Revisiting the WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective

Dr. Pallavi Kishore*

Contemporary international law faces challenges stemming from interactions between different areas of law and various stakeholders. For example, tensions arise from the interaction between international trade law and environmental law, as well as between developed and developing countries.

The interface between trade and the environment is increasing and is taking different forms. From the protection of turtles to the protection of the climate, the international community faces many different environmental challenges. Protection of markets, however, also remains a perennial and underlying concern. This increasing interface between trade and the environment has certain consequences for development. The World Trade Organization (“WTO”) is the jurisdictional body before which these issues are debated. The panels and Appellate Body (“AB”) have, on various occasions, been asked to decide issues having a bearing on the environment. Examples of these cases include United States—Standards for Reformulated and Conventional Gasoline,1 United States—Import Prohibition of Certain Shrimp and Shrimp Products (“U.S.—Shrimps”),2 European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,3 and Brazil—Measures Affecting Imports of Retreaded Tyres (“Brazil—Retreaded Tyres”).4 These cases, in which certain laws were analysed in light of which XX of the General Agreement on Tariffs and Trade (“GATT”)),5 indicate a desire to protect the environment. In fact, U.S.—Shrimps provides an outstanding example of lawmaking in favor of the environment. In this case, as will be discussed below, the AB made some very important observations that will have a bearing on future cases.

After targeting developing countries’ exports for lack of protection of turtles, the United States has contemplated targeting them again for lack of sufficient action to curb greenhouse gas emissions.6 Such endeavors of developed countries often succeed, firstly because article XX is a general provision that can cover all sorts of restrictions, and secondly because the WTO’s judicial organs tend to reinforce the position of developed nations, as happened in U.S.—Shrimps. As Pascal Lamy, the Director-General of the WTO, asserted in a speech in Ottawa, “the multilateral trading system . . . cannot stand as a barrier to the fight against climate change . . . .” 7 The United States will likely ensure that any new U.S. laws that tax products imported into the United States based on emissions released during their production (similar to the proposed American Clean Energy and Security Act of 2009)8 will be in conformity with WTO rules.9 For this reason, if developing countries approach the WTO’s Dispute Settlement Body (“DSB”), then a repeat of U.S.—Shrimps is likely. Therefore, it is opportune to revisit U.S.—Shrimps.

The objectives of the WTO are to increase market access and promote nondiscriminatory treatment of imports vis-

---

5. See, e.g., Gasoline AB Report, supra note 1, at 13.
vis other imports and domestic products. The nondiscrimination principle is the basic principle of WTO agreements, including the GATT. The WTO “contract” requires that WTO Members do not discriminate between domestic and foreign goods, services, and service providers. In WTO law, the concept of nondiscrimination can be interpreted in different ways. For example, the notion of discrimination in articles I(1) and III(4) of the GATT requires a comparison of how like products are treated, whereas the notion of nondiscrimination in article XX requires a comparison of countries in which similar conditions prevail.

I. Introduction to Article XX of the GATT

Succinctly summarizing article XX of the GATT, Aaditya Mattoo and Petros C. Mavroidis explain, “according to the GATT case law, Article XX is not a positive rule establishing obligations in itself, but a list of general exceptions to obligations otherwise assumed by WTO members.”

Although the GATT contains exceptions to its own provisions, when applied, those exceptions must still comply with the principle of nondiscrimination. Article XX sets out a list of exceptions. However, these are susceptible to misuse by GATT members. In fact, these exceptions may be viewed as responses to particular conditions existing in specific countries. The propositions made by the United States for the setting up of the International Trade Organization exemplified some of these exceptions, but the United Kingdom proposed a clause (known as the article XX chapeau) to protect against misuse of GATT exceptions. The chapeau of article XX basically includes both the most-favored-nation clause (prohibiting arbitrary or unjustifiable discrimination between countries where the same conditions prevail) and the national-treatment clause (prohibiting disguised restriction on international trade). However, it is not easy to decipher the exact meaning of the chapeau: What is the aim of setting out exceptions, if it is not to protect domestic industry? The answer is that article XX is necessary because it renders legal certain measures, such as a prohibition of imports dangerous to health, that would otherwise infringe article XI (general elimination of quantitative restrictions). Nevertheless, the possibility of protectionism is very real. This is due to the fact that the language of the chapeau is ambiguous; what are the meanings of the expressions “arbitrary or unjustifiable” and “disguised restriction”?

Another important aspect of article XX is that it does not require notice of measures taken in accordance with its provisions, even though it would be logical to expect that members give notice of measures that comply with the GATT only by virtue of article XX. Notification would also improve compliance with article X (publication and administration of trade regulations) and would allow other members to evaluate the measure in question in the light of the objectives of article XX and of the GATT. Additionally, the members would be in a better position to formulate appropriate proposals to improve international trade while also taking into account the diverse legitimate goals that members’ own laws may advocate.

Article XX spells out many exceptions to the GATT, but they must be applied in a nondiscriminatory fashion. Among these exceptions are paragraphs b and g, which are directly concerned with environmental goals. Before the WTO came into force, article XX was the main provision that allowed members to impose environmental measures. With the establishment of the WTO, there are other agreements such as the Technical Barriers to Trade and the Sanitary and Phytosanitary Measures agreements that allow such measures. The environmental exceptions in article XX do not fall within the four principles of the GATT (articles I, II, III, and XI). Thus, the number of cases involving environmental issues is increasing because environmental protection is becoming a greater priority for members. Given that a large number of environmental measures violate article XI, which prohibits quantitative restrictions, most of the cases deal with whether these measures would be justified under article XX.

However, these exceptions do not refer to the word environment. There is disagreement on whether the legislators wanted to apply these exceptions to a broad or a narrow field of environmental issues. According to certain writers, the legislators wanted to take into account environmental protection, economic considerations, and public health, because they were aware of existing international conventions relating


15. Id. at 741–42.

16. Id.

17. Id. at 741–44.


19. Article I embodies the most-favored-nation clause, article II embodies the requirement that each member must provide schedules of concessions, article III embodies the national treatment clause, and article XI lays down a general prohibition on quantitative restrictions. General Agreement on Tariffs and Trade, arts. I–III, XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

20. See generally cases listed supra notes 1–4.

21. See generally id.
to environmental protection. They did not make an explicit exception in favor of the environment, however, because they presumed that paragraphs b and g would suffice to achieve their goal.22

Thus, article XX has three characteristics that could prove dangerous for developing countries that wish to export to other countries. First, the chapeau is ambiguous, as discussed above; second, measures taken in accordance with article XX need not be accompanied by notices;23 and third, the paragraphs under the chapeau are too general.24 This leaves the judicial organs with too much liberty to interpret this article. The main problem with paragraphs b and g of article XX is the possibility that measures taken to protect the environment could be perceived as protectionist with respect to the domestic market. It is difficult to identify whether a measure constitutes a disguised restriction on international trade, because it is frequently the application of a measure that leads to protectionism.25 Therefore, it is useful to examine the case law relating to article XX.

II. The Shrimp-Turtle Case

The first case in which the WTO authorized unilateral national extraterritorial environmental measures against developing countries under article XX was U.S.—Shrimps.26 The history of this case began when the United States made it compulsory for American trawlers to be installed with turtle-excluder devices (“TED”) so that certain sea turtles protected by the Endangered Species Act could escape while catching shrimps. The United States then imposed a prohibition on imports of shrimps that had been caught without using TED. There were two reasons behind the imposition of this prohibition. First, fitting trawlers with TED requires substantial expenditure. Therefore, foreign shrimpers would be obliged to spend as much as their American counterparts, thereby protecting the latter from foreign competition.27 The same philosophy would guide the imposition of border measures based on greenhouse-gas emissions, contemplated by the United States and Europe. This was made clear by Director-General Lamy when he said that these members “must offset the competitive disadvantage that their industry may suffer from enduring the costs of climate mitigation.”28 Second, the prohibition would exert pressure on foreign governments to take measures to protect turtles.29

In response to the above U.S. import restrictions, India, Pakistan, Malaysia, and Thailand lodged a complaint against the United States at the WTO, because their shrimp exports had been adversely affected. The argument of the complainants was that section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 199030 and the guidelines for its implementation had violated articles I(1), XI(1), XIII(1), XX(b), and XX(g) of the GATT.31 In other words, they claimed a violation of the principle of nondiscrimination. India also argued that the American measure impinged India’s sovereign right to formulate its environmental policy.32 It stated that the United States should not have imposed a far-reaching extraterritorial measure on other members.33 India believed that this measure amounted to an unacceptable interference with the sovereign jurisdiction of India.34 The measure had been imposed unilaterally. The United States claimed that the use...
of TED was a multilateral environmental norm and that the complainants had refused to negotiate an international agreement in this regard. India and Thailand responded that the use of TED had become an international norm only because of the pressure exerted by the United States. India also revealed another example of this pressure tactic; the United States had indicated its readiness to enter into a regional agreement with India if the latter withdrew the complaint before the WTO Dispute Settlement Mechanism (“DSM”).

Before the WTO, the United States raised the defense of article XX(b) and (g). Article XX(b) allows members to impose measures necessary for the protection of human, animal, or plant life or health, while article XX(g) allows members to impose measures relating to the conservation of exhaustible natural resources. The panel ruled against the United States, stating that the United States had violated article XI(1). The panel’s rationale was that only countries certified by the United States as having a TED-implementation program could export to the United States. The United States did not certify a country if the exporting country had protected turtles by means other than TED. The panel held that this distinction was discriminatory under the chapeau of article XX, because countries in the same situation (i.e., protecting turtles) were being treated differently. The panel also stated that the principal objective of the GATT was to advance economic development by multilateral free trade, thereby preserving the multilateral trading system. It further stated that the multilateral trading system would lose its predictability if exporters were to comply with the different laws of each importing member. Moreover, the chapeau of article XX, even though an exception, does not allow redress in market access and discriminatory treatment. The United States appealed the decision of the panel.

According to the AB, the fundamental principles of GATT and members’ laws to implement the objectives mentioned in article XX are equally important. The AB referred to the preamble of the Marrakesh Agreement to support its stance that the WTO does value environmental concerns. Therefore, this decision of the AB demonstrates that environmental issues will not be dealt with as exceptions to GATT under article XX. However, the AB did not clarify why article XX contained environmental “exceptions” if they were not to be dealt with as exceptions. If the AB’s interpretation in U.S.—Shrimps is actually applied, then none of the concepts in the preamble will be considered exceptions, and these concepts include taking into account the situation of members at different levels of development. Is the AB ready to apply this principle as a nonexception? Special-and-differential-treatment (S&DT) provisions actually reflect the differing levels of development of members. Are they no longer exceptions?

The AB stated that a balance has to be struck between the rights of a member under article XX and the rights of other members under provisions such as article XI. The interpretation of the chapeau must not deprive parties of the rights accorded to them under the paragraphs of article XX. This is understandable; however, this does not mean that article XX is not an exception. The purpose of the chapeau is to guard against a misuse of the exceptions. Moreover, the chapeau represents the fundamental principle of nondiscrimination, which must be applied to exceptions as well.

The AB went on to say:

[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.

The AB noted that international law had evolved over time, and that it now recognized that natural resources such as turtles should be protected. The complainants had put forward a traditional interpretation of the expression exhaustible natural resources as envisaged in 1947. Rejecting the interpretation of the complainants, the AB held that turtles would be considered exhaustible natural resources even if they could reproduce. It once again took into account the preamble of the Marrakesh Agreement that refers to sustainable development and interpreted the aforesaid expression in the light of international agreements that also promote sustainable development.

---

37. Id. ¶ 7.16.
38. Id. ¶ 7.18.
39. Id. ¶ 7.33.
41. Shrimps I Panel Report, supra note 2, ¶¶ 7.44–7.45.
42. See Shrimps I AB Report, supra note 2, ¶ 112 (quoting Shrimps I Panel Report, supra note 2, ¶ 7.44).
43. See id.
44. Id. ¶ 156, 159.
45. Id. ¶ 129 (the Preamble states “seeking both to protect and preserve the environment”). But see Lorand Barcés, The Appellate Body Report in European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes, in HUMAN RIGHTS AND INTERNATIONAL TRADE 461, 476 (Thomas Cottier, Jost Pauwelyn, & Elisabeth Bürgi eds., 2005) (arguing that environmental protection is not a goal of the WTO).
47. The preamble states:

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted . . . in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure 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 . . . .

Marrakesh Agreement, supra note 46, pmbl.
48. Shrimps I AB Report, supra note 2, ¶ 156.
49. Id. ¶ 121.
50. Id. ¶¶ 129–34.
51. Id. ¶ 127.
52. Id. ¶ 128.
53. Id. ¶¶ 129–30.
ened environmental protection in the WTO by limiting the distinction between resources capable of reproducing and those that cannot. It is logical to interpret the expression *exhaustible natural resources* in the light of the present situation, but it also means that there is no difference between resources that can reproduce and those that cannot (such as minerals). Therefore, this finding of the AB could be termed as amounting to legislating; the AB generally follows a textual approach of interpretation,64 which it modified in this case while interpreting the word *exhaustible*

The AB held that the prohibitory measure imposed by the United States was in conformity with article XX(g) but not with the chapeau of article XX.57 It also held that certain modifications would be required in the measure to make it conform to the chapeau.65 Even though the AB criticized the unilateral application of the measure, it did not criticize its logic. Gregory Shaffer has discussed this phenomenon in his work. He says that judicial forums favor economic powers by striking down the application of their laws instead of the laws themselves, thereby compelling developing countries to bring every case before the DSM.59 The AB did not analyze the American measure in terms of balancing environmental gains and the costs associated with the restriction of international trade.60 On the contrary, it stated emphatically, “We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is.”70 Consequently, it put an end to the notion that environmental measures are at odds with the goals of the multilateral trading system. Then the AB applied the law to the facts of the case, a technique called “compel[ing] the analysis.”60 It held that the measure could not pass the test of the chapeau of article XX because its application constituted unjustifiable and arbitrary discrimination between members.61

The AB even noted:

We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other inter-

national fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.62

This point was not raised by the parties. Hence, the AB overstepped its mandate when it said that sovereign nations “should” adopt measures to protect endangered species. Although some find this observation to be merely an ex obiter dictum,63 that does not absolve the AB of the responsibility of making responsible statements. Additionally, this statement may seem at odds with Director-General Lamy’s statement a decade later that “[r]elying on trade measures to fix global environmental problems will not work.”64 Either he was stating a general rule of the WTO, he was unaware of U.S.—Shrimps, or his statement itself was an ex obiter dictum. However, as mentioned above, Lamy later stated that the multilateral trading system would not act as an obstacle to the fight against climate change.65 The AB can derive support from this statement. It is obvious that WTO law has more permanence and sanctity than the statements of its directors-general. Therefore, the DSM will not be rehearing and redeciding U.S.—Shrimps. It remains to be seen how the AB will decide new cases relating to these issues in light of Lamy’s statements.

U.S.—Shrimps shows the desire of the AB to regulate international trade in a more comprehensive way that encompasses nontrade values as well as commercial objectives. Thus, the AB might become a court dealing with general matters and not only trade matters.66 The panels and AB can only decide on nontrade matters as long as they have a relation with trade.

III. Evaluation of the Shrimp Case

An evaluation of the substantive and procedural matters in U.S.—Shrimps will show how an international tribunal uses international law to arrive at the desired result of protecting the environment.

A. Substantive Issues

When the AB stated that the American measure was justified under article XX(g), it recognized the extraterritorial application of the subjective discretion of the United States.67 This shows that a measure that complies with WTO law may create obstacles to the enhancement of market access, a legitimate goal of the WTO. In such a case, the interpretation of

55. *Shrimps* AB Report, supra note 2, ¶ 186.
56. See id. ¶ 183.
59. *Shrimps* AB Report, supra note 2, ¶ 185.
60. Howse, supra note 59, at 498.
61. *Shrimps* AB Report, supra note 2, ¶ 186.
62. *Id.* ¶ 185.
65. See supra text accompanying note 7.
the law by the DSM becomes all the more important. The right to impose trade-restrictive measures in accordance with article XX has an element of great discretion and subjectivity because different values are dear to different members. The 153 members of the WTO are at different levels of development, and the majority are developing countries.68 Given that developed countries have the resources to implement such measures, it is important that the DSM take into account the position of the developing countries.69

The preamble refers to sustainable development and environmental protection, but it also refers to the fact that this must be done “in a manner consistent with [members’] respective needs and concerns at different levels of economic development.”70 This was reinforced by Director-General Lamy when he stated his preference for assigning climate commitments to all countries “under common but differentiated responsibilities.”71

Principle 12 of the Rio de Janeiro Declaration states that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.”72 Director-General Lamy recently stated that unilateral action could not solve the problem of climate change and competitiveness of industry.73 However, the AB in U.S.—Shrimps said that unilateralism was part of the exceptions in article XX.74 Earlier, we saw that the AB criticized the unilateral application of the measure.75 Perhaps the AB meant that a measure taken to further the objectives in the exceptions would obviously be unilateral; however, its application should not be unilateral. In United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia (“U.S.—Shrimps II”), the AB held that the measure as modified by the United States would be justified under article XX as long as serious good-faith efforts were being made to arrive at a multilateral agreement,76 and as long as it required exporters to put in place a program that would be comparable in effectiveness to the American program—allowing latitude to the exporters to adopt a program suited to their circumstances.77 Thus, the measure was held valid only because it now had a component of international negotiation78 and took into account the needs of the complainants. The unilateral measure was legal so long as the United States applied it by multilateral means. This seems a bit paradoxical. It is a type of forced multilateralization.79

In U.S.—Shrimps II, the AB said that a measure must take into account the specific conditions prevailing in any exporting member but not those prevailing in every exporting member.80 The AB is not clear about what it wants to say. This reasoning—or rather the lack thereof—is not in the interest of developing members, because it turns the requirement of flexibility in the measure into a theoretical one. Moreover, the panel in U.S.—Shrimps II said that it was “mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality.”81 Even then, the AB chose to apply this criterion.

Another inconsistency is evident in the report of the AB. In India—Patent Protection for Pharmaceutical and Agricultural Chemical Products,82 the AB disagreed with the panel’s application of the criterion of legitimate expectations,83 whereas in U.S.—Shrimps II, it referred to the aforementioned criterion confirming that adopted reports were part of the GATT acquis and created legitimate expectations among members.84

Additionally, in U.S.—Shrimps I, the AB disagreed with the panel’s view that the American measure would undermine the multilateral trading system stating that this criterion could not be used in interpreting the law.85 However, article 3(2) of the Dispute Settlement Understanding (“DSU”) stipulates: “The dispute settlement system of the WTO is a central element in providing security and predictability to

70. Shrimps I AB Report, supra note 2, ¶ 129 (quoting ¶ note 3able development in the Preamble of the WTO Agreement).
71. Director-General Lamy also referred to the concept of sustainable development in the preamble. See Lamy, supra note 7.
73. See Lamy, supra note 7.
74. Shrimps I AB Report, supra note 2, ¶ 121.
75. Id. ¶ 172.
76. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, ¶ 122, WT/DSS5/RW/RW (Oct. 22, 2001) [hereinafter Shrimps II AB Report]. By applying the principle of good faith, the AB was in effect saying that the complainants would construe the said principle if they refused to negotiate. In such a situation, unilateral measures would be justified. See Mitsuhiro Motoji, et al., The World Trade Organization: Law, Practice and Policy 866 (2006).
77. See Shrimps II AB Report, supra note 76, ¶ 144.
80. See Shrimps II AB Report, supra note 76, at ¶ 149.
83. AB Report India, supra note 82, ¶ 45 (“the legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the impugnation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”).
84. Shrimps II AB Report, supra note 76, ¶ 108.
the multilateral trading system.\textsuperscript{86} If the DSU can take the multilateral trading system into account, the panel should also be allowed to do so. Developing countries depend on the DSM, which in turn depends on WTO law. The AB should have taken this article into account.

It is obvious that the AB or any judicial forum must choose one of the different interpretations of the law to apply. Thus, the AB emphasized protection of the environment instead of the negative effect this would have on international trade.\textsuperscript{87} Despite India's argument to take into account the needs of members at different levels of development, the AB preferred to take into account that part of the preamble of the Marrakesh Agreement that refers to the environment and sustainable development.\textsuperscript{88} On the one hand, despite the fact that the importance of noneconomic values is increasing, it should be remembered that the WTO is supposed to regulate only those aspects of environmental measures that "have a significant effect on trade."\textsuperscript{89} On the other hand, if article XX is part of WTO law, it should be possible to apply it. However, the pressing question from the perspective of developing countries is whether the interpretation adopted by the AB will promote development in their countries.

Furthermore, even if article XX allows unilateralism for purposes of environmental protection, the American measure did not provide a guarantee against protection of the domestic American market, a phenomenon referred to as green protectionism.\textsuperscript{90} Article XX positions nontrade values above trade values so long as the chapeau of article XX is satisfied.\textsuperscript{91} Therefore, the American measure would be legal even if it led to protection of the American market, so long as it fulfilled the conditions specified in article XX.

However, even though the United States was obliged to modify its measure, the modification would not meaningfully serve many developing countries, because few countries’ programs could compare in stringency with that of the United States. In addition, it may be difficult for developing countries to impose such measures on developed countries. One example of this difficulty may be found in the case of Brazil—Retreaded Tyres, in which the European Communities ("EC") lodged a complaint against Brazil after the latter had imposed restrictions on the imports of retreaded tires from the EC.\textsuperscript{92} According to the EC, this amounted to a violation of articles I(1), III(4), XI(1) and XIII(1) of the GATT (i.e., the principle of nondiscrimination).\textsuperscript{93} Brazil raised the defense of article XX, but the panel and AB held that there had been a violation of articles XI(1) and III(4) that was not justified by article XX (chapeau and paragraphs b and d).\textsuperscript{94} This demonstrates that at least some developing countries lack sufficiently sophisticated mechanisms to frame laws that would be trade-restrictive yet WTO-friendly.

In \textit{U.S.—Shrimps}, India argued the impropriety of the extraterritorial nature of the American measure.\textsuperscript{95} However, the AB clarified that it would not decide the issue of the limitation of jurisdiction in article XX(g).\textsuperscript{96} It should have ruled on this issue, considering that article XX(g) is silent on this point. The fact that article XX mentions nothing about jurisdiction can be interpreted in two ways; either it allows or prohibits extraterritorial measures. According to certain authors, article XX should be interpreted narrowly, as it lays down exceptions.\textsuperscript{97} For others, the fact of admitting that natural resources outside the jurisdiction of a state can be regulated by that state would amount to recognizing a sort of universal competence in favor of the importing state.\textsuperscript{98} The AB said that these turtles were found in waters within American jurisdiction.\textsuperscript{99} Does that mean that the AB did not allow extraterritorial measures? Was the AB implying that the United States could not regulate the conditions of Indian turtles in Indian waters? Perhaps this is why the AB explicitly said that it would not rule on the question of limitation of jurisdiction in article XX(g).

Another aspect of this issue relates to the fact that, according to article XX(g), such measures are to be applied in conjunction with national measures.\textsuperscript{100} Is it therefore possible to conclude that the United States could refuse to import Indian shrimps caught in Indian waters without protecting Indian turtles, simply because it did not allow the production and/or consumption of American shrimps caught in American waters without protecting American turtles? This makes it obvious that the question of jurisdiction is complex and required a response from the AB.

According to other writers, the AB allowed extraterritorial measures under article XX(g).\textsuperscript{101} However, according to Howse and Neven, the United States did not impose its law or measure and did not prescribe environmental norms applicable on foreign territory.\textsuperscript{102} It only refused to let some products enter its territory unless they fulfilled certain conditions.\textsuperscript{103} Howse and Neven go so far as to cite \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)},\textsuperscript{104} in which the International Court of Justice ("ICJ") held that economic pressure, including an embargo on a state to make it change its policy, did not constitute a violation of the rules of customary international law.\textsuperscript{105} However, this judgment of the ICJ is not applicable in the present case because the WTO is a jurisdiction separate from the ICJ. The fact remains that the United States did not allow the

\textsuperscript{86} Marrakesh Agreement, supra note 46, annex 2, art. 3.
\textsuperscript{87} Shrimps I AB Report, supra note 2, ¶ 129.
\textsuperscript{88} Id.
\textsuperscript{90} Howse & Neven, supra note 58, at 66–67.
\textsuperscript{91} See supra notes 13–25 and accompanying text.
\textsuperscript{92} Tyres AB Report, supra note 4, ¶ 1.
\textsuperscript{93} Id. ¶ 2.
\textsuperscript{94} Id. ¶¶ 4–5, 258.
\textsuperscript{95} Shrimps I Panel Report, supra note 2, ¶ 3.6.
\textsuperscript{96} Shrimps I AB Report, supra note 2, ¶ 133.
\textsuperscript{97} Mantoo & Mavroidis, supra note 13, at 394.
\textsuperscript{98} Lanfranchi, supra note 78, at 89.
\textsuperscript{99} Shrimps I AB Report, supra note 2, ¶ 133.
\textsuperscript{100} See GATT, supra note 19, art. XX(g).
\textsuperscript{101} Matsushita et al., supra note 767, at 799.
\textsuperscript{102} Howse & Neven, supra note 58, at 64–65.
\textsuperscript{103} Id.
\textsuperscript{104} Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
\textsuperscript{105} Howse & Neven, supra note 58, at 64–65.
entry of shrimps unless they fulfilled a condition imposed by the United States that was applicable in the territory of exporting countries. 116

The method of shrimping is part of the production process of shrimps. Thus, shrimps caught using TED are the same whether they come from certified countries or not. The American measure arguably violates article XIII of the GATT even if process and production method (“PPM”) is taken into consideration. 107 WTO law allows PPM-based measures only if the production process affects the physical characteristics of the product. 108 A member can resort to article XX if its measure cannot be justified in terms of the aforementioned criterion. 109 But it is important to note that restrictions in accordance with the production process are allowed by article XX only if the product is harmful to the environment. 110 The AB’s report legitimizes measures to protect the environment based on the production process. 111 Yet, it is difficult to attain a level of protection comparable to that in the United States without modifying the production process. This is because the method of shrimping is part of the shrimp’s production process. This production process has to be changed to achieve the protection of turtles required by the United States. Consequently, this is not a positive development as far as developing countries are concerned. First, developing countries will not be able to comply with the production-process requirements imposed by the developed countries because developing countries lack the technological and financial means to do so. 112 Second, developing countries will not be able to benefit from their comparative advantage, allowing for disguised protectionism by developed countries. 113 Thus, such measures act as an obstacle to development in developing countries. It is possible that PPM-based restrictions might also be used in climate-related trade measures, as developing countries’ exports may be taxed in the future based on their emissions during the production of the exports. 114

To decide in favor of environmental issues, the AB interpreted article XX(a) literally according to the Vienna Convention on the Law of Treaties, 115 and also XX(b) in a flexible way, to decide that turtles are an exhaustible natural resource 116 and that nontate entities could participate in the proceedings of the DSB. 117 But what did the AB do to decide in favor of market access for developing countries? Using U.S.—Shrimps, other powerful members, such as the EC, could justify the imposition of trade sanctions for the protection of the environment or for the protection of their domestic markets. Further, this AB decision legitimizes unilateral measures imposed for other reasons in the preamble of the Marrakesh Agreement, such as full employment. 118

When Malaysia lodged a complaint against the United States with respect to article 21(5) of the DSU (U.S.—Shrimps II), it alleged that the American measure infringed upon the sovereign right of Malaysia to formulate its own environmental policies. 119 However, the panel disagreed with Malaysia. 120 India also argued in the first U.S.—Shrimps case that the American measure violated India’s sovereign right to formulate its own environmental policies. 121 The AB, at the time of striking down the impugned measure (because it was discriminatory), held that sovereign nations should adopt measures to protect the environment. 122 Why did the AB make such a finding? To emphasize the sovereignty of the United States, which is a developed country that has the resources to adopt such measures? Even if the United States were exercising its sovereign right to refuse certain imports, it should not have been an excuse to protect its market. 123

Certain writers state that a unilateral measure taken in conformity with article XX(g) is not in conflict with the notion of sovereignty in international law. 124 Thus, it is possible to conclude that developing countries have no recourse in WTO law against the violations of their sovereignty. 125 In fact, violations of sovereignty would arguably be included in article XX, which applies to all members. Yet, developing countries will not be able to compel developed countries to implement environmental policies. For example, the United States has not ratified the Kyoto Protocol. 126 This strongly suggests a lack of concern for the environment on the part of the United States. Developing countries cannot oblige the United States to ratify the Protocol. India acceded to

106. Shrimps I AB Report, supra note 2, at ¶ 6.
109. Id.
110. See Srivastava & Ahuja, supra note 27, at 3445.
111. Ansari, supra note 40, at 31.
117. Shrimps I AB Report, supra note 2, ¶¶ 79–91.
119. Shrimps II Panel Report, supra note 81, ¶ 5.1.
120. Id. at ¶¶ 5.103–104, 5.123.
121. Shrimps I Panel Report, supra note 2, ¶ 3.6.
122. Shrimps I AB Report, supra note 2, ¶ 185.
124. Houwe & Neven, supra note 58, at 64–65.
125. The fact of being a member of the WTO is not equivalent to consenting to unilateral measures that violate the sovereignty of members. Even though the AB recognized the element of unilateralism in article XX, it still preferred implementation through multilateral means such as negotiations. Shrimps II AB Report, supra note 76, ¶ 123–24.
achieve certain results, why did it not require the United States to impose a unilateral measure, leading to unjustifiable discrimination so long as it did not complete the negotiation. Moreover, the United States could continue negotiating without the intention to conclude an agreement, with the objective of keeping the measure in place for as long as possible. The AB responded that the obligation of the United States extended only to negotiating an agreement; i.e., it was an obligation of means and not of results. The AB explained that the chapeau of article XX does not stipulate that the member imposing the measure by virtue of article XX(g) must obtain the consent of other members. The AB found that there could be no obligation to conclude an agreement because other members could compel the United States to conclude it, which would lead to reverse unilateralism.

The AB’s findings inexplicably did not give the same deference and treatment to the United States and the complainant developing countries. Because the modified American measure imposed an obligation to achieve certain results without any restriction on means, the complainants could adopt any method to arrive at that result. This would take into account the conditions prevailing in different countries. But if the WTO imposed on developing countries an obligation to achieve certain results, why did it not require the United States to conclude an agreement (i.e., achieve a result)? If it were impossible for the United States to conclude an agreement, it might also be impossible for the complainants to implement an American policy to protect turtles. Why was there a difference in the way the parties were treated? Additionally, another pertinent question is that if unilateralism is part of article XX, why can reverse unilateralism not be part of article XX? The answer, as the panel said in the first U.S.—Shrimps case, is that the multilateral trading system would come to an end if all the members started applying unilateral measures.

The AB also recalled the major role played by the United States in the Kuantan Memorandum of Understanding, which was concluded between the United States and the countries of the Indian Ocean and of southeast Asia. But it did not mention the fact that this agreement came into force on September 1, 2001, after the distribution of the panel report.

The United States kept the embargo in force while the first AB proceedings were ongoing, and also while it was implementing the recommendations of the AB (i.e., during the negotiations). During this entire length of time, the complainants were deprived of access to the American market. The law of the WTO does not provide any solution to such a situation.

According to the panel in U.S.—Shrimps II, the restrictions imposed by the United States since 1996 by means of section 609 served as an efficient pressure mechanism that reinforced the weight of the United States in the negotiations that they undertook later on. Developing countries “may have found themselves constrained to accept conditions that they may not have accepted had Section 609 not been applied.” In such a case, the search for a negotiated solution becomes an avenue to escape the prohibition of unilateral protectionist measures.

The panel in U.S.—Shrimps II said that the restrictions were temporary and a last resort in the case of an emergency. It also said that a permanent prohibition of imports was justified only if an international agreement allowed it or if the prohibition had been enforced after having made serious good-faith efforts to conclude a multilateral agreement. The AB could have confirmed the first finding of the panel but it did not do so. The silence of the AB in this regard could be interpreted as its indifference to the interests of

127. Id.
132. See Howse & Neven, supra note 58, at 52.
133. Shrimps II AB Report, supra note 76, ¶ 123–24.
134. Id.
135. Shrimps II Panel Report, supra note 81, ¶ 5.124.
developing countries. The Kuantan agreement had no legal force.\textsuperscript{140} The United States could impose unilateral measures and would not be obliged to remove them even if they were prohibited by the Kuantan agreement simply because it had no legal force. The chapeau of article XX does not require any process of negotiations despite the unilateral character of the measure at issue. But the elements of unilateralism identified by the AB lead to unjustifiable discrimination. It is with the aim of correcting or removing these elements of discrimination that the AB in \textit{U.S.—Shrimps I} emphasized the process of negotiations.\textsuperscript{150} This may perhaps be the reason why the AB did not confirm the finding of the panel that an import prohibition was justified only if an international agreement allowed it.

Section 609 required the U.S. Secretary of State to start negotiations with other countries to finalize bilateral or multilateral agreements.\textsuperscript{151} However, this was not done.\textsuperscript{152} Moreover, the United States even argued against the principle of good faith.\textsuperscript{153} This suggests that the United States did not want to protect turtles. Yet, the representative of the United States did say that her country would implement the recommendations of the AB in a manner consistent not only with its WTO obligations but also with a firm commitment to the protection of turtles.\textsuperscript{154} If section 609 had been applied in good faith, the AB would not have decided against its application.

B. Procedural Issues

This case is considered unfavorable by developing countries, not only for substantive reasons, but also for procedural reasons. Some examples of such procedural issues follow below.

During the appeal by the United States to the AB in the first \textit{U.S.—Shrimps} case, the complainants (developing countries) raised a procedural argument that because the United States had submitted a very general declaration, the countries raised a procedural argument that because the United States did not want to protect turtles. Yet, the representative of the United States did say that her country would implement the recommendations of the AB in a manner consistent not only with its WTO obligations but also with a firm commitment to the protection of turtles.\textsuperscript{154} If section 609 had been applied in good faith, the AB would not have decided against its application.

When Malaysia took recourse to article 21(5) and then appealed, the AB, while deciding the question of the competence of the panel, stated that the parties and the panel were under an obligation to accept the previous reports of the AB.\textsuperscript{159} The AB explained that the adopted reports of the AB constituted a final decision of the case.\textsuperscript{160} It did not mention the principle of res judicata, but it applied it. Similarly, India was precluded from appealing on a point related to article 3(5) of the Anti-dumping Agreement because the finding of the panel was not appealed by India before the initial AB and was subject to the principle of res judicata.\textsuperscript{161} Consequently, it would seem that the application of the aforementioned principle leads to decisions that are not favorable to developing countries.\textsuperscript{162}

In \textit{U.S.—Shrimps}, the AB examined the facts minutely, thereby exercising a function of the panels.\textsuperscript{163} It is a method of completing the analysis (i.e. of applying the law to the facts of the case) for the AB to arrive at a solution when the AB disagrees with the factual or legal analysis of the panel.\textsuperscript{164} This method makes the role of the panels superfluous. According to Alan Yanovich and Tania Voon, the AB is compelled to complete the analysis because it can only examine questions of law, and because the DSM lacks a remand mechanism.\textsuperscript{165} But Peter Van den Bossche has noted that some authors believe that article 17(13) of the DSU\textsuperscript{166} does

\textsuperscript{140} See Shrimps II Panel Report, supra note 81, ¶ 5.81–5.83.

\textsuperscript{150} See Shrimps I AB Report, supra note 2, ¶ 166.

\textsuperscript{151} See id. ¶ 3 (“Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, \textit{inter alia}, to ‘initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations . . . ’.”).

\textsuperscript{153} Id. ¶ 18.

\textsuperscript{154} Sydney M. Cone III, \textit{The Appellate Body, the Protection of Sea Turtles and the Technique of “Completing the Analysis”}, 33 J. World Trade 51, 54 (1999); see also Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 25 November 1998, ¶ 3(a), WT/DSB/M/51 (Jan. 22, 1999).

\textsuperscript{155} Shrimps I AB Report, supra note 2, ¶ 92.

\textsuperscript{156} Id. ¶ 97.

157. \textit{Id.}

158. \textit{Appellate Body Report, European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India, ¶s 98–99, WT/DS141/AB/RW (Apr. 8, 2003) [hereinafter Bed Linen AB Report]. India was unable to prove its allegation in the initial case and came up with new arguments before the second panel. But the panel and AB rejected India’s position due to the principle of res judicata. See id.}

159. Shrimps II AB Report, supra note 76, ¶ 97. The AB did not explicitly state that the panel was under such an obligation. However, it stated that panel proceedings under article 21(5) include AB reports. \textit{Id.}

160. \textit{Id.}


162. This also supports the conclusion that developing countries are still getting accustomed to a more juridicized system.

163. Cone, supra note 154, at 56.

164. \textit{Id.}


166. Marrakesh Agreement, supra note 46, annex 2, art. 17(13) (“The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the
not allow the practice of completing the analysis.\textsuperscript{167} The AB, however, believes that it has a duty and responsibility to complete the analysis because it helps in achieving the goal of the DSM—i.e., the settlement of disputes.\textsuperscript{168} Yet, this practice is only a partial response to the twin problems of the limitation of the AB’s mandate to questions of law and the lack of a remand mechanism.\textsuperscript{169}

The DSM uses the rule of precedent in its decisions because the panels and AB frequently refer to previous reports, even though WTO law does not contain any provisions in this regard.\textsuperscript{170} Moreover, as mentioned earlier, the AB said in \textit{U.S.—Shrimps II} that the parties and panels were under an obligation to accept the previous reports of the AB.\textsuperscript{171} Also, article 17(14) of the DSU states that AB reports “shall be . . . unconditionally accepted by the parties to the dispute.”\textsuperscript{172} This implies that protection of the environment will prevail over market access in future disputes. However, the aim should be to find a balance between the two issues.

This dispute is also famous for another important point. The AB allowed private persons to participate in the dispute-settlement procedure as \textit{amici curiae}.\textsuperscript{173} The panel in the first \textit{U.S.—Shrimps} case had agreed to accept information from nongovernmental organizations (“NGOs”) on the condition that it be attached to the submissions of the party to the dispute.\textsuperscript{174} The complainants had protested this, stating that the attachments contained legal arguments whereas article 13 only allows accepting of information.\textsuperscript{175} The AB struck down the panel’s stand stating that the power to seek information (in article 13 of the DSU) did not amount to a prohibition to accept unsolicited information.\textsuperscript{176} However, the fact remains that even though the DSU does not prohibit the acceptance of unsolicited information, it does not allow it either. Additionally, the AB, which is very particular about a textual approach,\textsuperscript{177} did not follow it in this case.

The AB added that panels had the discretionary authority to accept or reject information submitted to them whether or not they had requested it.\textsuperscript{178} It was critical of the panel when the panel said that accepting unsolicited documents would not conform to the DSU,\textsuperscript{179} but it agreed with the panel that the parties could add these documents to their submissions.\textsuperscript{180} Furthermore, the AB held that panels could receive not only factual information but also legal principles applicable to the facts.\textsuperscript{181} The AB made this important finding after a joint reading of articles 12(1) and 12(2) of the DSU.\textsuperscript{182} However, according to article 13, only panels have the right to seek information.\textsuperscript{183} The AB cannot intervene in the functioning of panels if the latter have exercised their right in a WTO-compliant way.

During the appeal, the AB considered documents from NGOs containing facts and legal arguments, which were attached to the submissions of the United States.\textsuperscript{184} The appellees said that the AB should not accept these documents because they contained facts,\textsuperscript{185} and article 17(6) of the DSU only allows legal arguments.\textsuperscript{186} Additionally, article 17(6) refers to issues of law covered by the panel in its report and not to issues of law received from elsewhere.\textsuperscript{187} Moreover, article 17(4) of the DSU does not allow NGOs to participate in the dispute-settlement procedure.\textsuperscript{188} Additionally, because these documents were attached to the submission of the United States, they were no longer independent but instead reflected the views of the United States. The AB gave only four days to the appellees to respond to the revised briefs.\textsuperscript{189}

According to Petros Mavroidis, even though the AB’s functions are limited by article 17 of the DSU, the AB is not bound by what is explicitly stated in the DSU. It must have discretion in its functioning.\textsuperscript{190} His position is that \textit{amici curiae} submissions can only contain questions of law because article 17 is limited to questions of law.\textsuperscript{191} This is acceptable even if it is in favor of a member because it does not infringe article 3(2) of the DSU.\textsuperscript{192} However, in such a case, it is obvious that articles 3(2)\textsuperscript{193} and 13 of the DSU are not satisfied.

\begin{thebibliography}{99}
\item\textsuperscript{168} Shrimps I AB Report, supra note 2, ¶ 123–24.
\item\textsuperscript{169} See Yanovich & Voon, supra note 165, at 950.
\item\textsuperscript{170} Wofford, supra note 116, at 590.
\item\textsuperscript{171} Shrimps II AB Report, supra note 76, ¶ 97.
\item\textsuperscript{172} Marrakesh Agreement, supra note 46, annex 2, art. 17(14).
\item\textsuperscript{173} Shrimps I AB Report, supra note 2, ¶¶ 88–91.
\item\textsuperscript{174} Shrimps I Panel Report, supra note 2, ¶ 3.129.
\item\textsuperscript{175} Id. ¶ 3.131.
\item\textsuperscript{176} Shrimps I AB Report, supra note 2, ¶ 108.
\item\textsuperscript{177} Lennard, supra note 54, at 22–23.
\item\textsuperscript{178} Shrimps I AB Report, supra note 2, ¶ 108.
\item\textsuperscript{179} Id.
\item\textsuperscript{180} Id. ¶ 109.
\item\textsuperscript{181} Id. ¶ 106.
\item\textsuperscript{182} Id. ¶ 105. These articles read: “1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute. 2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.”
\item\textsuperscript{183} Marrakesh Agreement, supra note 46, annex 2, art. 12(1)–(2).
\item\textsuperscript{184} Shrimps I AB Report, supra note 2, ¶¶ 83, 91.
\item\textsuperscript{185} Id. ¶ 82.
\item\textsuperscript{186} This article reads: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”
\item\textsuperscript{187} Id. art. 17(6).
\item\textsuperscript{188} This article reads: “Only parties to the dispute, not third parties, may appeal a panel report.” Id. art. 17(4).
\item\textsuperscript{189} While the \textit{amicus} submitted initial briefs with the United States on July 23, 1998, they slightly revised the briefs on August 3—four days before the joint appellees responded. Shrimps I AB report, supra note 2, ¶¶ 79–80.
\item\textsuperscript{190} Petros C. Mavroidis, \textit{Amicus Curiae Briefs Before the WTO: Much Ado About Nothing} 13 (Jean Monnet Program, Working Paper No. 2/01, 2001), available at http://centreforum.org.uk/jpmo/papers/01/010201.html (“The Working Procedures, that are adopted in accordance with Art. 17.9 DSU, cannot of course go beyond the mandate of Art. 17 DSU. . . . Is this however the end of the story? Is the Appellate Body bound only by what is explicitly stated in the DSU?”).
\item\textsuperscript{191} Id. at 14.
\item\textsuperscript{192} Id.
\item\textsuperscript{193} This article reads as follows: 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 DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Marrakesh Agreement, supra note 46, annex 2, art. 3(2).
\end{thebibliography}
In *U.S.—Shrimps*, this is because rights of certain members were enhanced at the cost of rights of other members, and because unsolicited documents were accepted.

In fact, WTO law is influenced not only by the decisions of international courts, such as those of the Inter-American Court of Human Rights and the European Court of Human Rights, but also by those of national courts such as the U.S. Supreme Court. These courts have accepted *amicus curiae* submissions. Consequently, these sources of law support the AB’s interpretation that it also has the right to accept *amicus curiae* submissions.

The AB considered the NGO submissions to be a part of the submissions of the United States, thereby preserving the state screen. It took the NGO submissions into account on the condition that the United States accept them. This gave the right to the United States to choose only those arguments of the NGOs that were useful to it. The United States said that even if the documents of the NGOs had been independent, it approved of their legal arguments if they were similar to the American arguments in their main submission. This means that these documents acted as a support for the views of the United States. The United States possesses enormous legal resources to argue before the AB, and the opportunity to retain useful NGO arguments added to its strength. How could unsolicited submissions be useful for the WTO procedure if the United States accepted them only if they corresponded with its own arguments? Moreover, it is not clear as to why independent submissions should be attached to those of a party to the dispute (the United States in this case). This deprives these submissions of their independent identity and thus reduces their utility for the dispute-settlement procedure. Perhaps, their attachment to a party’s submission is necessary precisely because nonmembers cannot participate in the dispute-settlement process.

NGOs of developing countries lack resources to participate in the dispute-settlement process. Most of the NGOs that do have resources to participate in the WTO procedure are in the developed countries. Hence, they may not have a good understanding of the problems of developing countries and thus cannot promote the interests of these countries. For example, in 1992, a group of NGOs led by Earth Island Institute (an NGO of San Francisco) filed a case against the U.S. Secretaries of State and Commerce in the U.S. Court of International Trade asking that the American law be applied to all exporters of shrimps so that turtles could be protected.

It is precisely this type of NGO that is able to participate in the dispute-settlement process of the WTO. Such NGOs, if they were instruments of powerful corporations promoting their own interests, could use such an opportunity to increase protectionism.

In accepting submissions from NGOs in favor of environmental protection in the absence of NGOs in favor of market access for the exports of developing countries, the AB did not take into account the preamble of the Marrakesh Agreement, which aims to strike a balance between protection of the environment and economic development in developing countries. The preamble clearly mentions that commercial relations should be conducted in a manner consistent not only with environmental protection but also with the differing levels of development of various WTO members. Would the fact of acceptance of submissions from NGOs of the North in the absence of NGOs from the South not amount to discrimination against developing countries?

According to Robert Howse, developing countries’ delegates to the WTO fiercely criticize the acceptance of *amicus curiae* submissions by the AB, but developing-country NGOs want to take advantage of the opportunity to submit *amicus curiae* documents. Thus, according to Howse, the idea that acceptance of such documents is useful only for the developed countries is not credible. Furthermore, according to Howse, powerful commercial interests in developed countries have access to other means, such as politicians, to get their views across to the WTO, and they do not depend on *amicus curiae* submissions for this purpose.

On the contrary, this practice allows other, nonparty interests to participate in the process before the AB. Members of the AB can thus receive different views when making decisions involving human values.

However, members of the WTO are sovereign states and customs territories, and the AB must be cautious when allowing NGO participation. NGO submissions burden the dispute-settlement process because the panels do not have the means to deal with such submissions. Additionally, such submissions compel parties to the dispute to respond to these submissions. This is extremely burdensome for developing countries. This amounts to creating additional obligations on parties, which the dispute-settlement process is not authorized to do. If the AB wants to implement the principle of nondiscrimination, it must not expect developing countries to respond to submissions from NGOs, particularly from NGOs whose objectives are opposed to those of developing countries. Also, even if their objectives are the same (in this case, the protection of the environment), it needs to be

---

195. Id.
196. Id.
197. Id.
198. Id.
199. Id. ¶ 90.
201. One may view the countries of origin for NGOs that have contributed position papers to the WTO at NGO Position Papers Received by the WTO Secretariat, World Trade Org., http://www.wto.org/english/forums_e/ngo_s/ospospap_e.htm (last visited Dec. 27, 2011).
203. Id. at 1755.
204. Marrakesh Agreement, supra note 46, pmbl.
205. Howse, supra note 194, at 509.
206. See id.
207. See id. at 509–10.
209. Id. at 184–85.
210. See id. at 186.
understood that there may be other ways of achieving those objectives in developing countries. Some authors have suggested using environmental experts as members of the panels and AB when disputes relating to the environment come up. Others have suggested incorporating sustainable-development experts into the pool of panel members who would be available by request in a case involving a dispute relating to the environment. Suggestions have also been made regarding the amendment of the DSU to give litigants the possibility of attaching expert opinions to their submissions even when the panelists do not ask for them.

Regarding the first two suggestions, it must be made clear that WTO law regulates the environment only when it relates to trade. Therefore, there is no necessity for environmental experts. Also, these experts might decide against market access for developing countries that can neither implement environmental policies nor formulate them to impose on other members. Some developing countries, such as India, have always opposed the entry of nontrade values in the WTO. The last suggestion may have been inspired by a desire to give more power to the developed countries, because entities that participate in the WTO or its dispute-settlement process often come from there.

The receptiveness to amicus curiae submissions has been criticized a great deal, mainly by members of the WTO. India has also criticized it, stating that it would allow powerful commercial interests to participate in dispute settlement.

IV. Conclusion

The WTO is an organization that regulates trade and not nontrade values in ways that may be particularly detrimental to developing countries. This is not to say that commercial values must prevail over all other values. Expecting the WTO to settle disputes relating to social problems could put the multilateral trading system in danger. Environmental-protection issues can be considered outside the framework of the WTO in the presence of experts relating to trade, environment, and development. Apart from NGOs, shrimpers from developing countries who cannot earn their livelihood must also participate in such a forum. Even though turtles are well-protected today, are Asian shrimpers well-protected too?

The DSB applies the negative-consensus rule. It thus has the power to modify—by means of interpretation of the WTO agreements—the rights and obligations of members, even if such modification is prohibited by article 3(2) of the DSU. Such a modification occurred in U.S.—Shrimps and resulted in an increase in the obligations of developing countries. Trade and development may suffer significant setbacks in developing countries unless important third world countries like India act to prevent the dispute settlement machinery from assuming an extra-constitutional role.

The U.S.—Shrimps cases demonstrate that the nondiscrimination principle is central to the multilateral trading system. The principle’s application extends to exceptions for all members and not only to exceptions for developing countries. Moreover, the incorporation of this principle in the GATT and then in the WTO is proof of its importance. However, its poor application can lead to results considered unfavorable by developing countries, as happened in the U.S.—Shrimps cases.

Perhaps the United States will learn from this case. We can expect that it will comply with the principle of nondiscrimination in any future case related to climate protectionism. However, even if that is not the case, the AB will likely come to its rescue. It is noteworthy that this enthusiasm for the protection of the environment was absent during the GATT. However, the AB has not hesitated to decide issues at the intersection of trade and environmental protection. In fact, Director-General Lamy has expressed his support for an international agreement on climate change involving as many players as possible where the WTO would enter the picture at the stage of implementation. Thus, he believes that the WTO is the right forum to decide these matters and has stated that a trading system that ignores carbon prices and greenhouse-gas emissions would reduce human welfare.

The U.S.—Shrimps cases illustrate perfectly the challenges faced by developing countries in international law and the challenges faced by international law in finding solutions to the challenges faced by developing countries.

212. Wofford, supra note 116, at 570 n.44.
214. Id.
215. See supra note 89 and accompanying text.
217. See supra note 201 and accompanying text.
218. Charnovitz, supra note 208, at 187.
219. Id.
220. See supra Part II.