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J. Patrick Kelly†

Abstract

The Article proposes new interpretations of GATT Article XX to minimize the harmful effects of recent WTO jurisprudence that threaten to undermine the goals of the trading system and diminish the role of states in policymaking. In the Shrimp/Turtle cases the WTO's Appellate Body ("AB") utilized an "evolutionary" methodology to interpret the conservation of "exhaustible natural resources" exception in Article XX(g) to permit the unilateral regulation by one country of how goods are produced ("PPMs") in other countries. Such an expansive approach to interpretation permits wealthy nations with large markets to unilaterally impose their preferred environmental policies, and presumably other PPM social policies, on nations at a different level of economic development. Developing nations dependent on export markets for economic development would be forced to chose between unwanted costs that reduce their comparative advantage or the loss of market access.

The Article criticizes the AB's "evolutionary" methodology as a form of "Naturalism" inconsistent with the AB's delegated authority, contrary to the consent-based structure of governance at the WTO and the clearly articulated views of the majority of Member nations, and incompatible with the original understanding of the Article XX(g) exception. The Article then suggests sev-

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eral interpretive strategies to minimize the harmful potential of unilateralism and to restore balance to global policy negotiations.

Introduction

The recent *Shrimp/Turtle* decisions (*Shrimp/Turtle* I and *Shrimp/Turtle* II)[1] of the Appellate Body ("AB") effectively reversed longstanding, although unadopted, decisions[2] of the GATT/WTO[3] dispute resolution system that had been supported by a majority of States.[4] These remarkable examples of judicial activism constitute a transfer of the power to make fundamental policy decisions from WTO Member states to the Appellate Body. *Shrimp/Turtle I* interpreted the Article XX(g)[5] exception for the "conservation of exhaustible natural resources" to include living, renewable resources,[6] thereby permitting a Member state to unilaterally exclude imports if other Member states fail to adopt that Member's preferred conservation policy, as long as its trade measure meets the general standards

1. WTO Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle I*]; WTO Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle II*].

2. *See infra* notes 79-80.

3. GATT refers to the informal institution that operated to oversee the interim General Agreement on Tariffs and Trade. GATT became the WTO in April 1994. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994) [hereinafter WTO Agreement].

4. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1167, 1183 (1994).

5. Article XX provides in relevant parts:

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

General Agreement on Tariffs and Trade ("GATT"), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 262 [hereinafter GATT 1947]. As a result of the Uruguay Round of Trade Negotiations, the GATT 1947 agreement became GATT 1994 annexed to the WTO Agreement. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex IA, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

6. *Shrimp/Turtle I*, *supra* note 1, at paras. 127-34. Previous panel and Appellate Body decisions had found that salmon, herring, and clean air constitute exhaustible natural resources for purposes of Article XX(g). *See* Canada–Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. L/6268-35S/98 at para. 4.4 (1987); WTO Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (April 29, 1996) [hereinafter *U.S.-Reformulated Gasoline*].

in the Article XX chapeau.[7]

In doing so the Appellate Body also inherently determined that unilateral regulation, not of the qualities of the imported products themselves but of their production processes and methods, (so-called "PPMs"), is permissible under the Article XX(g) conservation exception and, by implication, under other exceptions as well. Regulation of the qualities of products that enter a nation's jurisdiction is clearly permitted under the health and safety exception in Article XX(b).[8] However, the regulation of the environmental effects of production in other territories and of the working conditions of employees who produce goods abroad is controversial. Such regulation of PPMs increases production costs in developing countries by diminishing their comparative advantage and thereby decreasing their economic development. It forces such countries to comply with the policy choices of a few wealthy nations if they want access to the world's largest markets.

In *Shrimp/Turtle II* the AB confirmed that unilateral regulation of production methods in other countries that meet the requirement of the chapeau is permissible, and it appeared to merely require that any negotiations with other countries to effectuate the purposes of such regulations be nondiscriminatory.[9] In reaching these remarkable conclusions the AB adopted an "evolutionary" interpretation methodology that interpreted negotiated terms in WTO agreements not based on their meaning at the time of negotiation, but rather on the AB's perception of the contemporary concerns of the international community.[10] My concern with the *Shrimp/Sea Turtle* cases rests not just with the AB's "evolutionary" methodology, but also with its apparently sweeping conclusion that the regulation of PPMs is generally permissible under the GATT.

These revolutionary conclusions and the AB's interpretive methodology raise fundamental issues of global governance. Implicit in these policy conclusions is the premise that major substantive policy issues not negotiated by Member states may be appropriately determined by judicial decision. Permitting individual nations to unilaterally regulate how goods are produced in other countries as a condition of entry treads on the fundamental social policy decisions of other societies. Such judicial activism

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7. GATT 1994, *supra* note 5, at art. XX. The general standards require that the measure not be either "arbitrary or unjustifiable discrimination between countries" or a "disguised restriction on international trade." *Id.*

8. Article XX(b) provides in relevant part: "(b) necessary to protect human, animal, or plant life or health . . . ." GATT 1994, *supra* note 5, at art. XX(b).

9. *Shrimp/Turtle II, supra* note 1, at paras. 128 and 137-38. "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX." *Id.* at para. 137. Further, using the Inter-American Convention as an example, the AB expresses distaste for "unjustifiable discrimination" in negotiations. *Id.* at para. 128.

10. *Shrimp/Turtle I, supra* note 1, at paras. 129-30. The AB indicated that the words "exhaustible natural resources" in Article XX(g) "must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment." *Id.* at para. 129.

undermines the ability of developing countries to participate in international policy formation because only the largest, most developed nations possess the market power to impose their social policy on other nations.[11]

The *Shrimp/Turtle I* opinion occurred after an outcry from international environmental NGOs, angry demonstrations in the streets, and the development of an extensive literature within the environmental and trade communities arguing that the WTO adjudicative bodies were acting contrary to accepted international environmental policy.[12] The AB's opinion may have solved a public relations problem with the environmental community,[13] but it will create an even greater one with developing countries and with advanced industrial societies in which access to foreign markets is restricted.

Environmentalists' concerns about the plight of endangered species, the emission of greenhouse gases, and the destruction of biodiversity are well-founded.[14] However, the question of how such policy decisions are to be made and which institutions should engage in the balancing of the many factors and perspectives relating to these issues is a question of the appropriate form of global governance.

There are, in general, two competing paradigms of how international law and policy should be made. The State Consent paradigm asserts that legitimate international norms that limit the sovereign prerogatives of states require the express consent of the affected states, which are then

11. The economies of developing countries are often export-dependent and particularly sensitive to foreign trade policy. Exports constitute on average 49% of the GDP of small African states and 55% of the GDP in the states of Latin America and the Caribbean. COMMONWEALTH SECRETARIAT/WORLD BANK JOINT TASK FORCE ON SMALL STATES, SMALL STATES: MEETING CHALLENGES IN THE GLOBAL ECONOMY 9 (2000).

12. *See, e.g.*, Steve Charnovitz, *Environmentalism Confronts GATT Rules*, 27 J. WORLD TRADE 37 (1993) (discussing the clash between 1992 environmental laws enacted by the United States and GATT rules); DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994) (discussing the various competing and often conflicting interests that must be brought together to achieve both continued trade liberalization and effective global environmental protection); Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 J. WORLD TRADE 73 (1998) (arguing that since legal instruments for environmental cooperation have not succeeded in the adequate protection of endangered species, States have been compelled to resort to unilateral measures that often violate trade liberalization commitments).

13. Arthur Appleton makes the point. I am indebted to his article for raising several troubling issues in the *Shrimp/Turtle I* decision. Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. INT'L ECON. L. 477, 477 (1999). "From a political perspective this decision satisfied a public relations objective—reducing the distrust of the WTO which exists in the environmental community." *Id.*

14. There is a long history of the unthinking and wanton destruction of animal and plant species to our detriment. The number of species is expected to decline by fifty percent over the next one hundred years. *See* EDWARD O. WILSON, THE FUTURE OF LIFE 102 (2002); *see also Biodiversity and Ecosystem Functioning: Maintaining Natural Life Support Processes*, 4 ISSUES IN ECOLOGY (1999), *available at* http://esa.org/science/Issues ("On a global scale, even at the lowest estimated current extinction rate about half of all species could be extinct within 100 years.").

accountable to their domestic polities.[15] As embodied in the WTO system this model requires that changes in rights or obligations be negotiated and concluded by a formal agreement or other authorized process.[16] The second paradigm, which I am characterizing as the Naturalist paradigm,[17] implicitly or explicitly draws on the much older tradition of natural law or assumed global values as a source of international norms. It postulates that universal norms, or norms perceived to be generally accepted by the observer, bind states even without their express consent.[18] Advocates of this approach use nonbinding resolutions at international forums, selected domestic court decisions from the United States and Europe, and general language from treaties to generate binding legal norms when there is, in fact, no agreement that these norms constitute binding legal obligations, and explicit state consent would be difficult or impossible to obtain.[19]

Advocates of the Naturalist paradigm rely on judicial activism and the cosmopolitan conscience to inject new norms into what appear to be consensual regimes. There is a vast and growing body of work supporting judicial activist interpretations of UN resolutions, general nonbinding declarations, and domestic judicial decisions to create legal norms.[20] Within the WTO literature influential scholars such as Ernst-Ulrich Petersman would explicitly adopt the Naturalist approach by treating the WTO agreements as a constitution containing certain moral imperatives, particularly rights associated with human autonomy.[21] A second approach, employed

15. This paradigm is also referred to as the Political Autonomy Model. *See* John Yoo & Jennifer Koester, *Judicial Safeguards of Federalism and the Environment: YUCCA Mountain from a Constitutional Perspective*, 75 U. COLO. L. REV. 1317, 1325 (2004).

16. *See* WTO Agreement, *supra* note 3, at arts. IX-X.

17. Naturalism may be expressed through natural law, a fundamental rights perspective, constructivist perceptions of international societal norms, or the selective use of international instruments and nonbinding resolutions to find one's own values in the form of customary international law ("CIL") or even general principles of law. For an extended argument that substantive, nonstructural CIL norms are, in nearly all cases, used as a form of Naturalist reasoning and not as an empirical source of law, see J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VIR. J. INT'L. L. 449 (2000).

18. *Id.* at 451-52.

19. The tension between the State Consent and Naturalist models of governance frequently emerges in the international debates about the legality of the death penalty. European governments and activist scholars argue, for example, that the death penalty violates international law even though a majority of nations retain the death penalty. At the recent meeting of the U.N. Commission on Human Rights, a European Union-sponsored resolution calling for a moratorium on executions passed by a margin of only 27 for, 18 against, and 7 abstaining, in a vote of the 53 nations attending. Sixty-one countries including many not on the Commission signed a statement "disassociating" themselves from the resolution because it would interfere with a State's right to choose its own political, cultural, and legal system. *See* Michael J. Dennis, *Current Developments: The Fifty-Seventh Session of the UN Commission on Human Rights*, 96 AM. J. INT'L L. 181, 184 (2002).

20. *See, e.g.*, ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000) (suggesting that the WTO trade regime be interpreted and applied in a manner consistent with the human rights obligations of states).

21. Ernst-Ulrich Petersmann, *Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law*, *in* THE POLITI-

by others such as Petros Mavroidis and David Palmeter implicitly utilizes the Naturalist paradigm by promoting the incorporation of ill-defined substantive customary international legal norms into WTO jurisprudence in a manner that would trump previously negotiated norms.[22] Finally, Robert Howse[23] and Steve Charnovitz,[24] among others, would inject their progressive social values into WTO agreements through expansive judicial interpretation of existing provisions without state consent.

The WTO Agreement and the Dispute Settlement Understanding ("DSU"), however, contain a detailed structure of governance based on state consent and a textualist interpretation methodology.[25] The AB's infusion of what are essentially the value preferences of particular interest groups and some scholars into the trade regime through the technique of "evolutionary" interpretation in *Shrimp/Turtle I* is a dangerous trend for global governance. The Naturalist approach to law formation is, first, less democratic than nation-state representation under a consensual regime and, second, a process of lawmaking that most states have not accepted. Judicial innovations like those in *Shrimp/Turtle I* and *II* will inevitably create conflicts about the legitimacy of AB policymaking and undermine support for the trade regime in many domestic societies.

This article contests the legality of all three innovations by the AB in the *Shrimp/Turtle* cases and their wisdom as a form of global governance at this stage in the development of the international community. First, the "evolutionary" methodology is inconsistent with the structure of governance in the WTO agreements and the interpretive methodology that the Members selected in the DSU. Second, a proper interpretation of the Article XX(g) exception would not include living creatures as "exhaustible natural resources"; rather, the protection and conservation of humans, animals, and plants properly falls under the XX(b) exception. Finally, neither the Article XX(b) nor Article XX(g) exceptions, properly interpreted, permit the unilateral regulation of other countries' production processes.

CAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 32 (Daniel M. Kennedy & James D. Southwick eds., 2002).

22. David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998).

23. *See, e.g.*, Robert Howse & Donald Regan, *The Product/Process Distinction–An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000) (arguing that there is no real support for a product/process distinction and that regulatory distinctions related to actual nonprotectionist policies are consistent with the GATT); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999) (arguing that the WTO should play a role in the enforcement of fundamental labor rights).

24. *See, e.g.*, Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998) (arguing that the Article XX(a) exception for measures "necessary to protect public morals" be interpreted to prohibit child labor).

25. WTO Agreement, *supra* note 3; Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1226 (1994) [hereinafter DSU].

Beyond the concerns about the legality of the AB's policy initiative, I have an overriding concern that these decisions are empowering a weak and divisive form of lawmaking. Judicial activism is a poor process of lawmaking in a world of many different cultures, values, and interests. As a result of the *Shrimp/Turtle* cases, the conservation exception was expanded and PPM measures were permitted without the participation and input of many of the affected nations. Nor was there agreement on this new mode of international ordering that permits individual nations to set environmental and potentially other standards as a condition of market access. In a world of many different values and levels of economic development, important policy decisions on the appropriate balance of environmental protection and economic development, including which nations should bear the burden of international standards, are left to the vagaries of the domestic political arena in a few powerful nations.

Part II discusses the use of the "evolutionary" interpretation methodology in the WTO context. Part II applies the methodology of the Vienna Convention on Treaties to interpret Article XX(g) in a manner that illuminates the original understanding of this exception. Part III discusses the implications of the "evolutionary" trend for global governance and proposes interpretations of Article XX to minimize the impact of the unilateralist approach.

I. The "Evolutionary" Interpretation Methodology

In *Shrimp/Turtle I* the AB determined that U.S. measures[26] prohibiting the import of shrimp captured in a manner causing the incidental killing of sea turtles did relate to the "conservation of exhaustible natural resources" and were therefore provisionally exempt.[27] In reaching this conclusion the Appellate Body utilized what it termed an "evolutionary" approach to the problem of the interpretation of agreements in a treaty regime. Rather than use the textual approach of the Vienna Convention on the Law of Treaties[28] or attempt to determine what Member states intended in negotiating the GATT agreement, the AB announced that Article XX(g) must be interpreted "in the light of the contemporary concerns of the community of nations about the protection and conservation of the environment."[29]

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26. The United States amended the Endangered Species Act to impose a ban on the importation of shrimp harvested in a manner that damages sea turtles. Section 609(b)(2) provides that the import ban will not apply to harvesting states that receive an annual certification. States are eligible for certification if (1) the country's shrimp harvesting environment does not pose a threat to the incidental taking of sea turtles; or (2) the harvesting state requires Turtle Excluder Devices (TEDs) comparable in effectiveness to those required in the United States. Pub. L. No. 101-162, tit. VI, § 609, 16 U.S.C. § 1537 (1989).

27. *Shrimp/Turtle I*, *supra* note 1, at para. 142.

28. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

29. *Shrimp/Turtle I*, *supra* note 1, at para. 129. The AB continued, "From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term

First, the particular "evolutionary" approach the AB used in this case is directly contrary to the clearly articulated structure of governance in the WTO agreements. The DSU,[30] in allocating responsibility to the dispute settlement bodies, establishes a consent-based legal system allocating only a limited law-applying role for the Appellate Body. Article 3.2 specifies that the purpose of the dispute settlement system is "to preserve the rights and obligations of Members under the covered agreements" and that rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[31] This limited mandate is reinforced by the clear language of Article 19.2 that "the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[32]

The AB did not determine that the conservation exception, as drafted in 1947, applied to "living" natural resources, nor did it attempt to determine if the *travaux preparatoires* (preparatory drafts and documents) resolved any ambiguity in the meaning of "exhaustible natural resources."[33] Instead, it appeared to determine only that such an "evolutionary" interpretation would not be directly contrary to the text of the 1947 exception and thus was not foreclosed.[34] It chose to make this implausible and ahistorical interpretation based on its assumption that the phrase "exhaustible natural resources" must reflect contemporary concerns of the international community about the protection and conservation of the environment.[35] This assumption, however, is directly contrary

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'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary.'" *Id.* at para. 130.

30. DSU, *supra* note 25.

31. Article 3.2 provides:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSU cannot add to or diminish the rights and obligations provided in the covered agreements.

Id. at art. 3.2.

32. Article 19.2 provides: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." *Id.* at art. 19.2.

33. The Vienna Convention permits resort to preparatory documents in order to conform the meaning of the text or to determine the meaning when it is ambiguous or obscure. Vienna Convention, *supra* note 28, at art. 32.

34. "Textually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources . . . . We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive." *Shrimp/Turtle I*, *supra* note 1, at para. 128.

35. *Shrimp/Turtle I*, *supra* note 1, at paras. 129-30.

> The words of Article XX(g), "exhaustible natural resources," were actually crafted more than 50 years ago. They must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment . . . . From the perspective embodied in the preamble to the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary."

to the explicit instruction in Article 19 not to add to or diminish Members' rights or obligations.

Some terms in the WTO agreement, such as "necessary" in several subsections of Article XX, are sufficiently general and undefined that some latitude in interpretation, which one might term as "evolutionary," may be warranted. "Exhaustible natural resources," however, as explained below, had a definite meaning in this context. A dichotomy was drawn in Article XX between living resources (humans, animals, and plants) protected under Article XX(b) and inanimate, nonrenewable resources (e.g., minerals and oil) protected under Article XX(g).[36] The use of an "evolutionary" approach here undermines this distinction and effectively substitutes the AB's ad hoc implementation of "Naturalist" values for the bargain painstakingly negotiated by Member states.

Thus the "evolutionary" methodology became the means to expand the categories of resources covered by the phrase "exhaustible natural resources" beyond the negotiated agreement.[37] This expansion of the categories covered by the exception is quite different from the acceptable interstitial application of a general phrase, such as "living natural resources," found in the United Nations Convention on the Law of the Sea,[38] to include newly discovered or evolved species that fall within the general category of "living natural resources." The expansion of categories eligible for an exception diminishes rights, such as market access, for some while increasing the right of others to ban products without a comparable concession. Article 3.5 of the DSU pointedly requires that all dispute settlement solutions shall be consistent with the agreements and shall not impair Member benefits.[39]

Consistent with a consent-based regime, the WTO Agreement reserves the authority to alter rights or obligations to the convocation of Member states sitting as either the Ministerial Council or the General Council. Articles IX and X grant these bodies the exclusive authority to adopt interpretations and amendments that alter the rights and obligations of Members.[40] Even this amendment procedure is only effective for those Members that

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Id.

36. GATT 1994, *supra* note 5.

37. "Exhaustible natural resources" is not necessarily an evolutionary concept. As discussed below it may have had a fixed and limited meaning.

38. U.N. Convention on the Law of the Sea, Dec. 10, 1982, at art. 56, U.N. Doc. A/CONF.62/122. 33 I.L.M. 1309 [hereinafter UNCLOS].

39. DSU, *supra* note 25, art. 3.5:

> All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

Id.

40. *See* WTO Agreement, *supra* note 3, at arts. IX-X. "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations . . . . The decision to adopt an interpretation shall be taken by a three-fourth majority of the Members." *Id.* at art. IX(2).

specifically accept the alteration of their rights or obligations.[41]

Second, the "evolutionary" approach is directly contrary to the method of interpretation selected by the parties in the agreements. The DSU specifies that the role of the AB is to clarify provisions in accordance with the customary rules of interpretation of public international law.[42] Article 3.2 specifically incorporates only the customary rules of interpretation for the purpose of clarifying existing provisions and excludes or contracts out those rules of international law that would diminish Members' rights and obligations.[43]

In an attempt to find precedent for its use of an "evolutionary" interpretation, the AB cited[44] the International Court of Justice's ("ICJ") use of a form of "evolutionary" methodology in the *Namibia* case.[45] However, in the *Namibia* case the ICJ actually used a quite limited approach to "evolutionary" interpretation. It determined that the phrase "the well-being and development" of the peoples concerned was not a static concept, but rather an evolutionary one.[46] The concepts of "well-being" and "development" are inherently quite abstract, and it is therefore likely that the drafters of the Covenant knew and intended that perceptions of what constitute "well-being" and "development" would change over time. Thus, the ICJ's interpretation of these abstract, evolving concepts in *Namibia* did not defeat the reasonable expectations of the negotiating parties.

Conversely, the term "exhaustible natural resources" is not an abstract, evolutionary phrase in the same sense. As I discuss below "exhaustible natural resources" was used at the time of the GATT's drafting to distinguish "renewable" living resources protected under Article XX(b) from finite, inanimate, nonrenewable resources protected under Article XX(g). By expanding the category of resources covered under XX(g) to include those already covered under XX(b), the AB has not only undermined that distinction, but also eliminated the policing function of the qualifying word, "necessary," in Article XX(b) with regard to measures that

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41. *Id.* at arts. X(1) & X(3).

42. DSU, *supra* note 25, at art. 3.2. The WTO Appellate Body has interpreted the phrase "customary rules of interpretation of public international law" in Article 3.2 to refer to the interpretive rules of the Vienna Convention on Treaties. *See* WTO Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS 8,10,11/AB/R, at 9 (Oct. 4, 1996), *citing U.S.-Reformulated Gasoline*, *supra* note 6 (interpreting the phrase in just this manner).

43. "Members recognize that it [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the exiting provisions of those agreements in accordance with customary rules of interpretation of public international law." DSU, *supra* note 25, at art. 3.2. "Customary rules of interpretation" appears to refer to the rules of interpretation codified in the Vienna Convention, *supra* note 28. *See* Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 343 (1999).

44. *Shrimp/Turtle I*, *supra* note 1, at para. 130 n.109.

45. Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1970 I.C.J. Rep. 31 (June 21, 1971), *available at* http://www.javier-leon-diaz.com/humanitarianIssues/NamibiaCase.pdf.

46. *Id.* at 3.

conserve human, animal, or plant life or health.[47] The concept of "necessary" serves as a gatekeeper to distinguish legitimate protective measures from those that might be protectionist or are not proportional to the ends sought.[48] The drafters of the renewable/nonrenewable distinction would not have anticipated such an expansion of Article XX(g).

However one may characterize the use of "evolutionary" interpretation in certain contexts by the ICJ, it is not necessarily a customary rule of interpretation. The ICJ did not attempt to discern if it had been generally accepted as a norm of customary international law. Rather the ICJ was exercising its inherent authority to fashion interpretive rules appropriate for its quite different function as a world court of general, albeit voluntary jurisdiction. Under the consent-based governance structure of the WTO, the AB does not have the broad authority to undermine negotiated bargains. It is limited to a role of clarifying existing provisions and interpreting such provisions in a manner that does not alter Members' rights or obligations.[49]

Rather Member states, consistent with a consent approach, selected a method of interpretation in the DSU that preserves state sovereignty by requiring Member participation in policy determinations. This selection inherently rejects a more teleological approach to interpretation,[50] such as that of the jurisprudence of the European Court of Justice and the United States Supreme Court, both of which adjudicate in the context of relatively homogeneous domestic societies. For good or ill, the Vienna Convention on Treaties ("VCT"), codifying the customary rules of interpretation,[51] articulates an essentially textualist method of interpretation.[52] The International Law Commission, in proposing the draft articles of the Vienna Convention, described the general rule of interpretation now codified in Article 31 as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[53]

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47. *See* GATT 1994, *supra* note 5, at art. XX(b), (g).

48. The concept of necessity has been interpreted to require that the Member invoking the exception demonstrate that there is no alternative measure consistent with the GATT, or less inconsistent with it, which the Member could be reasonably expected to employ to achieve the policy objective. WTO Appellate Body Report, *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 14, 1999).

49. *See* WTO Agreement, *supra* note 3, at art. III; DSU, *supra* note 25, at arts. 3 & 17.

50. Former President of the International Court of Justice, Jiménez de Aréchaga explained that the terms "object" and "purpose" in the Vienna Convention, *supra* note 28, were made part of the context, but were not set apart as autonomous elements in interpretation as advocated by the teleological school of interpretation. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 42-44 (1978).

51. *See* discussion *supra* note 42.

52. The International Law Commission's proposals were based on the view that it is the text of a treaty that is presumed to be the authentic expression of the parties. *See* I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 71 (1973).

53. *Id.*

The premise of Article 31 is that the ordinary meaning of a provision reveals the common intent of the parties. "Context" in the Convention means a treaty's preamble and annexes as well as any agreement relating to the treaty that was made between all the parties.[54] As noted above, Article 32 permits parties to resort to negotiating documents as a supplementary method of confirming the meaning of the text or to determine the meaning when it is ambiguous or obscure.[55] The purpose here is to determine if earlier drafts may elucidate the meaning of the text. Article 32 attempts to enable Members to determine the meaning of the document as expressed by the parties, not to revise negotiated bargains or permit "evolutionary" interpretations that are substantive expansions of those bargains.

Those supportive of the AB's "evolutionary" approach have argued that Article 31(3)(c) of the VCT, which permits reference to any relevant rules of international law in relations between the parties, permits an "evolutionary" approach by incorporating later adopted international law.[56] However, under the doctrine of *lex specialis*,[57] substantive customary rules that would contravene or diminish negotiated WTO rights are subordinate to the law created between the Members of the WTO. DSU Article 3.2 clearly does not permit non-WTO norms, even in an interpretive context, to diminish WTO rights.[58]

Even if one accepted the proposition that customary norms or non-WTO treaty norms may be used as interpretive material to clarify negotiated norms at the WTO, as several assert,[59] the Article 31(3)(c) theory seems inapplicable. The principle of sustainable development, referred to

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54. Vienna Convention, *supra* note 28, at art. 31(2).

55. *See* discussion *supra* note 33.

56. *See, e.g.*, Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 120-28 (1999) (referring to the drafting history of Article 31(3)(c) to support an argument for an "evolutionary" application of the VCT): "[T]he reference to any other relevant rule of international law in Paragraph 3 . . . [leaves] the door open for an interpretation that would take into account international law rules that take place after the conclusion of a treaty: the so-called evolutive interpretation." *Id.* at 121 (internal citations omitted).

57. The concept of *lex specialis* is that treaty law may derogates from general law between the parties to that agreement. *See, e.g.*, OPPENHEIM'S INTERNATIONAL LAW 1249 (R. Jennings & A. Watts eds., 9th ed. 1992) ("As between the parties, the provisions of a treaty prevail over any inconsistent rule of customary international law, unless it constitutes a rule of *ius cogens*.").

58. In the *European Beef Hormone* case the European Community ("EC") argued that the precautionary principle, which it termed a general customary rule of international law, justified a ban on imported hormone-fed beef. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26 & 48/AB/R (Jan. 16, 1998). The AB said: "[T]he precautionary principle does not, by itself, and without clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e., customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement." *Id.* at para. 124.

59. *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 536 (2001) (indicating that "general international law fills the gaps left by treaties"); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 406 (1998) (noting that "customary rules of interpretation . . . have found their way meaningfully into WTO dispute settlement").

by the AB as evidence of changing concerns, is not a rule of international law, but rather a vague, albeit important, principle of public policy that should guide national and international decisionmakers in balancing many factors, including the foreseeable environmental risks and expected economic and social benefits of a course of action. Its recitation in non-binding agreements, no matter how frequent, however, does not create a rule of law. The WTO agreements specifically and international law in general quite rightly recognize that this balance must be struck by the states themselves as representatives of their people, rather than by unelected and unrepresentative judicial bodies.[60]

Third, even if we assume that the AB does have the authority to engage in this type of broad "evolutionary" interpretation, it is apparent that it is using this methodology as a form of the "Naturalist" approach to lawmaking, not as an empirical inquiry to determine the contemporary concerns of the international community regarding the protection and conservation of the environment. The AB ostensibly sought to ascertain the international community's collective will by placing great reliance on the preamble of the 1994 WTO Agreement, which explicitly acknowledged the objective of sustainable development.[61] However, there is no evidence to suggest that by including the words "sustainable development" in the preamble Member states were modifying the substantive terms of the GATT agreement. The preamble of the WTO Agreement, for example, does not raise environmental concerns above others. The AB selected only one of the many objectives in the first clause of the preamble, "sustainable development," from among a list that included primarily economic objectives such as raising living standards and promoting growth in income, production, and employment.[62] The sustainable development goal itself is further qualified by a concern that the means be selected in a manner consistent with the respective needs of nations at different levels of economic develop-

60. *See, e.g.*, UN Conference on Environment and Development (UNCED), The Rio Declaration on Environment and Development, Aug. 12, 1992, 31 I.L.M. 874 [hereinafter Rio Declaration]. Principle 2 of the Rio Declaration proclaims:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities with their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. at princ. 2.

61. WTO Agreement, *supra* note 3, at pmbl., cl. 1. The relevant clause states:

> *Recognizing* that their relations in the field of trade and economic endeavor 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 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 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).

62. *Id.*

ment.[63] This one-hundred word, internally inconsistent clause gives no guidance on how to reconcile this general and conflicting mass of goals and concerns, nor on how to balance them with the goals delineated in the other clauses of the preamble, such as increasing trade and economic development in developing countries and the reduction of barriers to trade.[64]

Attention to the many conflicting goals in the preamble does not compel any particular interpretation of "exhaustible natural resources." Rather, the AB's selective use of the preamble provided it with the unfettered discretion to choose the policy concern in the preamble that supported its policy choice. It could just as well have referred to language in the preamble to justify a decision that the Article XX(g) exception was limited to "exhaustible" rather than renewable resources because a broader definition would close Members' borders to developing countries' products, shrink employment and economic growth in the Thailand shrimp industry, and interfere with, rather than preserve, the objectives of the trading system.

Abstract concerns about environmental protection and species conservation tells us little about how to resolve conflicts between economic development and environmental conservation. The international community and the WTO are similarly concerned about world hunger, low incomes in developing countries, and the barriers in Western societies to trade in agricultural and nonagricultural commodities from developing countries.[65]

The context of the preamble to the WTO Agreement is also instructive. The preamble does not modify the GATT agreement, nor does it introduce a constitution with broad, enumerated rights to be defined and expanded over the years by the AB. Rather, the preamble introduces an agreement that establishes a consent-based organization and a structure of governance allocating to Member states the exclusive authority to develop policy by interpretation and by amendment of its provisions.[66] To interpret the preamble as modifying the shared understanding of GATT, Article XX(g) by selecting one of the many policy goals is to ignore the context of a consent-based system of governance that the WTO agreement itself creates.

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63. *Id.*

64. Clause 2 of the Preamble provides: "*Recognizing* further that there is a need for positive efforts designed to insure that *developing countries*, and especially the least developed among them, *secure a share in the growth in international trade* commensurate with the needs of their economic development . . . ." WTO Agreement, *supra* note 3, at pmbl., cl. 2. Clause 5 provides: "*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system . . . ." *Id.* at pmbl., cl. 5. An emphasis on these goals might lead one to a quite different conclusion than that reached by the AB.

65. Agricultural subsidies and barriers are to be a major focus of the current Doha Development round of trade negotiations. The Ministerial Declaration stresses the importance of policies that ensure that developing countries, particularly the least developed, secure a share of world trade. Doha Ministerial Declaration, Nov. 14, 2001, WTO Doc. WT/MIN(01)/DEC/1 (2001).

66. *See* WTO Agreement, *supra* note 3, at arts. IX-X.

Some have argued that later in time environmental treaties may qualify as subsequent agreements between the parties under VCT Article 31(3)(a) and therefore permit an "evolutionary" interpretation.[67] While subsequent agreements or subsequent practice may operate as an explicit or implicit modification of an agreement in some circumstances,[68] there is no evidence to suggest that the mention of sustainable development in the WTO Agreement constitutes a modification of Members' rights, and there is considerable evidence that there was no such intent.

During the Uruguay negotiations that led to the WTO Agreement, developed nations, including the United States and the nations of Europe, as well as developing nations were concerned that environmental measures would be used as barriers to deny their trade access to markets.[69] These negotiations occurred in a background where prior panel decisions and the legal literature created the expectation that PPM measures violated GATT law. The WTO literature, including that posted on its website, had long asserted that PPMs violated the GATT.[70] In the WTO's Committee on Trade and Environment ("CTE") developing nations have adamantly opposed any changes in WTO rules that would permit unilateral PPMs, and have even objected to the formation of the Committee itself.[71] Clearly, those developing countries that have continuously and vocally opposed such measures did not perceive that they were agreeing to a modification of the conservation exception. Moreover, developed nations, including the United States, similarly concerned that such measures would injure their trading interests, pushed to form the WTO's Committee on Trade and Environment in order to prevent environmental issues from slowing progress on the Uruguay round and to shift unilateral PPM measures to a committee

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67. *See, e.g.*, Gabrielle Marceau, *supra* note 56, at 117-23 (indicating that any agreement relating to a treaty that was made between all the parties in connection with the conclusion of the treaty form part of the treaty "context" and are relevant to interpretation thereof). Article 31(3)(a) of the Vienna Convention provides that there shall be taken into account together with context, "(A) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . " Vienna Convention, *supra* note 28, at art. 31(3)(a).

68. SINCLAIR, *supra* note 52, at 80. Subsequent practice, in certain circumstances, may operate as tacit or implicit modification.

> [O]ne or more of the parties may fail to ratify the amending instrument, in which case the eventual result may be an *inter se* modification; even if all the parties do ratify the amending instrument there will inevitably be a certain lapse of time before they do so, during which period the amending instrument, if it has entered into force, will presumably operate as an *inter se* modification.

Id.

69. Gregory C. Shaffer, *"If Only We Were Elephants": The Political Economy of the WTO's Treatment of Trade and Environment Matters, in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC 349, 358 (Daniel M. Kennedy & James D. Southwick eds., 2002).

70. *See* the WTO . . . Why It Matters, *at* www.wto.org/english/thewto_e/minist_e/min01_e/wto_matters_e.pdf

71. For a discussion of developed nations' concerns that led to the formation of the CTE, see Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENV. L. REV. 1, 32 (2001).

where they could be controlled.[72]

In order to support its thesis that the term "natural resources" had evolved since GATT 1947 to now include living and nonliving resources, the AB cited[73] the U.N. Convention on the Law of the Sea ("UNCLOS").[74] However, an examination of UNCLOS does not suggest that there has been a subsequent agreement among the parties or an interpretation that creates a new definition of "natural resources" that would apply to GATT Article XX(g). Article 56 of UNCLOS specifically added the adjectives "living and nonliving" to clarify that the term "natural resources" included both animate and inanimate resources for purposes of that particular treaty regime.[75] The references to resources in Articles 61 and 62 were similarly modified by the adjective, "living," to clarify which resources were covered.[76] Such references in other treaties tell us little about the meaning of "natural resources" in the WTO regime, which is comprised of different parties and levies different sanctions for noncompliance. Similarly, the meaning of "natural resources" in Article XX(g) of the GATT cannot be divorced from the modifying and limiting adjective "exhaustible."

The faulty premise of the AB's entire analysis of XX(g) is that community concerns about environmental protection in one treaty context indicate an evolving community position in another about what measures are exempt from GATT obligations. Even if we assume that UNCLOS introduced a new definition of "natural resources" in the context of Law of the Sea negotiations, it tells us little about community sentiments in a context where parties could legally impose trade sanctions to enforce unilateral environmental measures. Nations are understandably more cautious about creating norms in treaties when serious sanctions are part of the treaty regime.

If one examined other more relevant international instruments and the results of specific negotiations, it is apparent that there has been vehement opposition rather than evolution on this issue. The more relevant instruments are the Rio Declaration on Environment and Development and the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES") regulating the international trade in endangered species, including sea turtles. The Rio Declaration, for example, weakened rather than strengthened the nonbinding commitment in the Stockholm Declaration that recognized that individual nations must ultimately decide for themselves how to balance economic and environmental factors.[77] "States have. . . the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the

72. *Id.* at 19-23.
73. *Shrimp/Turtle I*, *supra* note 1, at para. 130.
74. UNCLOS, *supra* note 38.
75. *Id.* at art. 56.
76. *Id.* at arts. 61-62.
77. U.N. Conference on the Human Environment, June 16, 1972, *available at* http://www.unep.org/Documents/Default.Print.asp?DocumentID=97&ArticleID=1503 [hereinafter Stockholm 1972 Declaration]. "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a

responsibility to. . . not cause damage to the environment of other States. . . ."[78] This principle appears to reaffirm the State Consent paradigm by respecting a nation's right to determine how to balance the conflicting goals of environment and economic development rather than harden the soft law principle of sustainable development.

Most tellingly, the AB did not discuss or analyze the single most important guide to community sentiment about the conservation of endangered species, CITES. CITES prohibits the trade in listed endangered species and their products.[79] It neither regulates the taking of endangered species within a nation's own borders nor authorizes the regulation of PPMs in order to protect endangered species.[80] Indeed, the genius of CITES is that it establishes an ongoing institution, the Conference of the Parties ("COP"), to analyze data on endangered species and to entertain proposals to update the treaty to increase their protection if other mechanisms are necessary.[81] This is the proper forum to raise the issue. Presumably an amendment to permit Parties to CITES to exclude the importation of products produced in a manner that injures endangered species listed in Appendix I would have prevailed if there was, in fact, substantial sentiment to create such a remedy. If anything, the failure to raise the issue is an indication that there is no broad community sentiment for such unilateral PPMs.

It is apparent that the AB's conclusion proceeded from its highly selective choice of instruments and a narrow focus on the disembodied meaning of "natural resources" rather than on the broad exception that it was creating. The AB's effective conclusion that there is some community consensus in support of creating exemptions for PPM measures that conserve living creatures must be characterized as inaccurate. There is quite evidently no such consensus. Rather the majority of nations from all levels of economic development have clearly and continuously expressed the exact opposite position. At the GATT Council meeting discussing the *Tuna-Dolphin II* report, all nations, including the European Union, Japan, Canada, Australia, India, and Mexico opposed such unilateral PPM measures. The lone exception was the United States, which was in the posture of defending its specific measure.[82]

During the WTO negotiations, the majority of nations opposed placing trade and environment on the agenda precisely because they opposed

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life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . . ." *Id.* at princ. 1.

78. Rio Declaration, *supra* note 60, at princ. 2.

79. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES]. There are 167 parties to CITES. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *at* http://www.cites.org (last updated Feb. 15, 2005).

80. *Id.* at arts. II-IV.

81. *Id.* at art. XI.

82. GATT Panel Report, *United States–Restrictions on Imports of Tuna*, DS29/R at 6-10 (June 16, 1994) (not adopted) [hereinafter *Tuna/Dolphin II*].

the development of environmental standards through the WTO. Instead, the Committee on Trade and Environment ("CTE") was formed by a Ministerial Declaration annexed to the Marrakesh Agreement establishing the WTO primarily because developed countries realized that unilateral environmental regulations threatened the trading interests of their domestic producers.[83] In negotiating and accepting the preamble, WTO Members were under the expectation affirmed by the *Tuna-Dolphin* decisions that PPM measures violated GATT rules. In subsequent CTE sessions developing nations successfully opposed language in the CTE 1996 Report that would have changed legal rules to permit environmental regulation of PPMs.[84] Developed nations such as the United States and countries of Europe, while attempting to placate environmentalists, were equally concerned that PPM trade restrictions would injure their own trading interests.[85] At the recent Doha Ministerial Conference, developing nations again opposed placing trade and environment issues on the agenda.[86]

The AB's misuse of the "evolutionary" interpretation methodology illustrates the dangers of the "Naturalist" approach. "Evolutionary" interpretation provides the means for judges to expand exceptions and other norms when there is no community agreement or consensus. In the *Shrimp/Turtle* decisions the AB ignored the State Consent aspects of the WTO agreements and assumed the legislative role of the Ministerial Council under the guise of "interpretation." Rather than apply negotiated rules and elucidate terms through interstitial interpretation, the AB has adopted a methodology that permits it to choose among the many conflicting goals of the WTO agreement and the variety of other international agreements to infuse new norms and new exceptions into a treaty regime designed to reduce barriers to trade.

The reconciliation of these various values is a fundamental political question properly reserved for Member states in the very agreement containing the preamble. By unilaterally undertaking the task of balancing environmental and economic development concerns, the AB changed the negotiated bargain. Importantly, it also undermined the bargaining power

83. Shaffer, *If Only We Were Elephants, supra* note 69, at 357-59. The formation of the CTE also placated domestic environmental interests, but developed nations, including the United States, were just as concerned as developing nations that environmental measures could be used as barriers to their business and trade interests. *Id.*

84. Shaffer, *The World Trade Organization Under Challenge, supra* note 71, at 40. Developing countries were particularly concerned that permitting unilateral environmental regulation of PPMs would set a "precedent for . . . trade restrictions based on unfair labor standards." *Id.*

85. *Id.* at 41-61.

86. European Union ("EU") proposals to place trade and environment issues on the negotiating agenda in the new trade round received little support from developing countries and were widely perceived as examples of "green protectionism." *See Trade Officials Assess Winners, Losers in Aftermath of Doha Ministerial Meeting*, 18 INT'L TRADE REP. (BNA) 1856, 1857 (2001). Similarly, developing countries successfully opposed any language in the ministerial declaration "linking the [new] trade agenda to labor issues." *See WTO Member Nations Agree To Launch Development Round at Tough Talks in Doha*, 18 INT'L TRADE REP. (BNA) 1814, 1817 (2001).

of the poorest states in any subsequent negotiations, including their ability to extract technical and financial assistance, to achieve environmental goals.[87]

II. The Vienna Convention and Interpreting Articles XX(b) & (g)

If we move beyond the "evolutionary" interpretation methodology and examine the specific interpretations made by the AB, there is concern that the AB has ignored the negotiated bargain struck by the parties to the GATT 1947 agreement or at a minimum expanded the exceptions beyond the agreement in circumstances where the scope of the exception is unclear. In *Shrimp/Turtle I*, the AB determined that living creatures constituted "exhaustible natural resources" for purposes of Article XX(g)[88] and appeared to conclude that unilateral measures regulating PPMs (how shrimp are caught to protect sea turtles) that are not qualities of the product itself (shrimp) may provisionally qualify for this exception.[89] *Shrimp/Turtle II* confirmed this latter conclusion first by affirming that a central aspect of *Shrimp/Turtle I* was that access to a domestic market could legitimately be based on whether Member countries comply with unilaterally prescribed policies,[90] and then by concluding that the U.S. PPM measures under Section 609 of Public Law 101-62, as implemented by the revised Guidelines, are justified under Article XX(g).[91]

The AB's analysis suggests that unilateral PPMs for the conservation of living resources, including measures dealing with global warming, clean air, the conservation of fisheries and forestry products, and endangered species, may be generally permissible under Article XX(g) as long as they are made in conjunction with restrictions on domestic production or consumption. The AB's language, while ambiguous on the extent to which unilateral PPM measures are permitted under other general exceptions, may be read to imply that unilateral PPM measures would be acceptable

87. Negotiation linkage using a two-region (North-South) numerical simulation model of world trade and environment indicates that Less Developed Countries ("LDCs") should embrace the trade-offs in trade and environment negotiations particularly if accompanied by side payments. *See* Lisandro E. Abrego et al., Trade and Environment: Bargaining Outcomes from Linked Negotiations, Centre for the Study of Globalization and Regionalisation, CSGR Working Paper No. 27/99, 4 (April 1999), *available at* http://www.csgr.org.

88. *Shrimp/Turtle I*, *supra* note 1, at paras. 127-34. "We hold that . . . measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)." *Id.* at para. 131.

89. *See id.* at para. 121. The relevant language states:

> [C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.

Id.

90. *Shrimp/Turtle II*, *supra* note 1, at para. 138

91. *Id.* at para. 153.

under XX(b) if they meet the rather strict "necessary" requirement.[92] Older panel decisions, including *Tuna/Dolphin I* and *II*,[93] had suggested that health or conservation measures associated with the qualities of a product itself that are not overly broad may meet the requirements of "necessary," but unilateral PPMs that require that Members change their policies within their own jurisdiction do not.[94]

The original understanding of the Articles XX(b) and (g) exceptions appears quite different than the implausible "evolutionary" interpretation. The Article XX(g) conservation exception, for example, applies not to all "natural resources," but only to "exhaustible natural resources."[95] Article 31 of the Vienna Convention directs the interpreter to determine the common intent of the parties as expressed in the ordinary meaning of the terms of the treaty in their context and in light of their object and purpose.[96] "Exhaustible" might mean "capable of being exhausted" or it may mean, in this context, "natural resources that are finite and thus subject to being used up without appropriate conservation policies." While living creatures are capable of being exhausted, they also reproduce and are therefore renewable. In interpreting the Article XX(g) exception, the context includes the separate exception in Article XX(b) for measures to protect plants, animals, and humans. This exception appears to include measures to conserve such living resources. "Protect" is a broad word that means to shield from injury, damage or danger.[97]

Consistent with the principle of effectiveness, the adjective "exhaustible" must have some meaning that limits those natural resources that are eligible for the exception.[98] If all natural resources, including all living and nonliving resources, are "exhaustible" for these purposes, then the term "exhaustible" serves no purpose and is redundant. An "evolutionary" interpretation to include living natural resources is unnecessary because Article XX(b) addressed the protection of living resources.

An examination of the preparatory documents as permitted under

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92. It appears to us . . . that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.

Shrimp/Turtle I, *supra* note 1, at para. 121; *Shrimp/Turtle II*, *supra* note 1, at paras. 137-38.

93. GATT Panel Report, *United States–Restrictions on Imports of Tuna*, DS21/R-39S/155 (Sept. 3, 1991) (not formally presented to the Council for adoption) [hereinafter *Tuna/Dolphin I*]; *Tuna/Dolphin II*, *supra* note 82.

94. *Tuna/Dolphin I*, *supra* note 93, at para. 5.27; *Tuna/Dolphin II*, *supra* note 82, at para. 5.38.

95. GATT 1947, *supra* note 5, at art. XX(g).

96. Vienna Convention, *supra* note 28, at art. 31.

97. *See* WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1446 (2d ed. 1979).

98. In *U.S.-Reformulated Gasoline* the AB, drawing on customary rules of interpretation, had indicated that it was "not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *U.S.-Reformulated Gasoline*, *supra* note 6, at 44-45.

Article 32 of the Vienna Convention[99] helps clarify whatever ambiguity may exist in Article XX(g). The initial draft, submitted by the United States to what eventually became the GATT, contained an exhaustible natural resources exception in Article 32.[100] Commentary on the earlier drafts reveals that the natural resources that were under discussion to be preserved were minerals and raw materials.[101] Discussion at the preparatory meetings on the precursor to Article XX(g) emphasized the problem of the export of minerals in short supply, not import restrictions.[102] The policy concern was apparently that conservation measures may be necessary to preserve domestic supplies of exhaustible mineral resources, such as oil, to assure an adequate domestic supply particularly in a time of war.[103]

At the time of the drafting of Article XX(b) and (g), exhaustible natural resources were typically contrasted with "renewable" resources. International agreements as well as technical studies distinguished "exhaustible" mineral resources, defined as non-renewable, finite minerals or stock resources that nevertheless might be depleted, from "renewable" resources such as humans, animals, or plants that were capable of reproduction.[104] While "renewable" resources are capable of being exhausted if poorly managed, the technical definition served to highlight the different problems and different approaches to conservation that are necessary with each type of resource.[105] This definitional dichotomy between "renewable" and "exhaustible" resources is reinforced by the separate exception in Article XX(b) for "renewable" resources described as human, animal, or plant life or health.[106] Under the AB's interpretation, GATT Article XX would contain two exceptions for renewable resources—one to protect and one to conserve, which is a concept included within protect.

Indeed, the AB in *Shrimp/Turtle I* appeared to recognize that the drafting history contained considerable evidence that the purpose of Article

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99. Vienna Convention, *supra* note 28, at art. 32.

100. U.S. DEP'T OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS 24 (Sept. 1946).

101. Charnovitz provides an excellent summary of the drafting history. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 45 (1991).

102. *Id.*

103. The State Department summary of the New York draft explained that the exception was designed to conserve *reserves* of "exhaustible natural resources." 13 STATE DEPT. BULL. 926 (1945).

104. *See* JOZO TOMASEVICH, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES 41 (1943).

> Technically, the approach to the conservation of various natural resources varies according to their technological nature. There are two main groups of natural resources: exhaustible or stock resources such as minerals; and renewable or flow resources such as soil, plants, animals, and water, not to speak of human life, knowledge, and skill.

Id.

105. *Id.* at 41-48.

106. GATT 1947, *supra* note 5, at art. XX(b).

XX(g) was to protect raw materials and minerals, not living resources.[107] The AB cited the joint Appellees' (India, Pakistan, and Thailand) submission referring to the drafting history, which indicated that the concern of some delegates was that export restrictions should be permitted for the preservation of natural resources such as manganese.[108]

The AB, rather than dispute this characterization of the drafting history with contrary evidence, decided to adopt an "evolutionary" interpretation that did not rely on the drafting history or other indications of the drafters' intent. It did not seek to determine the ordinary meaning of "exhaustible natural resources" in light of the preparatory documents under Article 32 of the Vienna Convention. Rather, it asserted that its "evolutionary" interpretation was not in direct conflict with the language of the exception. Its justification that Article XX(b) and (g) may not be mutually exclusive and that such an interpretation does not directly conflict with the language ignores the customary rules of interpretation in the Vienna Convention and empirical evidence that developing countries vehemently opposed a unilateral PPM environmental exception. What limited evidence there is suggests that the exception in Article XX(g) was concerned with finite mineral resources in short supply and that Article XX(b) fully covered living resources.

Does Article XX(b) or (g) apply to PPMs? Neither the language of these exceptions nor the drafting history provides any evidence that these exceptions apply to unilateral production or processing standards.[109] Such an exception would constitute a broad, self-judging loophole that one would expect to merit considerable discussion. The ensuing discussion, however, concerned the export of domestic supplies, not the regulation of how other nations produce resources.[110]

While there were a few bilateral and multilateral treaties that did protect fish and birds when Article XX was drafted, there was no suggestion that unilateral PPMs were permissible. An earlier, never adopted draft of the ill-fated International Trade Organization ("ITO") contained an exception in a portion of the commodity section for "international fisheries or wildlife conservation agreements with the sole objective of conserving or developing these resources."[111] While this provision did not find its way into the GATT, one could argue that it is implicitly merged in Article

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107. *Shrimp/Turtle I*, *supra* note 1, at para. 127 (considering and ultimately rejecting the argument of India, Pakistan, and Thailand that the term "exhaustible" refers to "finite resources such as minerals, rather than biological or renewable resources").

108. *Id.*

109. Charnovitz, *Environmental Exceptions*, *supra* note 101, at 53. Charnovitz makes the point that since there was a long history of trade measures with processing standards with regard to fisheries and wildlife, one could argue that the GATT does not preclude them either. *Id.* Notably, however, these fishery and wildlife treaties were multilateral, not unilateral.

110. *See supra* text accompanying notes 102-103.

111. The Commodities Committee accepted Norway's proposal to insert a fisheries and wildlife exception into the Commodities Chapter of the ITO draft. *Havana Charter for an International Trade Organization*, U.N. Conference on Trade and Development, Final Act and Related Documents, at 22, 58, U.N. Doc. E/CONF.2/78 (1948).

XX(g).[112]

However, even if an implicit fisheries exception for international agreements could be read into Article XX(g), it would not have created an exception for unilateral PPM measures. Rather it would only create an exception for multilateral agreements based on the principle of consent. It would then raise the interesting and quite separate problem of how to integrate multilateral agreements into the GATT/WTO framework. It is not a justification, however tenuous, for an exception for unilateral PPM measures under either (b) or (g).

If we apply this analysis to unilateral rather than multilateral "renewable" resources, there is no basis for any implication that Article XX(b) or (g) applies to unilateral PPMs. Neither the textual language of Article XX(b) or (g) nor the preparatory documents suggest that unilateral measures were ever contemplated, considered, discussed, or debated. Indeed it would be completely contrary to the underlying purpose of the GATT to include a large loophole for unilateral action that would be difficult to police. The clear purpose of the GATT was to increase trade and hence economic growth by reducing tariffs over time and minimizing barriers to trade.

An interpretation that the conservation exception now should be read to permit unilateral PPM measures is neither probable nor plausible. Such an idiosyncratic interpretation is particularly inappropriate in an expanded WTO. Since 1947, the nations of Africa, Asia, Latin America, and the Caribbean have emerged from colonialism to join the WTO as a means of fostering economic development. These nations had no voice in the original GATT deliberations. These developing nations quite reasonably signed the WTO agreements with the assumption that PPMs violated GATT rules and have long expressed their opposition to unilateral PPM measures[113] as contrary to their economic interests and the underlying social policy that wisely protects developing nations from unilateral actions of a few powerful countries.[114] For the AB to expand the conserva-

112. For an argument that this quite limited exception was viewed by the Temporary Chairman of the Working Group (on Inter-Governmental Arrangements) as covered under the "conservation of exhaustible natural resources" language in the unadopted Commodity Section and that therefore this interpretation should also govern the Commercial chapter, which was used as a draft for the GATT, see Charnovitz, *Environmental Exceptions*, *supra* note 101, at 46-47. It is unlikely that the GATT negotiators were aware of or intended such an unusual interpretation. In March of 1948 at the Havana meeting adopting the ill-fated ITO Charter, "the Commodities Committee inserted [an] exemption for any intergovernmental agreement relating solely to the conservation of fisheries resources, migratory birds or wild animals." *Id.* at 46 (internal quotation marks omitted). Despite the Commodities Committee recommendation, this was not added to the Commercial Policy Chapter.

113. During the negotiations of the 1996 WTO's Committee on Trade and Environment Report, developing countries as well as several developed countries were able to defeat any attempts to propose substantive legal changes to WTO rules to permit unilateral trade restrictions for environmental or labor protection. *See* Shaffer, *The World Trade Organization Under Challenge*, *supra* note 71, at 40-41.

114. Developing countries sought both during the WTO negotiations and in the Committee on Trade and the Environment to preserve the existing legal position that unilat-

tion exception without a discussion of the original GATT negotiations and in the face of widespread opposition during the Uruguay Round and CTE negotiations is to elevate its newly found policy perspective above that of the majority of nations representing the majority of the world's people.

The AB explained:

> [C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.[115]

This statement is unclear as to whether and when unilateral PPM measures are permissible, as opposed to those unilateral measures that regulate the qualities of a product itself such as the bacterial levels on imported shrimp. An earlier panel had cited the exception for prison labor as evidence that regulation of production methods in other countries, such as the conditions of labor, are in some circumstances permitted in GATT exceptions.[116] The prison labor exception, however, is a specifically mentioned clear exception for a particular method of production, not a broad implied category. The policy purpose is to minimize the cost advantage of goods produced in prisons at below market wages that do not reflect a comparative advantage. It effectively operates as a subsidy to production based on a government policy that provides an unfair advantage to that nation. The specific mention of a disfavored practice that happens to be a method of production that might defeat the purpose of the agreement does not imply that unspecified PPM measures that restrict trade are generally permitted. An interpretation more faithful to the text is that exceptions to market access for unilateral PPMs must be specifically stated.

There is no evidence in either the discussions or the preparatory documents to suggest that unilateral PPM measures were intended to be exempt under Article XX(b) or (g). The more recent negotiations at the Uruguay round and at Doha suggest that there is widespread opposition among the majority of nations to any exception for unilateral PPM measures.[117]

III. Implications for Global Governance and Suggested Interpretive Strategies

This Article has suggested that the "evolutionary" interpretation methodology as used by the AB is inconsistent with the AB's delegated authority and the clearly delineated system of governance in the DSU and the WTO

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eral PPM measures violated the GATT and also to expand market access for developing country products against the rising pressure for what they perceived as green protectionism. *See* the comments of the Delegate of India to the WTO negotiations, Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 J. WORLD TRADE 33, 51-53 (2000).

115. *Shrimp/Turtle I*, *supra* note 1, at para. 121.

116. *See Tuna/Dolphin II*, *supra* note 82, at para. 3.35 (referring to the exception in Article XX(e) on the products of prison labor).

117. *See supra* notes 83-87 and accompanying text.

Agreement. Moreover, a textualist interpretation that utilizes the preparatory documents to clarify ambiguity to preserve rights under the agreements, as required under the DSU, suggests that the Article XX(g) exception was not intended to apply to renewable living resources covered by XX(b). Finally, there is no textual or documentary evidence to suggest that unilateral PPM measures were ever contemplated or discussed except in the specific context of prison labor, which was widely viewed as an unfair method of competition.

In several respects the AB should be praised for its candor. By using an "evolutionary" methodology rather than hiding its normative choice in formal textual interpretation, the AB has made it clear that it is using a "Naturalist" technique to expand the Article XX(g) exception. As argued above, this approach fundamentally misconceives the role of the AB under the WTO consent-based system of governance. Yet we might also see the use of the "evolutionary" methodology in a more positive sense as a technique for requesting guidance from Member states on the proper way to balance competing policies.

Judicial activism is, however, an unwise means to moderate the excesses of laissez-faire capitalism. There is a need for wise international environmental and labor policy, but such important and politically sensitive legislative issues require a balancing of policy factors and economic development concerns that vary from country to country. The problems of global warming, environmental degradation, and child labor are complex, multilayered problems that impact nations differently and are not appropriate for simple interest balancing by judges or for an idiosyncratic solution by one powerful nation.

At one level we might see such judicial activism as a failure of process. This expansion of the Article XX(g) exception and the contraction of market access occurred without the input of all affected parties. If global public policy is to be wise and effective, there must be the full elaboration of the different views and perspectives of affected states, a full discussion of less trade-intrusive policy alternatives to achieve these ends, and the acceptance of these norms or policy solutions by those expected to comply. Under the undemocratic "evolutionary" interpretation methodology of the AB, the domestic politics of powerful nations would determine the costs to be borne by developing countries for Western cultural preferences without consideration of distributive justice concerns.

From another perspective the AB's "Naturalism" may be seen as an attempt to "overjudicialize"[118] the WTO legal system, i.e., to incorporate nonbinding, soft law norms from other contexts to fashion obligatory legal rules before states are willing to assume such an obligation. Under this analysis, the AB in *Shrimp/Turtle I* has constructed a compliance regime for protecting endangered species within a nation's borders when nations

118. For a discussion of the overjudicialization of the WTO, see William J. Davey, *The Case for a WTO Permanent Panel Body*, 6 J. INT'L ECON. L. 177, 183 (2003) (describing the WTO as "a system that is already too legalistic").

remain unwilling to agree to such a limitation themselves. Nations of the WTO have been unwilling to agree on the development of environmental standards or how to integrate environmental agreements into the WTO. The COP at CITES provides a procedure and a forum for amendments to protect endangered species, but there is no consensus on regulating intrastate activities and none on trade sanctions as a remedy for such a norm.

The danger of "overlegalization" or premature legalization is that it may place at risk the belief of many nations in the mutual reciprocity of the system and create domestic pressure to resist compliance, thereby undermining the regime.[119] The AB's "evolutionary" methodology undermines a fundamental goal of the WTO trading regime, a system under the rule of law rather than one controlled by economic power. Paradoxically, the abdication of the AB's responsibility to police barriers to access reduces the legal quality of the regime and emphasizes economic power as the means to obtain and deny access.

Consider two troubling possibilities down the slippery slope of unilateral activity. First, assume that the European Union issues a regulation excluding imported products, such as autos and steel, produced in a manner that does not comply with what the EU claims are the international standards in the Kyoto Protocol. Let us assume that the measure is nondiscriminatory and "related to" conservation of an "exhaustible natural resource"—clean air or at least appropriate levels of oxygen to forestall climate change.

Second, assume that either in retaliation or on its own, the United States passes the Comprehensive Global Warming Act of 2004. The United States has long protected its steel industry. President Bush recently approved steel tariffs under §201 of the Trade Act[120] and then subsequently withdrew them. The tariffs likely violated the 1995 Safeguards Agreement. Assume that as the election of 2004 approaches, President Bush and Congress pass this legislation that includes tax incentives to reduce greenhouse gases and a ban on the import of foreign steel produced at lower air pollution standards than those in the United States. Again, the legislation is non-discriminatory in the sense that all steel produced in a manner consistent with U.S. domestic standards are given national treatment, and it is "related to" conservation. This particular stratagem in an election year requires no sacrifice by U.S. industry and indeed protects a favored industry. The measure may well have the overwhelming support of the environmental community and the steel industry. However, it would

119. For a discussion of overlegalization, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1851-55 (2002). Overlegalization may occur when treaty obligations increase over time, requiring more extensive changes to domestic laws than anticipated, and generating domestic opposition to compliance. *Id.* at 1854. *See also* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 630 (2000) (cautioning that the risk of increased legalization of international trade is loss of liberalization).

120. Trade Act of 1974, 19 U.S.C. § 2251.

clearly reduce exports from Brazil and South Korea, reduce their gross domestic product ("GDP") and employment growth, and slow their economic development.

From a legal perspective, the XX(g) exception was never intended to be used as a broad exception for unilateral regulation determining how other nations produce goods. Lower wage and a more flexible environmental regime may form part of a developing nation's comparative advantage. From a policy perspective, it is unwise to encourage a shift of basic manufacturing jobs to advanced industrialized countries, as this could potentially lower world economic growth, increase the price of cars and other steel products, and increase pollution in the United States.

From a global governance perspective, decisions on minimum international environmental standards should not be made unilaterally by politicians running for election in one country. History and common sense suggest that unilateral power will be used in the self-interest of the decisionmaker and may encourage competitors to impose similar or retaliatory restrictions on international trade.

The overwhelming majority of Member states of the WTO, including both developed and developing countries, have opposed the use of unilateral trade restrictions to achieve labor and environmental objectives.[121] It is also far from clear that the government of the United States supports PPMs as a general means for injecting social policy into the trade regime. The U.S. position in *Shrimp/Turtle I* was motivated by strategic concerns and should not be seen as general support for the concept of PPM regulation.[122] Unilateral requirements that production be consistent with one state's environmental or labor policies undermine the United States' long term strategy of freer trade and provide a powerful tool for other countries to use against the United States in trade battles, as the European Union global warming regulation example suggests. The potential breadth of a broadened PPM exception and its negative effect on market access and freer trade will undermine the restraint that is necessary in a regime with weak sanctions.

We may now have a serious "slippery slope" problem in placing limits on the kind of unilateral PPM measures that are permissible while creating a large loophole that will be difficult and potentially expensive to police

121. The United States and the EU, while sounding supportive of the objectives of Western environmental NGOs, were actually ambivalent because they realized that environmental and other domestic restrictions on trade would also injure their trading interests. They were unwilling to develop strategies that would successfully induce developing countries to agree to changes in WTO rules and instead referred issues "such as the permissibility of unilateral [environmental] trade restrictions" to the CTE where they knew such issues could not be resolved. Shaffer, *The World Trade Organization Under Challenge*, *supra* note 71, at 81-82.

122. The United States, for example, threatened to challenge an EC Directive that would have banned the import of U.S. fur products based on asserted cruel methods of trapping animals. *See generally* André Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps*, 8 J. ENVTL L. 237 (1996).

through adjudication. Does the Article XX(g) exception apply to all unilateral process conservation policies, including global warming measures, applied in a nondiscriminatory manner? Is it also available for process regulations in other areas such as labor policies under Article XX(a), or health and safety policies under Article XX(b)? The transboundary character of global warming and other global commons issues requires a global solution, not a solution imposed by one nation. Consultation and even a requirement of nondiscriminatory good faith negotiations are inadequate. A broadened conservation exception creates an incentive for the unilateralist country in negotiations to not compromise and to insist on its policy approach, even if it may be required to be flexible on the means to achieve it.[123] This improves the bargaining position of the unilateralist with market power and diminishes that of the weaker nation irrespective of the merits or economic impact of their claims.

With several panels and now the AB interpreting Article XX(g) to include living renewable resources such as fish stocks and sea mammals as "exhaustible," the readoption of the term's original understanding seems unlikely at this point. The more important question today, because it potentially undermines a consensual, more democratic system of global governance, is whether a nation may unilaterally impose its own environmental, labor, or other process or production policy standards on Members as a condition of access to its market.

I want to suggest several interpretations of Article XX to minimize the harmful potential of unilateralism and to reinstate balance in global policy negotiations. Future jurisprudence should narrow the impact of *Shrimp/Turtle I* and *II* to maximize Less Developed Countries' ("LDCs") access to markets and win-win trade while reducing the opportunity for protectionism.

First, the application of Article XX(g) to living creatures should be limited to an emergency exception.[124] "Exhaustible" in the context of living creatures should be interpreted not as capable of being exhausted, but presently in danger of extinction. This gives the adjective "exhaustible" a purposeful meaning, where now it has none under the AB's opinion in *Shrimp/Turtle I*. All living creatures are potentially exhaustible, but they also reproduce and merit somewhat different treatment than finite resources. The present exhaustibility of living resources should be demonstrated by objective criteria, including their having been listed as endangered species under CITES or, in an emergency for unlisted species, by definitive scientific evidence that establishes a near-term danger of extinction.

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123. *Shrimp/Turtle II* appears to require that negotiations be conducted in good faith, but not that they be concluded on terms satisfactory to both parties. *Shrimp/Turtle II*, *supra* note 1, at para. 123 (indicating that "an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States").

124. *See* John H. Jackson, *Comments on* Shrimp/Turtle *and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303, 307 (2000) (hinting that an emergency limitation exists).

Such a reading would exclude unilateral measures to limit greenhouse gases or other agents of air pollution from the Article XX(g) exception, subject matter best left to international negotiation and multilateral solutions. Conservation measures other than those protecting endangered species should properly be considered under the Article XX(b) exception to protect human, animal, or plant life or health. Trade sanctions in the multilateral agreements themselves, such as those in the Montreal Protocols on Substances That Deplete the Ozone Layer,[125] might well meet the "necessary" requirement of XX(b).

Second, the unilateral regulation of how goods or commodities are produced in other countries (PPMs) must not be seen as generally permissible under the Article XX exceptions. Generally permitting PPMs creates large, potentially abusive loopholes that were not discussed or debated during the ITO and GATT negotiations. A fundamental assumption of WTO jurisprudence has been to narrowly construe exceptions to minimize the loss of Members' rights.[126] The much quoted passages in *Shrimp/Turtle I* and *II* that unilateralism may, to some degree, be a feature of the exceptions is unclear with regard to PPMs.[127] Unilateralism is also a feature of the regulation of the qualities of products themselves.

An interpretation of the place of PPMs within the Article XX framework more faithful to the original understanding, as expressed during the GATT negotiations and consistent with the position espoused by the majority of countries during the negotiation of the WTO agreements, would be that unilateral PPMs are a feature of the exceptions only to the extent that the particular exception specifically permits PPM measures. The prison labor exception in Article XX(e)[128] is specifically and directly concerned with the manner in which goods are produced in order to prevent the import of artificially low-priced goods not related to comparative advantage. Only Article XX exceptions that specifically permit measures regulating how goods are produced should be read to permit PPM measures.

Following this line of reasoning, if the AB adopts the suggestion to limit Article XX(g) to an emergency exception for endangered species, then this emergency exception may be read to encompass measures necessary to prevent their extinction. Increasingly, nations are cooperating to preserve fishing stocks, migratory birds, and other wildlife.[129] This approach would effectively incorporate a limited wildlife PPM exception in Article

125. Montreal Protocol on Substances That Deplete the Ozone Layer, art. 4, Sept. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1550. Article 4 bans the import and export of listed substances. *Id.*

126. *Shrimp/Sea Turtle I*, *supra* note 1, at para. 157. The AB held that each exception "is a limited and conditional exception from the substantive obligations . . . in GATT 1994." *Id.*, *adopting* GATT Panel Report, *United States–Section 337 of the United States Tariff Act of 1930*, BISD 365/345, para. 5.9 (Nov. 7, 1989) ("Article XX(d) thus provides a limited and conditional exception from obligations under other provisions.").

127. The relevant passage is quoted *supra* note 92. "This statement expresses a principle that was central to our ruling in *United States-Shrimp*." *Shrimp/Turtle II*, *supra* note 1, at para. 138.

128. GATT 1947, *supra* note 5, at art. XX(e).

129. Charnovitz, *Environmental Exceptions*, *supra* note 101, at 53.

XX(g) that was at least considered during the ITO negotiations, but it would not permit PPM measures in other sections where it is not an inherent part of the exception.

Article XX(b) should not be seen to generally encompass PPMs. Measures to conserve living creatures that are not endangered species should be required to meet the criteria of "necessary" in Article XX(b). Multilateral conservation or environmental agreements that are truly international might be seen as "necessary." The Sanitary and Phytosanitary Agreement ("SPS") is properly seen as a greater specification of the Article XX(b) exception with necessity and scientific evidence requirements to prevent the abusive use of sanitary regulations. It also expresses a clear preference for international standards. The SPS requires that such measures be "not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection"[130] and that they be based on scientific principles.[131] These requirements recognize that even facially nondiscriminatory regulations may in fact be disguised forms of protectionism and should be policed to preserve the rights of Members under the agreements. The wave of the future at the WTO will be greater specification to prevent protectionist abuse because the temptation to acquiesce to domestic political pressure is so great.[132]

The third proposed interpretation of Article XX to eliminate unilateralism is to encourage the AB to continue the process of clarifying that the chapeau of Article XX contains a proportionality test even when measures are nondiscriminatory. The phrase, "disguised restriction on international trade" in the chapeau, should be read to both limit the abuse of the general exceptions and to require that measures be proportional to the policy ends sought. To some extent the AB has begun this process by its interpretation of the nondiscrimination provisions in the chapeau. In *Shrimp/Turtle II* the AB required that the U.S. Guidelines applying the measure not exclude shrimp caught without the use of Turtle Excluder Devices ("TEDs") if the program is "comparable in effectiveness."[133] This may be seen as a preference for performance standards that reduce protectionism by permitting a variety of means to achieve a given conservation policy and allowing different cultural solutions to the problem of incidental taking, mindful of the special conditions in many developing countries. The AB also interpreted "arbitrary discrimination" to require that the certification process be struc-

130. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27 (1994), art. 5.6, *available at* http://www.worldtradelaw.net/uragreements/spsagreement.pdf [hereinafter SPS Agreement].

131. *Id.* at art. 2.2.

132. For a discussion of how WTO rules help governments resist domestic political pressure for protectionism, see John McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 515 (2000) (stating that "[t]he WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting both free trade and democracy").

133. *See Shrimp/Turtle II*, *supra* note 1, at para. 144. Here the AB agreed with the formulation of the Panel that a program "comparable in effectiveness" avoids the problem of arbitrary or unjustifiable discrimination. *Id.*

tured in "rigorous compliance with the fundamental requirements of due process."[134] A fair process requirement similarly minimizes the opportunity for further denial of market access through the manipulation of administrative processes or by the arbitrary application of the criteria for eligibility to import.

Proportionality and fairness should be extended to the other major limitation in the chapeau, "disguised restrictions on international trade." The AB has laid the foundation for this process by stating "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions.'"[135] If these concerns are applied to the prevention of abuse in the *design* and *purpose* of measures as well as in their application, this would effectively create a proportionality requirement in the chapeau that would balance the right to an exception with the other Members' right to market access.

The chapeau should be interpreted to ensure that the *purpose* and *design* of conservation measures, as well as how they are *applied,* are narrowly targeted to achieve the conservation objective while minimizing the restrictions on market access and the opportunity for protectionism. In *Shrimp/Turtle I*, the AB explained that the chapeau embodies the recognition by Members of the need to balance the rights of a Member to invoke an exception and the substantive rights (including access to markets) of other Members.[136] The balancing of rights apparently includes a balancing of several factors including the policy *purpose* and the *design* of the measure. "The location of the line of equilibrium [between rights], as expressed in the chapeau, is not fixed and unchanging; the line moves as the *kind* and *shape* of the measures at stake vary and as the facts making up specific cases differ."[137]

There is some drafting history that the term "applied" should be given a broad interpretation to prevent abusive design or purposes, not just in the application of measures. The AB, in interpreting the chapeau in *Shrimp/Turtle I,* discussed the drafting history of the phrase "disguised restriction on trade." The United Kingdom, in order to prevent abuse, proposed text for the chapeau that qualified the exceptions, "provided that they [exceptions] are not *applied* in such a manner as to constitute. . . a disguised restriction on international trade."[138] The Netherlands, Belgium and Luxembourg made clear that their concern in supporting a qualifying clause was to prevent indirect protection.[139]

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134. *Shrimp/Turtle I*, *supra* note 1, at para. 182.

135. *Id.* at para. 151 (quoting *U.S.-Reformulated Gasoline*, *supra* note 6, at 20. "If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.") *Id.*

136. *Id.* at para. 156.

137. *Id.* at para. 159 (emphasis added).

138. *Id.* at para. 157 n.155 (emphasis added).

139. *See id.* at n.154.

The AB went on to address only the application of the U.S. measure as a means of arbitrary or unjustified discrimination. Nevertheless, in the appropriate case the chapeau should be used to police the indirect protection in purpose and design. The chapeau mandate that measures not be *applied* in a manner that would constitute a "disguised restriction on international trade" should be read to include not just the form of the measure, but also the *application of the abusive policy* or the *application of an abusive policy design*. The AB would then be in a position to balance a Member's right to any exception, conservation or otherwise, in the context of a commingled protectionist purpose. It would thereby require other less restrictive means to achieve a conservation or other policy objective. Such an approach will permit the AB to minimize protectionism in the valid use of exceptions and to police the abusive use in order to protect local industry under the guise of a legitimate purpose.

The meaning of "necessary" has appeared to evolve in recent WTO jurisprudence and may provide helpful criteria to balance Members' rights in the chapeau.[140] Earlier cases had interpreted "necessary" to require the least GATT-inconsistent alternative reasonably available.[141] In the *Korea-Beef* case,[142] the AB formulated a more nuanced balancing test to apply in determining whether a measure is "necessary":

> In sum, determination of whether a measure, which is not "indispensable," may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[143]

This balancing test provides a useful beginning approach in assessing whether the form of a measure, ostensibly for a conservation purpose, is nevertheless a "disguised restriction on international trade" that is not proportional to the policy goal or is otherwise a disguised form of protectionism. All measures should be designed to effectively achieve permissible policy goals with minimum interference with Members' rights. If unilateral PPM measures are permitted under the conservation exception, or contrary to the advice of this Article, under the other Article XX exceptions, then the AB must police the abuse of exceptions as surreptitious forms of

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140. For an extended discussion of the necessity and proportionality tests in Article XX, the Technical Barriers to Trade Agreement ("TBT Agreement"), and the SPS, see Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811, 824-33, 850-54 (2002).

141. *See* GATT Panel Report, *United States–Section 337 of the Tariff Act of 1930*, B.I.S.D. L/6439-36S/345 para. 5.26 (Nov. 7, 1989); GATT Panel Report, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, B.I.S.D. DS10/R-37S/200 para. 23 (Nov. 7, 1990).

142. WTO Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R (Dec. 11, 2000).

143. *Id.* at para. 164.

protectionism. Careful scrutiny may lead to measures that achieve a permissible purpose with a minimum of restrictions on access.

There is a long history of the misuse and exploitation of exceptions and technical requirements to protect local markets and to subsidize exports in a manner that has particularly injured developing countries. The United States and Europe, while exponents of freer trade, have long used and misused exceptions and subsidies to protect their steel, textile, and agricultural industries. These are precisely the industries in which the LDCs have a comparative advantage and where freer trade is likely to increase income and employment to combat poverty and ultimately to improve environmental standards.[144]

Unilateral PPMs that impose the social policy of the wealthy on the developing countries, particularly in industries vital to developing countries, must be narrowed and subjected to multilateral negotiations and discipline. The worthy goals of species conservation, cleaner environment, and biodiversity are best achieved by developed nations subsidizing the adoption of their preferred policies rather than imposing costs on poorer nations.[145] In employing an "evolutionary" methodology to engraft its version of wise public policy onto Article XX, the AB exceeded its authority and undermined the governance structure of the WTO.

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144. *See* The World Bank, Globalization, Growth, and Poverty: Building An Inclusive World Economy (World Bank Policy Research Report #23591) 53-62 (2002).

145. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 153-58 (2004) (noting that developing countries have significant resource problems and that wealthy developed countries seeking to impose their value preferences on poorer nations should subsidize the PPMs that they advocate).