at 22; Dunleavy, *supra* note 22, at 265.

28. Dunleavy, *supra* note 22, at 271.

29. *See generally* BROWNLIE, *supra* note 1, at 289; Jackson 2008, *supra* note 17, at 11; JACKSON 2000, *supra* note 18, at 369.

30. JACKSON 2000, *supra* note 18, at 380.

31. *Id.* at 379.

32. Jackson 2008, *supra* note 17, at 19.

33. Sarooshi, *supra* note 7, at 9-11.

law principles. The following sections discuss whether a State's sovereign right is constrained by the unilateral action of another State and the obligations of international law.

2. A STATE'S UNILATERAL ACTION AFFECTING OTHER STATES' SOVEREIGNTY

2.1. A State's Unilateral Action Affecting Other States' Sovereignty to Enforce Environmental Policies

A State's unilateral action based on its domestic environmental policies or its international obligations under Multilateral Environmental Agreements (MEAs) can constrain other States' sovereign rights. A State has right to implement its policies and to impose trade restrictions to achieve both its domestic environmental goals³⁴ and the goals it has taken collectively through MEAs.³⁵ However, a State's authority to enforce its environmental policies is limited in international relations when its exercising authority is a unilateral action affecting the sovereign rights of other States. A State's unilateral action constrains other States' sovereign rights to regulate and implement their environmental policies when it puts pressure on others to make their national policies more uniform.³⁶ This unilateral constraint results in a State's intervening in the environmental policies of other States by using economic rules.³⁷ A State's intervening national policies go against the sovereignty principle of international law – that a State's domestic problems should be solved within its own

34. See Edith Brown Weiss & John H. Jackson, *The Framework for Environment and Trade Disputes*, in RECONCILING ENVIRONMENT AND TRADE 1, 27 (Edith Brown Weiss et al. eds., 2nd ed. 2008). See also Shinya Murase, *Unilateral Measures and the Concept of Opposability in International Law*, in 28 MIGHT AND RIGHT IN INTERNATIONAL RELATIONS 397, 405, 453 (Kalliopi Koufa ed., 1999) [hereinafter Murase 1999].

35. See GATT Secretariat, *Trade and the Environment* 10-11, GATT/ 1529 (Feb. 3, 1992) [hereinafter GATT Report 1992]. See also Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L EVNTL. L. REV. 1, 100-107, 112, 122 (1999); TIM LANG & COLIN HINES, *THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE* 66 (1993); Esty, *supra* note 2, at 19-20, 144, 150.

36. Bodansky & Lawrence, *supra* note 5, at 522.

37. When a State affects other States' domestic environmental policies, such action can be considered eco-imperialism. Weiss, *supra* note 10, at 732. Eco-imperialism is defined as instances "when the strong nations use trade power to force their preferred values on the weaker nations but the equally autonomous values of the weaker nations cannot be forced upon the stronger nations" in the same way. *Id.* See also Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?*, in 1 FAIR TRADE AND HARMONIZATION 159, 181 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996; Bhagwati 1993, *supra* note 3, at 171.

jurisdiction. States and international institutions must “refrain from intervening in the internal or external affairs of other states.”³⁸

Therefore, when a State’s unilateral measure potentially infringes on another State’s sovereignty, a balance must exist between a State’s right to take measures and another State’s right to implement its own environmental policies. Here, three different types of balance between States can be considered: first, balance between States’ rights to implement their domestic policies; second, balance between a State’s common concern for environmental conservation and another State’s discretion to choose its own policy; and, third, balance between a State’s right to take environmental measures and its obligation to respect other States’ rights under the WTO.

First, the State harmonization requirement to compel another State to adopt uniform environmental policies must consider the balance between States making their own choices to shape their environmental policies. Under international law and in the WTO, a State is not permitted to take unilateral action to coerce other States to make their domestic policies uniform with its policies, for this can hinder their rights to implement their environmental policies. Thus, balance is required when a State’s policy choice affects another State’s policy. Principle 2 of the 1992 Rio Declaration on Environment and Development (hereinafter Rio Declaration) provides that each State has the sovereign right to choose its own environmental policies on the basis of its national need.³⁹

WTO decisions have ruled against a State’s unilateral measures when it affects another State’s right to make policy choices. The Panel of *United States-Restrictions on Imports of Tuna* (hereinafter *US-Tuna*), where the U.S. prohibited the import of tuna from Mexico and EEC, which was harvested in a way that adversely affected dolphin. It was noted that a State’s unilateral measures based on the environmental exceptions provided by Articles XX(b) and XX(g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994)⁴⁰ can “jeopardize [other States’] rights” under the General

38. BROWNLIE, *supra* note 1, at 292.

39. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*]. In addition, States have to consider its obligation not to damage the environment of other States. Principle 2 says that “[s]tates have . . . the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” *Id.*

40. The General Agreement on Tariffs and Trade 1994 (GATT 1994) consists of the provisions in the General Agreement on Tariffs and Trade 1947. Thus, the GATT 1994 means same as the GATT 1947. *See* General Agreement on Tariffs and Trade 1994 ¶ 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

Agreement on Tariffs and Trade (GATT).⁴¹ The Appellate Body in *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US-Shrimp*), in which the U.S. banned the import of shrimp harvested in a way that adversely affected sea turtles, recognized that the 1996 Guidelines and certification requirements under Section 609 prevented other countries from executing and implementing their own domestic policies.⁴²

Meanwhile, in international trade, some constraints exist that relate to the rights of trading countries because the exporting country must meet the requirements of the importing country to access the importing country's market.⁴³ Constraints exist both in one State's taking coercive unilateral measures and in another State's accessing the market. In this context, the statement of the Panel in *United States-Import Prohibition of Certain Shrimp and Shrimp Products -Recourse to Article 21.5 by Malaysia* (hereinafter *US-Shrimp (21.5)*) is controversial. It noted that, for Malaysia to export shrimp to the United States, it is acceptable to distort Malaysia's environmental policy priorities to meet the policy requirements of the United States.⁴⁴ This statement seems to imply that a certain level of constraint on the exporting State's policy priority is acceptable in order to respect the importing State's autonomy to implement its environmental or economic policies. However, the Panel's choice to use the term "distort" was not appropriate in terms of a State's national policy priorities or sovereign right. Accordingly, to create a balance between States' policy choices, a State must respect another States' autonomy and right to determine and implement their national environmental policies under international law and the WTO.

Second, one State's measures to implement common concern on environmental conservation should balance with another State's discretion to make its own policy choice. Trade measures can be allowed when international agreements use economic sanctions to enforce their provisions, preventing transboundary environmental harm.⁴⁵ State's measures are also

41. Panel Report, *United States - Restrictions on Imports of Tuna*, ¶¶ 5.27, 5.32, DS21/R -39S/155 (Sept. 3, 1991) (*unadopted*), GATT B.I.S.D. (39th Supp.) (1992) [hereinafter *US-Tuna (Mexico)*]; Panel Report, *United States - Restrictions on Imports of Tuna*, ¶ 5.26, DS29/R (Jun. 16, 1994) (*unadopted*) [hereinafter *US-Tuna (EEC)*].

42. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 161, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US-Shrimp Appellate Body Report*].

43. *Id.* ¶ 121; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products -Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 138, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *US-Shrimp (21.5) Appellate Body Report*].

44. Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products -Recourse to Article 21.5 by Malaysia*, ¶ 5.103, WT/DS58/RW (June 15, 2001) [hereinafter *US-Shrimp (21.5) Panel Report*].

45. Esty, *supra* note 2, at 19-20, 144, 150. See also GATT Secretariat, *Industrial Pollution Control and International Trade* 4, L/3538 (June 9, 1971) [hereinafter *GATT Report 1971*].

permitted when there is no international agreement to address the problem, or when no alternative exists to achieve national environmental policy objectives.⁴⁶ However, the notion that the protection of the environment is a common concern as a whole can weaken a nation-state's autonomy over its conventional jurisdiction.⁴⁷ International obligations under MEAs do not necessarily authorize a State the legal justification to take unilateral measures.⁴⁸ There needs to be a balance between a State's common concern for the environmental protection and another State's discretion of policy choice. Rio Principle 12 finds a balance by encouraging States to rely on international consensus when taking environmental measures to deal with transboundary or global environmental problems.⁴⁹ Thus, balance between a State's common concern and another's discretion lies in creating international cooperation related to environmental conservation for areas of common concern.

Third, a State's rights are constrained to the extent necessary to, one, ensure its obligation to respect other States' rights in the WTO and, two, not excessively exercise discretion in a way that affects other States' rights to market access in international trade. The WTO encourages its Member States both to exercise their own right to take environmental protection measures and to respect other States' rights under the WTO. The *US-Shrimp* Appellate Body confirmed this by ruling that the introductory paragraph of Article XX of the GATT 1994 (Chapeau of GATT Article XX)⁵⁰ shows that

46. PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 777-78 (3rd ed. 2009); ESTY, *supra* note 2, at 144, 237; LANG & HINES, *supra* note 35, at 65-66; Weiss & Jackson, *supra* note 34, at 28-29; Murase 1999, *supra* note 34, at 424, 430; Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433, 461 (1995).

47. Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity Among Trading Nations*, in 1 FAIR TRADE AND HARMONIZATION 9, 10-11 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996). Some argue that unilateral measures "outside . . . national jurisdiction" to protect the global commons should be acceptable because enforcement of protection of the global commons is recognized as a nation's obligation under customary international law. Weiss, *supra* note 10, at 731-33. However, under international law, it is not established yet whether environmental protection is an international responsibility or whether global environmental damage is considered an international crime.

48. Hudec 1996, *supra* note 6, at 157.

49. *Rio Declaration*, *supra* note 39, principle 12 ("States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.").

50. Article XX of the GATT 1994 provides exceptions to general obligations of the GATT and WTO so that WTO Member States can take measures necessary to or relating to environmental protection. To justify trade measures, a Member State must meet both each

WTO Members recognize “the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . and the substantive rights of the other Members under the GATT 1994.”⁵¹ States’ environmental policy goals are legitimate when they respect other Members’ rights under the WTO.

Meanwhile, a State’s excessive exercise of its rights will not be allowed in the WTO because it can threaten other Member States’ rights to trade freely. Allowing States to enact national environmental policies under the concept of state sovereignty can, in fact, give a State a way to disguise trade protectionism by claiming a legitimate environmental protection goal.⁵² National governments’ decisions should be given considerable deference, but that deference should not be absolute.⁵³ When a country is granted the absolute discretion to determine its environmental policies, it can abuse this power by using its policies to justify trade protectionism.⁵⁴ A State’s excessive exercise of its rights will not be allowed in the WTO because it can threaten other member states’ right to trade freely. The WTO Panels and Appellate Bodies have found it necessary to limit Member States’ abuse of national environmental policies.⁵⁵ The *US-Shrimp* Appellate Body noted that prohibiting a State’s abuse of its rights is a general principle of international law.⁵⁶ Accordingly, the WTO requires its Member States to balance a State’s discretion to take environmental measures with another State’s right to access the global market.

In sum, in international relations, a State has the right to implement its environmental policies and to take measures to enforce them. However, this

relevant provisional requirement under GATT Article XX and the requirements under the introductory paragraph of GATT Article XX (the Chapeau of Article XX). See *US-Tuna (Mexico)*, *supra* note 41, ¶¶ 5.27, 5.32; *US-Tuna (EEC)*, *supra* note 41, ¶¶ 5.12, 5.29; Report of the Panel, *United States-Taxes on Automobiles*, ¶ 5.56, DS31/R (Oct. 11, 1994) (unadopted) [hereinafter *US-Automobiles*]; Panel Report, *United States- Standards for Reformulated and Conventional Gasoline*, ¶¶ 6.20, 6.31, 6.35, WT/DS2/R (Jan. 29, 1996) [hereinafter *US Gasoline Panel Report*]; Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R 19 (Apr. 29, 1996) [hereinafter *US-Gasoline Appellate Body Report*]; *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 118; *US-Shrimp (21.5) Panel Report*, *supra* note 44, ¶ 5.28; Panel Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.37-7.38, WT/DS332/R (June 12, 2007) [hereinafter *Brazil-Tyres Panel Report*].

51. See *US-Shrimp Appellate Body Report*, *supra* note 42, ¶¶ 156-59. See also *US-Shrimp (21.5) Panel Report*, *supra* note 44, ¶¶ 5.50, 5.51; Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, ¶ 224, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil-Tyres Appellate Body Report*].

52. *ESTY*, *supra* note 2, at 57; Dunleavy, *supra* note 22, at 272.

53. *ESTY*, *supra* note 2, at 58.

54. *Id.* at 57-58.

55. See *US-Tuna (Mexico)*, *supra* note 41, ¶ 6.2. See also *US Gasoline Panel Report*, *supra* note 50, ¶ 7.1; *US-Gasoline Appellate Body Report*, *supra* note 50, at 30; *US-Shrimp Panel Report*, *supra* note 6, ¶¶ 6.6, 7.45, 7.55, 9.1; *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 186; *Brazil-Tyres Appellate Body Report*, *supra* note 51, ¶ 210.

56. *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 158.

unilateral action is limited to the extent necessary for other States to exercise their rights. A State's right to take measures on the basis of environmental policy must be balanced with the other States' autonomy to make environmental or economic policy choices.

2.2. A State's Unilateral Measures Acting Extraterritorial Jurisdiction for Environmental Protection

States have jurisdiction, which is "the general legal competence of States such as judicial, legislative, and administrative competence within its territory."⁵⁷ A State has the authority to regulate and to enforce those regulations within its territory.⁵⁸ When a State's law binds the sovereignty of other States, the exercise of law is an "excess of jurisdiction" or extra-jurisdiction.⁵⁹

Jurisdiction is based on the principle of territoriality, which means every State possesses exclusive authority over its nationals within its territory.⁶⁰ One of the fundamental principles of international law is that a nation's public law can only be applied and enforced in its territory and that any extraterritorial extension of sovereign power is unjustified.⁶¹ Extraterritorial jurisdiction has "significant harmful effects within the territory that asserts jurisdiction."⁶² A State cannot take measures or enforce national laws in the territory of another State unless that State consents⁶³ because a State's extraterritorial action can limit the jurisdiction or sovereign rights of other States.⁶⁴ A State can exercise extraterritorial jurisdiction only when "its

57. See BROWNLIE, *supra* note 1, at 299; see also MANN, *supra* note 9, at 30; see generally Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5) (recognizing that jurisdiction is one of the most obvious forms of the exercise of sovereign power).

58. See BROWNLIE, *supra* note 1, at 299; see also MANN, *supra* note 9, at 9-15. See MANN, *supra* note 9, at 9 (distinguishing international jurisdiction from domestic jurisdiction of internal power, constitutional capacity or sovereignty).

59. See MANN, *supra* note 9, at 12, at 24-28.

60. See BROWNLIE, *supra* note 1, at 299; see also MANN, *supra* note 9, at 24-40.

61. Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 283, 349 (1995) [hereinafter Murase 1995].

62. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 74 (1994).

63. BROWNLIE, *supra* note 1, at 299, 309.

64. Peter L. Lallas et al., Daniel C. Esty & David J. van Hoogstraten, *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271, 340 (1992). Extra-territorial jurisdiction includes nationality, protective, passive-personality, and universal jurisdiction. The nationality principle grants a State the jurisdiction over its nationals within its territory and abroad. The passive-personality principle grants a State the jurisdiction over its national outside territory when its nationals are harmed. The protective principle grants a State the jurisdiction outside territory for its security. Universal jurisdiction grants a State the jurisdiction outside its territory or over non-nationals for international crimes such as genocide, war crimes, piracy, or slavery. See HIGGINS, *supra* note 62, at 56-65, 73-74; see also BROWNLIE, *supra* note 1, at 300-307.

exercise is not excessive and it does not attempt to enforce its jurisdiction within the territory of another State.”⁶⁵ It is unacceptable for a State to enforce its laws upon its nationals when they are in another State’s territory.⁶⁶

Extraterritorial jurisdiction will be legitimate in certain circumstances, including three principles: one, the non-intervention principle, second, the proportionality principle, and third, the substantial link.⁶⁷ First, a State’s extraterritorial exercise of jurisdiction must not intervene with other States’ jurisdiction. As interdependence between States increases, the absolute application of the principle of territorial jurisdiction becomes difficult.⁶⁸ Even though a State cannot enforce its jurisdiction outside its territory, a State may be able to create legal norms, which effectively control conduct outside its territory.⁶⁹ In this instance, a State’s extraterritorial exercise of jurisdiction is legitimate only when it does not intervene with the jurisdiction of other States under established international law.⁷⁰ Second, a State’s extraterritorial jurisdictional measure must be mutual and proportionate with the other States’ breach of international law.⁷¹ Third, to apply extraterritorial jurisdiction, a State must demonstrate that its exercise of jurisdiction is substantially linked to the subject matter.⁷² In the *US-Tuna* case, there was no “direct link” between “the act of incidental killing of dolphins” and “the act of importing tuna into the United States.”⁷³ The Panel ruled against the United States’ import restriction because of the lack of a direct link between the “protection of dolphins and import restriction of tuna.”⁷⁴ Accordingly, a State should consider these three principles when it exercises jurisdiction extraterritorially.

A State’s unilateral action is not allowed under the established international law and the WTO when such action affects areas outside a State’s jurisdiction.⁷⁵ Extraterritorial jurisdiction is distinguished from extra-jurisdiction.⁷⁶ Extra-jurisdiction is when a state acts in excess of its own jurisdiction.⁷⁷ It is a fundamental principle of international law that a State cannot exercise jurisdiction over nationals and territory with which it “has

65. HIGGINS, *supra* note 62, at 73.

66. *Id.*

67. BROWNLIE, *supra* note 1, at 311-12.

68. MANN, *supra* note 9, at 36-40.

69. MURASE 1995, *supra* note 61, at 351.

70. BROWNLIE, *supra* note 1, at 311-12.

71. *Id.*

72. *Id.* at 352-54; MANN, *supra* note 9, at 43-51.

73. MURASE 1995, *supra* note 61, at 353.

74. *Id.* at 354.

75. Bhagwati & Srinivasan, *supra* note 37, at 179.

76. BIRNIE ET AL., *supra* note 46, at 771.

77. Mann, *supra* note 9, at 37, 43-51.

no absolute concern.”⁷⁸ Meanwhile, extraterritorial jurisdiction implies that a country exercises its jurisdiction outside its territory.⁷⁹ The *US-Tuna (EEC)* Panel distinguished extraterritorial jurisdiction from extra-jurisdiction. While the *US-Tuna (Mexico)* Panel used the term of “extra-jurisdiction,” the *US-Tuna (EEC)* Panel introduced the term “extra-territorial jurisdiction” regarding environmental conservation.⁸⁰ The *US-Tuna (Mexico)* Panel rejected the parties’ extra-jurisdictional application of GATT Articles XX(b) and XX(g) to protect the environment on the basis that natural resources were only “within the jurisdiction of the importing country under GATT Articles XX(b) and XX(g).”⁸¹

GATT Article XX has been interpreted to allow conditionally national measures when they are for the protection of extraterritorial resources.⁸² GATT/WTO decisions recognized the exercise of extraterritorial jurisdiction to protect the environment in certain circumstances. The Panel in *US-Tuna (EEC)* and the Appellate Body in *US-Shrimp* recognized that certain circumstances warrant States using extraterritorial jurisdiction to protect and conserve natural resources under GATT Article XX.⁸³ The *US-Tuna (EEC)* Panel noted that “the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resource to be reserved [under Article XX(g) and of the living thing to be protected under Article XX(b).]”⁸⁴ There, the Panel found that States could regulate only the conduct of their own nationals and vessels outside of their territory to conserve the living things and the exhaustible natural resources under Article XX(b) and XX(g).⁸⁵ The Appellate Body in *US-Shrimp* noted that “there is a sufficient nexus between the migratory species and . . . the United States [jurisdiction] for the purpose of Article XX(g).”⁸⁶ The Appellate Body recognized this nexus only in “specific circumstances,” - the fact that sea turtles can freely “pass in and out of waters subject to the rights of

78. *The Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* (1933) 49 CLR 220, 239 (Austl.).

79. See generally BROWNIE, *supra* note 1, at 299-311.

80. *US-Tuna (Mexico)*, *supra* note 41, ¶¶ 5.25-5.32; *US-Tuna (EEC)*, *supra* note 41, ¶¶ 5.15-5.33.

81. *US-Tuna (Mexico)*, *supra* note 41, ¶¶ 5.26, 5.31-.32. The Panel ruled that, since a country can only control production or consumption within its jurisdiction, a trade measure would have to be taken within its jurisdiction under Article XX(g). *Id.* ¶ 5.31. See also Cheyne, *supra* note 46, at 452-53.

82. BIRNIE ET AL., *supra* note 46, at 771.

83. *US-Tuna (EEC)*, *supra* note 41, ¶¶ 5.15, .20, .31-.33; *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 133.

84. *US-Tuna (EEC)*, *supra* note 41, ¶¶ 5.15, .20, .31-.33.

85. *Id.* ¶¶ 5.17-.20, .33. This decision “is based on the active personality jurisdiction under which a State may control the activities of its own citizens.” Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 280 (1997); Cheyne, *supra* note 46, at 455.

86. *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 133.

jurisdiction of various coastal States.”⁸⁷ Thus, GATT Article XX can permit a State’s extraterritorial measure when a sufficient link exists between environmental measures and a State’s policy objective.

These cases conditionally recognized that GATT Articles XX(b) and XX(g) allow for national measures designed to protect resources using extraterritorial jurisdictions, but not measures that are extra-jurisdictional.⁸⁸ However, the application of extraterritorial jurisdiction is limited. When a country decides to apply its domestic law extraterritorially, it is a unilateral decision made by that country, not a decision made with international agreements.⁸⁹ In these instances, extraterritorial application may involve a government’s unilateral action that goes against a foreign government’s different policy objective.⁹⁰

In summary, within its own jurisdiction, a State is free to enact environmental regulations and enforce those regulations related to both domestic and global concerns. However, a State cannot exercise power beyond its jurisdiction. In addition, because the theory of state sovereignty is based on territoriality, a State cannot regulate and implement its domestic environmental policies outside its territory except in certain instances. Under international law and the international trade system, a State’s unilateral action taken outside of its jurisdiction is limited to instances where a substantial link exists between trade measures and an environmental policy objective.

3. THE WTO HARMONIZATION REQUIREMENT AND A STATE’S SOVEREIGNTY

This section examines how WTO harmonization affects state sovereignty by looking at relationship between the WTO harmonization requirement and a States’ diversity in value preferences and between a State’s obligations and rights under the WTO.

3.1. The WTO’s Harmonization and a State’s Diversity of Environmental Policies

The WTO harmonization requirement is meaningful when it reaches reconciliation with national economic policy choices. The WTO strives to expand the harmonized international trading mechanism, which improves economic development through the reduction of tariffs and trade barriers, and

87. *Id.*

88. Cheyne, *supra* note 46, at 453; Schoenbaum, *supra* note 85, at 280.

89. Murase 1999, *supra* note 34, at 437.

90. *Id.*

elimination of discriminatory treatment.⁹¹ For States to harmonize toward international rule and to eliminate policy differences across borders, they must make concessions related to their sovereignty.⁹² Further, requiring a State to accept internationally harmonized economic rules can preclude it from determining internally optimal economic policies.⁹³ National economic policies clash with international economic regulations when national value policy preferences disfavor foreign products.⁹⁴ Thus, the WTO harmonization requirement needs to be reconciled with State's national policy choices, which are based on diversity in each country.

A uniform legal system between States can be attained by accepting an internationally harmonized system or by introducing the legal system of other States. On the one hand, international instruments can provide States with an internationally harmonized system. On the other hand, the State's previously introduced legal system can serve as a model for other States' legal systems, which would also result in uniform or similar legal systems or policies. A uniform legal system or policy, thus, can reflect a State's willingness to accept previously successful legal systems or policies. However, implementing a uniform legal system and policies in each State will not necessarily be exactly the same because changes can occur in the process of a State accepting and incorporating either international or another State's legal system or policies into its domestic ones. Every country has its own specific social, cultural, religious, political, and economic priorities.⁹⁵ Thus, any uniform international system must recognize there will be a large degree of diversity due to cultural differences, historical backgrounds, government systems or economic attainment and needs to adjust accordingly.⁹⁶

In the WTO's international economic mechanism, it can be controversial to have different treatment on the basis of different value preferences.⁹⁷ In this context, the WTO can be criticized for being a homogenizing force on culture and community.⁹⁸ In *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* (hereinafter *Canada-Herring and Salmon*), the Canadian policy regulating exports of unprocessed salmon and

91. GATT 1994, *supra* note 40, preamble; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, Annex 1A [hereinafter WTO Establishing Agreement].

92. Dunleavy, *supra* note 22, at 268-69.

93. Leebron, *supra* note 11, at 65; Dunleavy, *supra* note 22, at 269.

94. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 539 (5th ed. 2008).

95. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 56 (1969) [hereinafter Jackson 1969].

96. Jackson 1994, *supra* note 2, at 600.

97. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1243 (1992).

98. Charnovitz, *supra* note 8, at 56.

herring was called into question. This policy was implemented to continue Canada's longstanding fishery resource preservation and management program, which had existed in Canada's west coast since 1908.⁹⁹ In its defense, Canada noted that each country could have "different national priorities on fisheries."¹⁰⁰ The Panel recognized "the harvest limitations 'restrictions on domestic production' [as measures] within the meaning of Article XX(g)", but ruled against Canada because Canada could preserve fisheries without imposing export prohibitions on them.¹⁰¹ Similarly, in *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes* (hereinafter *Thailand-Cigarettes*), the Thailand Tobacco Act, which was implemented in 1938, was declared inconsistent with the GATT rules.¹⁰² In both *Canada-Herring and Salmon* and *Thailand-Cigarettes*, long-standing policies were declared incompatible with the GATT/WTO. These diverse priorities in national policies raise a question about the extent to which the WTO requires its member states to alter value preferences in social, cultural, political or economic policies to make them more uniform with the WTO's economic rules.¹⁰³

The WTO does not require its member states to enact and implement the same economic policies and laws.¹⁰⁴ WTO rules do not address Member States' harmonization of regulations or standards, but rather provides the states with rules for international trade.¹⁰⁵ Except for tariff concessions, WTO Member States are free to legislate, implement, and enforce their domestic policies and laws so long as they are compatible with obligations under the WTO.¹⁰⁶ The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), for example, does not require WTO Members to introduce specific uniformed SPS standards. Similarly, the Agreement on Technical Barriers to Trade (TBT Agreement) does not provide WTO Members with harmonized technical standards. The WTO only requires its Member States to incorporate their commitments and agreements under the WTO into their domestic laws in order to implement those commitments and agreements.

99. Report of the Panel, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶¶ 3.5-3.7, L/6268 (Mar. 22, 1988), GATT B.I.S.D. (35th Supp.) at 98.

100. *Id.* ¶ 3.7.

101. *Id.* ¶¶ 4.4, 4.7.

102. Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 20, 38, 87, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 [hereinafter *Thailand-Cigarettes*]. Requirements of existing legislation to be effective in the WTO are to: be legislation in the formal sense; predate the Protocol; and, be mandatory in character by its terms or expressed intent. *Id.* ¶ 83; see also Report of the Panel, *Norway-Restrictions on Imports of Apples and Pears*, ¶ 5.7, L/6474 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 306.

103. JACKSON 1969, *supra* note 95, at 295.

104. Robertson, *supra* note 2, at 310-11.

105. Jackson 1994, *supra* note 2, at 600; Ala'i interview, *supra* note 12.

106. Jackson 1994, *supra* note 2, at 600.

WTO rules do not constrain States' authority to determine and implement legitimate environmental policies so long as the policies meet WTO obligations of non-discrimination and market access.¹⁰⁷ The WTO does not preclude its Member States from implementing regulations or taxes to curtail domestic pollution and the activities that contribute to pollution.¹⁰⁸ WTO Members can establish health or environmental policies based on different values and priorities, as it is difficult to require Member States to apply common criteria in their domestic policies in these areas.¹⁰⁹ Constraints under WTO rules are imposed on State's discriminatory or protectionist measures that are taken unilaterally without negotiating with other Member States.¹¹⁰ The purpose of non-discrimination obligations under the GATT Articles I and III is for national choices on social, political, and economic policies not to constrain goods in international trade.¹¹¹ TBT or SPS measures, subsidies,¹¹² or quantity quota¹¹³ should be made by balancing the desire to avoid distortions in international competition and the right to enforce national environmental policies.¹¹⁴ Diversity in regulation between different countries is expected under the WTO trading system unless international agreements exist that provide a common norm.¹¹⁵

General exceptions under GATT Article XX¹¹⁶ are interpreted not to constrain domestic policy goals for health and environmental protection.

107. GATT Report 1992, *supra* note 35, at 5, 7; Bhagwati & Srinivasan 1996, *supra* note 37, at 188-90.

108. GATT Report 1992, *supra* note 35, at 7.

109. Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS, *supra* note 6 at 21, 34-35.

110. GATT Report 1992, *supra* note 35, at 5-6.

111. Mitsuo Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* 215-16 (2d ed. 2006); Roessler, *supra* note 109, at 49.

112. See GATT 1994, *supra* note 40, art. XVI. See also Agreement on Subsidies and Countervailing Measures art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

113. Article XI of the GATT 1994 does not allow any trade restrictive measure such as quotas, import or export licenses, or other measures other than tariffs or duties. GATT Article XI:1 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting part.

GATT 1994, *supra* note 40, art. XI:1.

114. GATT Report 1992, *supra* note 35, at 8.

115. GATT Report 1971, *supra* note 45, at 4.

116. As for environmental measures, paragraphs (b), (d) and (g) of GATT Article XX are generally invoked. Article XX states:

The Panel in *Thailand-Cigarette* noted that “[GATT Article XX(b)] ... allow[s] [Member States] to give priorities to human health over trade liberalization” as long as trade measures meet the “necessity to” requirement under the provision.¹¹⁷ Under GATT Article XX(b), “necessity to” is not interpreted in a way that judges the Member State’s justification of its environmental policies, but instead examines the trade measures that implement the environmental policies.¹¹⁸ The *US-Shrimp* Appellate Body noted that the certification requirement under Section 609 constituted “arbitrary discrimination” under the GATT Article XX Chapeau because it required exporting countries to adopt the same regulatory program as that in the United States without considering the conditions of the exporting countries.¹¹⁹ The Panel in *EC-Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EC-Asbestos*) recognized the non-economic character of GATT Article XX as well. It noted that “certain interests may take precedence over the rules governing international trade and authorizes the adoption of trade measures aimed at preserving these interests while at the same time observing certain criteria.”¹²⁰ Accordingly, GATT Article XX respects non-economic considerations of its Member States’ economic policies.

These legal requirements and the DSBs’ decisions under the GATT/WTO demonstrate that the purpose of WTO harmonization is not to remove the diversity of national value preferences, but to require that national trade measures are consistent with WTO rules.¹²¹ A State’s value preferences are permitted to the extent that they do not threaten the value or reliability of

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; . . .

(d) *necessary to* secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . .;

(g) *relating to* the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (emphasis added).

GATT 1994, *supra* note 40, art. XX.

117. Thailand-Cigarettes, *supra* note 102, ¶ 73.

118. Roessler, *supra* note 109, at 34-35.

119. US-Shrimp Appellate Body Report, *supra* note 42, ¶ 177.

120. Panel Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.129, WT/DS135/R (Sept. 18, 2000) [hereinafter *EC-Asbestos Panel Report*].

121. In this context, the international trade law principle of comparative advantage and the international law principle of state sovereignty have the common goal internationally of allowing a State to adopt its optimal policies that supports diversity of national policies. See Leebron, *supra* note 11, at 71.

the WTO's commitment to a free and open market.¹²² If each governmental policy goal or value was accepted as an environmental exception to the WTO, then the international legal system of trade would be threatened.¹²³ Accordingly, the WTO harmonization reconciles States' domestic policies, on the one hand, by the WTO recognizing the diversity of policy choices in each different society; and, on the other hand, States meeting their value preferences for making policy choices in line with the fundamental principles of the WTO.

3.2. A State's Rights and Contractual Obligations in the WTO

WTO harmonization requires a Member State to comply with obligations under the WTO and parties to a dispute to implement decisions of the WTO DSB. This section discusses whether this WTO harmonization requirement limits a State's right to determine and enforce its environmental policies.

3.2.1. State Sovereignty and Contractual Obligations in International Law and the WTO

3.2.1.1. State Sovereignty and Contractual Obligations under International Law

The international trading system should not interfere with the ability of nations to determine or employ measures to achieve environmental goals.¹²⁴ In international law, States have the right to determine their own laws and policies and what acts are allowed to take place within sovereign territory.¹²⁵ International instruments cannot hinder a State from freely pursuing its domestic objectives.¹²⁶ The WTO does not have authority to legally challenge national policies.¹²⁷ A State is only bound to the obligations of the

122. Hudec 1996b, *supra* note 6, at 129, 146.

123. US-Shrimp Panel Report, *supra* note 6, ¶ 7.45; Rober E. Hudec, *Introduction to 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS*, *supra* note 6, at 1, 5.

124. Lallas et al, *supra* note 64, at 271, 335.

125. BROWNIE, *supra* note 1, at 277. Regarding territorial jurisdiction, the author introduces the concept of "decisional sovereignty" in the *Nuclear Test* case decision, which stated that a State has right "to determine what acts should take place within its territory." See Request For An Examination of the Situation in Accordance With Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

126. Bhagwati 1993, *supra* note 3, at 165-66; Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, in 2 FAIR TRADE AND HARMONIZATION, *supra* note 6, at 59, 63.

127. ESTY, *supra* note 2, at 56.

specific international treaties to which it agrees.¹²⁸ In the absence of adherence to the WTO agreements, a State is free to deny market access to any other State for any reason and to impose trade restrictions discriminately.¹²⁹ In this instance, the State is not bound by the obligations of Most-Favored-Nation (MFN), which prohibits discriminatory treatment between the same goods from different foreign countries,¹³⁰ and national treatment, which prohibits discriminatory treatment between the same domestic and foreign goods,¹³¹ and can discriminate against imported products.¹³²

However, when a State agrees to an international instrument, some limitations are imposed upon States' sovereign rights based on the agreement.¹³³ Thus, accepting any treaty or trade agreement diminishes the freedom of the State to implement domestic policies or take any national actions.¹³⁴ When a State agrees to confer its power to an international organization, it agrees to limit its right to exercise the powers conferred to the international organization.¹³⁵ Thus, certain types of actions inconsistent with the treaty norms would give rise to an international law violation.¹³⁶ WTO Member States are bound by treaty obligations when they accept and agree to WTO agreements.¹³⁷ The Panel in *US-Shrimp* noted that "by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures."¹³⁸ WTO Member States must comply with basic obligations of MFN, national treatment, non-quantitative restriction and concession, and obligations under WTO covered agreements.¹³⁹ In summary, a State's sovereignty, as it relates to its ability to make its own domestic policy choices, is constrained to the extent that it accepts and agrees to the WTO Agreement.

128. See BROWNLIE, *supra* note 1, at 289; Jackson 2008, *supra* note 17, at 19; Jackson 2000, *supra* note 18, at 369.

129. Hudec 1996b, *supra* note 6, at 149.

130. GATT 1994, *supra* note 40, art. I.

131. GATT 1994, *supra* note 40, art. III.

132. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 158 (2d ed. 1997) [hereinafter Jackson 1997].

133. Hudec 1996b, *supra* note 6, at 149; SAROOSHI, *supra* note 7, at 1-2.

134. Jackson 2000, *supra* note 18, at 380; Dunleavy, *supra* note 22, at 268.

135. SAROOSHI, *supra* note 7, at 69.

136. Jackson 2000, *supra* note 18, at 380.

137. See generally Hudec 1996b, *supra* note 6, at 116-17.

138. *US-Shrimp Panel Report*, *supra* note 6, ¶ 7.26.

139. The WTO covered agreements include the Agreement Establishing the World Trade Organization, Multilateral Trade Agreements in Annexes 1 and 2, and Plurilateral Trade Agreement in Annex 4. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Appendix 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

3.2.1.2. WTO Dispute Settlement Decisions as International Law Obligations

WTO rules and DSB decisions are binding as international legal obligations.¹⁴⁰ A dispute settlement body's ruling can extend the powers conferred to an international organization.¹⁴¹ When the WTO DSB rules that a Member State is violating WTO rules, it creates an international legal obligation requiring that State to change its economic policy, namely the inconsistent measure, to make it consistent with WTO rules.¹⁴²

However, decisions of WTO dispute settlement bodies enforce the existing obligations and do not impose new obligations on Members, nor does it inappropriately limit a Member State's discretion in legislating.¹⁴³ Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that "[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements."¹⁴⁴ The dispute settlement mechanism is not designed to fill or create new rules or set forth norms in areas the WTO does not already, for example, environment or labor standards.¹⁴⁵ Further, the decisions of the DSB are binding only on the States that are parties to the dispute.¹⁴⁶

The WTO's jurisprudence exacerbates the tension between internationalism and national sovereignty¹⁴⁷ because WTO decisions can have important effects in a domestic court's jurisprudence.¹⁴⁸ The Appellate Body in *US-Shrimp* found that the U.S. Court of International Trade's decision allowing the import ban was inconsistent with the GATT Article XX Chapeau, and that the import ban should be withdrawn.¹⁴⁹ This decision holds that State courts must consider international law obligations when interpreting national law.¹⁵⁰ The decision that rejected the U.S. domestic court's ruling casts a question on the extent to which States can exercise their national environmental policies and jurisdiction in the WTO system.

140. Pauwelyn, *supra* note 7, at 341; Jackson 1997a, *supra* note 7, at 63-64.

141. SAROOSHI, *supra* note 7, at 12-13.

142. Pauwelyn, *supra* note 7, at 341; Jackson 1997a, *supra* note 7, at 60; SAROOSHI, *supra* note 7, at 96-97.

143. William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT'L ECON. L. 79, 96 (2001).

144. DSU, *supra* note 139, art. 3.2.

145. John H. Jackson, *Dispute Settlement and the WTO Emerging Problems*, 1 J. INT'L ECON. L. 329, 347 (1998).

146. SAROOSHI, *supra* note 7, at 70.

147. Jackson 2008, *supra* note 17, at 6-7.

148. Jackson 1997a, *supra* note 7, at 64.

149. US-Shrimp Panel Report, *supra* note 6, ¶ 7.56; US-Shrimp Appellate Body Report, *supra* note 42, ¶ 173.

150. Jackson 1997a, *supra* note 7, at 61.

Even though States confer their rights to the WTO, the DSB decisions' legal effects and the WTO agreements' limits on Members' rights can be criticized on the basis that the WTO restricts the sovereign rights of Member States to exercise control over their natural resources via export or import control.¹⁵¹ The next section examines whether the WTO's multilateral trading system deprives Member States of the right to determine appropriate national environmental policies.

3.2.2. A State's Right to Determine its Environmental Policies in the WTO

3.2.2.1. WTO Rules on States' Authority of National Environmental Policies

The WTO recognizes its Member States' authority to legislate and enforce their national environmental policies and laws. The national treatment obligation under the GATT Article III is interpreted to allow WTO Member States to determine legitimate environmental policies unless those environmental policies are taken with protectionist intent.¹⁵² The GATT Article XX provides a State with the right to regulate and implement its policies on public morals, health, and the environment.¹⁵³ The WTO DSBs' interpretation of measures "necessary to" protect the environment as "least trade restrictive" under Article XX(b) is criticized as hindering a State's sovereign right to solve domestic environmental problems.¹⁵⁴ Article XX(b), however, allows a State to determine its own environmental policies and the level of desirable protection these policies will require.¹⁵⁵ With regard to the level of protection, the Appellate Body in *EC-Asbestos* held that within the meaning of Article XX(b), "WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."¹⁵⁶ Thus, States may impose environmental requirements on foreign producers provided the requirement is for the implementation of an environmental policy that meets the requirements of Article XX.¹⁵⁷

The WTO Agreements also recognize its Member States' choice of environmental policies. The Preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO Establishing

151. LANG & HINES, *supra* note 35, at 63-64.

152. US-Automobiles, *supra* note 50, ¶ 5.8.

153. Jackson 1997, *supra* note 132, at 233.

154. Schoenbaum, *supra* note 85, at 277.

155. *Id.* at 285. See also Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A ¶ 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

156. Appellate Body Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC-Asbestos Appellate Body Report].

157. Hudec 1996b, *supra* note 6, at 116-17, 151.

Agreement)¹⁵⁸ incorporates the concept of sustainable development, which was introduced by the World Commission on Environment and Development (WCED) in 1987¹⁵⁹ and was firmly established by the 1992 Rio Declaration.¹⁶⁰ The 2001 Ministerial Declaration (Doha Declaration) reaffirmed the goal of sustainable development in the WTO¹⁶¹ and recognized environmental protection and social development as part of the mandate of an economic system.¹⁶² Preamble of the WTO Establishing Agreement also recognizes that members' respective needs and concerns differ depending on economic development, which affects how each protects the environment.¹⁶³ Thus, the WTO Establishing Agreement recognizes WTO Members' right to take appropriate measures to protect the environment.

The WTO covered agreements also provide Member States with the authority to determine their own policies. For example, Article XIV(b) of the General Agreement on Trade in Services (GATS) also allows WTO Member

158. WTO Establishing Agreement, *supra* note 85, pmbl. ¶ 1. It provides:

The Parties to this Agreement, [r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for *the optimal use of the world's resources* in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Id. (emphasis added).

159. The most commonly referenced form of sustainable development is the definition by the World Commission on Environment and Development (WCED: Brundtland Commission). Recognizing the linkage between the environment and economic and social issues, the Brundtland Commission recommended "sustainable development" as "development that meets the needs of the present and future generations" in 1987. *The World Commission on Environment and Development, Our Common Future* 43-46 (1987). The Brundtland Commission emphasized that development should be maintained in a way that balances, reconciles, and integrates economic, environmental, and social priorities. Marie-Claire Cordonier Segger & Markus W. Gehring, *Introduction to SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* 5, 5 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

160. Principle 3 of the Rio Declaration refers to inter-generational equity in the Brundtland Commission's Report. It states that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." *Rio Declaration, supra* note 39, princ. 3.

161. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 6, WT/MIN(01)/DEC/1 (Nov. 20, 2001), 41 I.L.M.746 (2002) [hereinafter Doha Declaration].

162. Segger & Gehring, *supra* note 159, at 21.

163. WTO Establishing Agreement, *supra* note 91, pmbl. Paragraph 1 Preamble to the WTO Establishing Agreement states that parties recognize they are "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

States to adopt or enforce measures “necessary to protect human, animal or plant life or health.”¹⁶⁴ Similarly, the SPS Agreement recognizes a State’s discretion to determine its own appropriate health policies by incorporating the notion of the precautionary principle as an exception to risk assessment and international standards requirements. Article 5.7 of the SPS Agreement allows States to take precautionary measures in the absence of sufficient scientific evidence, rather than waiting for a time when the risk assessment requirement can be met.¹⁶⁵ The precautionary principle provides that States should not allow the absence of full scientific certainty to prevent them from enacting measures to protect the environment.¹⁶⁶ The precautionary principle grants States discretion in their policy making to act in order to prevent any harm to human health or the environment.¹⁶⁷ Article 3.3 of the SPS Agreement also allows Members to adopt appropriate domestic policies to protect the environment with standards that are higher than international standards.¹⁶⁸ The Appellate Body in *European Communities-Measures Concerning Meat and Meat Products* (hereinafter *EC-Hormones*) recognized the precautionary principle is reflected in Articles 5.7 and 3.3 and paragraph six of the Preamble of the SPS Agreement.¹⁶⁹ These provisions give WTO Members the discretion to determine their own optimal policies for human health and environmental protection.

164. General Agreement on Trade in Services art. XIV(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]. Article XIV(b) of the GATS provides:

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect human, animal or plant life or health.

Id.

165. SPS Agreement, *supra* note 155, art. 5.7.

166. Wingspread Conference on the Precautionary Principle of January 26, 1998, The Wingspread Consensus Statement on the Precautionary Principle, *available at* <http://www.sehn.org/wing.html> (Dec. 22, 2008).

167. James Cameron, *The Precautionary Principle*, in TRADE, ENVIRONMENT AND THE MILLENNIUM 287, 288 (Gary P. Sampson & W. Bradnee Chambers eds., 2d ed. 2002); David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle*, in THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 3, 13 (David Freestone & Ellen Hey eds., 1996); Hunter et al., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 511 (3rd ed. 2007) (1998); Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4 GEO. INT’L L. REV. 303, 307 (1992) (broadly defining the precautionary principle as a “policy-making strategy . . . address[ing] the manner in which policy-makers, for purposes of protecting the environment, apply science, technology, and economics.”).

168. SPS Agreement, *supra* note 155, art. 3.3.

169. Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, ¶ 124, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

The TBT Agreement also permits WTO Members to adopt the appropriate technical regulations to fulfill a legitimate governmental objective related to their environmental policies. The Preamble of the TBT Agreement, provides that “no country should be prevented from taking measures . . . for the protection of human, animal or plant life or health, of the environment.”¹⁷⁰ Under Article 2.2 of the TBT Agreement, a Member State can adopt a technical regulation to “fulfill a legitimate objective” of the environment.¹⁷¹ Article 2.4 of the TBT Agreement permits Member States to adopt and use national standards for technical standards when international standards are absent.¹⁷² The Appellate Body in *European Communities-Trade Description of Sardines* noted that the TBT Agreement acknowledged the right of WTO members to establish the objectives of their technical regulations.¹⁷³

The GATT and the WTO have granted members the right to choose their own economic system and trade policies,¹⁷⁴ but they have not allowed

170. Agreement on Technical Barriers to Trade preamble ¶ 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

171. *Id.* art. 2.2. Article 2.2 provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

Id.

172. *Id.* art. 2.4. It says:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Id.

173. Appellate Body Report, *European Communities-Trade Description of Sardines*, ¶ 276, WT/DS231/AB/R (Sept. 26, 2002).

174. Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833 (Oct. 23, 1958), GATT B.I.S.D. (7th Supp.) at 60 (Italy extend favorable credit to purchasers of Italian-made tractors and the UK brought action alleging violation of national treatment provision in Article III:4, the Panel found that the GATT does not limit the right of a member State to adopt measures that appeared necessary to it to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the GATT).

members' measures when they are arbitrary or unjustifiably discriminate, or are a disguised restriction on international trade. While GATT Article XX provides Member States with justification for trade measures necessary to or relating to environmental protection, such measures must not constitute "arbitrary or unjustifiable discrimination" nor "a disguised restriction on international trade" under the Chapeau of GATT Article XX. Those principles of non-discrimination or a non-disguised restriction are also embodied in the SPS Agreement, the TBT Agreement, and the GATS.¹⁷⁵ Doha Declaration also noted that Members' measures should not constitute "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade," and that those measures should be in accordance with the WTO agreements.¹⁷⁶ In addition to these non-discrimination and non-protectionism principles, a Member State must meet requirements under each covered agreement to justify its trade measures.

These provisional devices impose a certain degree of constraint on WTO Member States' ability to exercise their rights to defend other Member States' market-access rights. The purpose of the GATT 1994 and WTO covered agreements is not to guarantee that Members use the domestic policies of specific technical regulations, SPS measures, subsidies, anti-dumping duties, or countervailing duties, but rather to ensure that these domestic policies do not undermine market access rights.¹⁷⁷ This implies that if the WTO decides to include an Environment Agreement as one of its covered agreements, then the WTO Environment Agreement would regulate environmental measures, not to hinder international trade, but rather to provide a framework for environmental protection in international trade.

In sum, the WTO gives Member States discretion to choose and enforce their optimal environmental policies, though with some limitations based on contractual obligations and legitimate requirements under the GATT 1994 and the WTO agreements.

3.2.2.2. WTO Jurisprudence on States' Authority of National Environmental Policies

The GATT/WTO dispute settlement bodies have recognized its Member States' discretion to adopt and implement their own environmental policies. Many GATT/WTO decisions have supported States' authority of national environmental policies using different expression. For example, both Panels of the *US-Tuna (Mexico)* and *US-Tuna (EEC)* noted that a State has right to implement national policies in pursuant to environmental protection goals.

175. See SPS Agreement, *supra* note 155, prmb1 ¶ 1, arts. 2(3), 5(5); TBT Agreement, *supra* note 170, pmb1 ¶ 6; GATS, *supra* note 164, art. XIV(b).

176. Doha Declaration, *supra* note 161, ¶ 6.

177. See Roessler, *supra* note 109, at 42, 52; see also Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT'L ECON. L. 483, 491-92 (2007).

The *US-Tuna (Mexico)* and *US-Tuna (EEC)* Panels noted that their decisions were based on the “consideration that [they] would affect neither the rights of individual [Member States] to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies, nor the right of [Member States] acting jointly to address international environmental problems.”¹⁷⁸ Further, the *US-Tuna (Mexico)* Panel concluded that a State is “free to tax or regulate imported products . . . for environmental purposes” unless its taxes and regulations discriminate against imported products or afford protection to domestic products.¹⁷⁹ Here the *US-Tuna (Mexico)* Panel emphasized that non-discriminatory and non-protectionist policies are legitimate for environmental protection.

In *United States-Standards for Reformulated and Conventional Gasoline* (hereinafter *US-Gasoline*), the Panel and Appellate Body stressed the balance States environmental policy goals and WTO rules. The Panel of *US-Gasoline* concluded “WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with [WTO rules].”¹⁸⁰ The *US-Gasoline* Appellate Body also noted in its concluding remarks that “WTO Members have a large measure of autonomy to determine their own policies on the environment . . . , their environmental objectives and the environmental legislation they enact and implement. . . . [T]hat autonomy is circumscribed only by the need to respect the requirements of [the GATT] and other covered agreements.”¹⁸¹ The *US-Gasoline* decisions stressed that so long as Member States complied with obligations of the GATT 1994 and WTO covered agreements, States could exercise their environmental autonomy.

The *US-Shrimp* Panel highlighted the importance of securing the multilateral trading system in determining national environmental policies. The *US-Shrimp* Panel emphasized that under the WTO, Member States have “the right . . . to implement the environmental policies of their choice through trade measures, as long as those trade measures do not affect the multilateral system to the point where the WTO Agreement is deprived of its object and purpose.”¹⁸² The *US-Shrimp* Panel noted, in its concluding remarks, that “Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose.”¹⁸³ Thus, the *US-Shrimp* Appellate Body, similar to *US-Gasoline* Appellate Body, recognized that States can

178. *US-Tuna (Mexico)*, *supra* note 41, ¶ 6.4; *see also* *US-Tuna (EEC)*, *supra* note 41, ¶¶ 5.26, 5.37-5.38.

179. *US-Tuna (Mexico)*, *supra* note 41, ¶ 6.2.

180. *US-Gasoline* Panel Report, *supra* note 50, ¶ 7.1.

181. *US-Gasoline* Appellate Body Report, *supra* note 50, at 30.

182. *US-Shrimp* Panel Report, *supra* note 6, ¶ 6.6; *see also id.* ¶¶ 7.45, 7.55, 9.1.

183. *Id.* ¶ 9.1.

adopt their own policies to protect the environment provided that they “fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.”¹⁸⁴

Several decisions supported that GATT Article XX grants States right to determine environmental policies in pursuant to the appropriate level of protection in each country. The *EC-Asbestos* Panel noted that the “necessary to protect” requirement under GATT Article XX(b) does not imply a restriction on Members’ “freedom . . . to take certain measures rather than others.”¹⁸⁵ The *EC-Asbestos* Appellate Body also recognized WTO Members’ rights to determine the appropriate level of protection under GATT Article XX(b).¹⁸⁶ In *Brazil-Measures Affecting Imports of Retreaded Tyres* (hereinafter *Brazil-Tyres*), where Brazil invoked Article XX(b) to justify its ban on imports of retreaded tires, the Panel recalled the *EC-Asbestos* Appellate Body’ position, noting that “every WTO Member has the ‘right to determine a level of protection of health that [it considers] appropriate in a given situation’” within the meaning of [GATT] Article XX(b).¹⁸⁷ The *Brazil-Tyres* Appellate Body also, in determining measures necessary to protect under GATT Article XX(b), observed that “it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.”¹⁸⁸ The Appellate Body recognized that it is a fundamental principle that “WTO members have the right to determine the level of protection they consider appropriate” within the meaning of GATT Article XX(b).¹⁸⁹ The Panel in *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* [hereinafter *US-Tuna Labeling*] also followed previous decisions by recognizing that WTO members have the “right to determine the legitimate policies they want to pursue.”¹⁹⁰

In summary, the goals of the WTO Member States’ environmental policies are considered legitimate as long as they fulfill their obligations and respect other Members’ rights under the GATT 1994 and WTO covered agreements, comply with the fundamental international trade principles of non-discrimination and non-protectionism, and secure the object and purpose of the multilateral trading system.¹⁹¹ When measures meet these

184. US-Shrimp Appellate Body Report, *supra* note 42, ¶ 186.

185. EC-Asbestos Panel Report, *supra* note 120, ¶ 8.183.

186. EC-Asbestos Appellate Body Report, *supra* note 156, ¶ 168.

187. Brazil-Tyres Panel Report, *supra* note 50, ¶ 5.3.

188. Brazil-Tyres Appellate Body Report, *supra* note 51, ¶ 140.

189. *Id.* ¶ 210.

190. Panel Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 7.441, 7.622, WT/DS381/R (Sept. 15, 2011) [hereinafter *US-Tuna Labeling* Panel Report].

191. *US-Tuna (Mexico)*, *supra* note 41, ¶ 6.2; *US Gasoline Panel Report*, *supra* note 50, ¶ 7.1; *US Gasoline Appellate Body Report*, *supra* note 50, at 30; *US-Shrimp Panel Report*,

requirements, they are recognized as “necessary to” or “relating to” achieve an environmental policy objective.

3.3. WTO’s Limited Adjudication to Judge National Environmental Necessity

Under the state sovereignty principle, the WTO cannot interfere with a State’s authority to determine and enforce its national environmental policies and laws within its jurisdiction. Member states of the WTO are constrained only in the application of their national policies and laws to the extent necessary to comply with their obligations under the WTO. Here, the application of national policies must be distinguished from the legislation or enforcement authority of such policies. While constraining the application of national policies and law to not violate WTO rules is acceptable, interfering with national capacity to legislate or enforce policies through the use of WTO rules or a DSBs’ decision is not acceptable under the state sovereignty principle. Accordingly, even though some limitations are imposed on a State’s application of its environmental policies and law, WTO rules and DSBs’ decisions demonstrate that WTO Members possess autonomy to determine, legislate, and enforce their environmental policies and laws to the extent that they are legitimate under the WTO economic rules.

The WTO has limited authority to adjudicate national policy choices and enforcement. Neither the WTO itself nor its DSBs have the power to enforce WTO rules or DSBs’ decisions in WTO Member States.¹⁹² Compliance with WTO obligations or DSBs’ decisions depends on the willingness of Member States or dispute parties to do so. The WTO DSBs, unlike domestic tribunals, cannot enforce their ruling by imposing punishment or fines on parties to the dispute. They only judge whether measures at issue in the dispute are consistent or inconsistent with WTO rules. The method of resolution depends on the parties to the dispute. A certain Member State would have to be “willing to bear the cost of measured retaliation” by injured Member States or withdraw from WTO covered agreements.¹⁹³

WTO Panels and Appellate Bodies cannot judge a country’s political values or the factors it considers to determine what policies are necessary based on the degree of serious environmental harm.¹⁹⁴ The Panel in *US-*

supra note 6, ¶¶ 6.6, 7.45, 7.55, 9.1; *US-Shrimp Appellate Body Report*, *supra* note 42, ¶ 186; *Brazil-Tyres Panel Report*, *supra* note 50, ¶ 210.

192. STEGER, *supra* note 177, at 485-86. Professor Steger notes that “the WTO is driven solely by its members acting collectively. . . . The members will not allow the Director-General to have any real power, nor will they delegate any significant policy setting”; see also Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 279 (1991).

193. Sykes, *supra* note 191, at 277, 279, 285.

194. Hudec 1996b, *supra* note 6, at 150; Murase 1999, *supra* note 34, at 421-24.

Gasoline noted that the task of the Panel was to examine whether “the aspect of the Gasoline Rule found inconsistent with [the GATT] was necessary to achieve the stated policy objectives under Article XX(b),” but it was “not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule . . . that the Panel did not specifically find to be inconsistent with [the GATT 1994].”¹⁹⁵ The Panel emphasized “[it was not its task] to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the [GATT 1994].”¹⁹⁶ The *Brazil-Tyres* Panel recalled *US-Gasoline* Panel’s position, noting the “[WTO Panel is not] required to examine the desirability of the declared policy goal as such” and, thus, “[does not have] to assess the policy choice by Brazil to protect human, animal or plant life or health.”¹⁹⁷ Similarly, the *US-Tuna Labeling* Panel noted the Panel does not determine “what might be an appropriate level of protection to achieve in relation to the objectives identified by the United States for the information of consumers and the protection of dolphins in relation to the manner in which tuna is caught.”¹⁹⁸ These decisions demonstrate that WTO DSBs do not have authority to assess environmental objectives of national policies.

The WTO has neither the capability nor the mandate to develop environmental performance standards.¹⁹⁹ Further, the WTO has no explicit provision regarding environmental protection, conservation or preservation.²⁰⁰ Thus, given the lack of substantive rules governing the relationship between trade and the environment, it is inevitable that the WTO DSBs would refuse to decide a case in which it has to do so based on the merits of an environmental policy itself.²⁰¹ The WTO DSBs only rule on whether the measure at issue is taken in accordance with obligations and requirements under the WTO.

SUMMARY

Both the State and WTO harmonization requirements must be implemented in a way that protects States’ right of environmental policy choice and enforcement. The State harmonization requirement, which restricts trade unless another State accepts its environmental policy, has the potential to infringe on another State’s right to determine and enforce its

195. US Gasoline Panel Report, *supra* note 50, ¶ 6.22.

196. *Id.* ¶ 7.1.

197. Brazil-Tyres Panel Report, *supra* note 50, ¶ 7.97.

198. US-Tuna Labeling Panel Report, *supra* note 190, ¶ 7.622.

199. ESTY, *supra* note 2, at 178.

200. Murase 1999, *supra* note 34, at 424.

201. *Id.*

own environmental policy. One State's right to take measures must be balanced with another State's right to choose national policies under the state sovereignty principle of international law. States' autonomy must be respected and thus policy choices that infringe on other States are not allowed to balance each State's rights. If the State harmonization requirement is based on common concern for environmental protection, then it can reach a balance with other States' autonomy through international cooperation. The WTO encourages balance between a State's rights and obligations. Because the WTO's function is to secure its system by providing freedom of trade for its Member States, the WTO's balancing requirement may constrain one State's right on a certain level to protect other States' rights.

WTO harmonization, requiring compliance with obligations under WTO rules and the rulings of WTO DSBs, must consider the diversity of States' value preferences and the authority of States to make their own policy choices. The WTO cannot judge a State's choice of policy, but it can judge a State's application of that policy. The WTO only judges whether a State's application of its laws and policies is within the WTO rules. In this context, the WTO requires a balance between a State's desire to avoid distortion in international competition and another State's right to enforce environmental policies. The WTO cannot judge whether a State's exercise of right infringes on another's right. Rather, the WTO judges whether a State's exercise of rights violates any obligations or concessions under the GATT 1994 and the WTO covered agreement to protect other States' rights to trade freely within the WTO system.

Further, even though a State is not allowed to infringe on another's sovereignty under the international law, when it occurs, it becomes a more political than legal issue. This is because the infringing State takes the action despite the fact it knows that it is illegal. International instruments such as the WTO or International Court of Justice (ICJ) may make legal decisions, but they cannot enforce their rulings on the countries nor punish such infringing States.

The modern state sovereignty principle recognizes that a State is more influenced by other States' actions or international institutions' activities due to increased interdependence caused by globalization. A State's rights also are constrained to the extent that a State consents to be bound by treaties or international law. However, these constraints on State's rights do not overwhelm state sovereignty because international constraints require a State's agreement. Accordingly, either the State or WTO harmonization must be implemented to respect a State's sovereign right to make its own environmental or economic policy choices.