



Chapitre de livre

2003

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### How to cite

BOISSON DE CHAZOURNES, Laurence. The use of unilateral trade measures to protect the environment. In: Economic globalization and compliance with international environmental agreements. Kiss, Alexandre... et al. (Ed.). The Hague : Kluwer Law International, 2003. p. 181–191. (International environmental law and policy series)

This publication URL: <https://archive-ouverte.unige.ch/unige:13267>

## 12. The Use of Unilateral Trade Measures to Protect the Environment

Laurence Boisson de Chazournes

### INTRODUCTION

There is a current noticeable trend to revamp the terms 'unilateralism' and 'unilateral measures', symbolically used to denounce various practices. Neither term, however, has a legal meaning per se; rather, their broadly crafted content allows them to be used as *passerpartout* against various types of acts and measures with international consequences. Some acts are merely political, others have a legal content and produce legal effects. Their common denominator is that they are adopted, proclaimed or exercised by a state, or by several states jointly, and entail consequences for other states. In an a-centralized society composed of sovereign and equal states, unilateralism – broadly defined – is generally perceived as being part of the 'normality' of international relations: it is understood as a means of exercising sovereign rights.

Unilateral measures will be distinguished herein from measures taken by a state to implement a multilateral environment agreement (MEA) to which it is a party.<sup>1</sup> In addition, the unilateral measures analysed below should be distinguished from those which are exercised by a state or several states acting jointly pursuant to an authorization provided by customary or conventional international law, such as measures of retorsions, reprisals or sanctions, covered under the heading of countermeasures.

Unilateral trade measures are often utilized for environmental purposes, although political, strategic, social and predominantly economic considerations may also motivate such measures. Their visibility is increasing and their use is becoming increasingly contentious. The decisions of the WTO Appellate Body contribute to shaping the legal regime applicable to these measures.

#### I. UNILATERAL MEASURES AS A LONG-STANDING PRACTICE

In a research paper prepared as early as the beginning of the 1970s,<sup>2</sup> Richard Bilder noted the large number of unilateral measures resorted to in the name of the

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1 See Lang, W., 'Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law', in *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (R. Wolfrum (ed.), Springer, Heidelberg, 1996) 266–83.

2 Bilder, R., 'The Role of Unilateral State Action in Preventing International Environmental Injury', (1981) 14 *Vanderbilt J. Transnat'l L.* 51. The paper was published with some updating in the early 1980s.

environment. The examples he mentions are numerous and take different forms. They include President Truman's assertion of United States (US) jurisdiction over the natural resources of the subsoil and seabed of the continental shelf off the coast of the US; the bombing in international waters of the Liberian-flag supertanker *Torrey Canyon* by the British Royal Air Force to prevent oil spills threatening English and French coasts; the enactment by Canada of its Arctic Waters Pollution Prevention Act which asserted Canadian jurisdiction over shipping up to 100 miles off its Arctic coasts; and the adoption by the US of statutes ranging from the prohibition of the importation of fish products from foreign countries whose nationals conduct fishing operations in a manner inconsistent with international fishery conservation programmes,<sup>3</sup> to restricting the import of DDT and other environmentally harmful substances into the country, as well as controlling their export.

Unilateral measures such as these may pave the way towards the negotiation of international agreements, as was the case with the bombing of the *Torrey Canyon*, which led to the conclusion in 1969 of the International Convention relating to Intervention in High Seas in Cases of Oil Pollution Casualties.<sup>4</sup> Other measures may substantiate the emergence of customary rules, as for example in the area of maritime jurisdiction. Finally, some of these unilateral measures have given rise to contentious cases, which were settled through negotiation or by judicial mechanisms, be it before international tribunals<sup>5</sup> or before the International Court of Justice.<sup>6</sup>

If unilateral measures for environmental purposes are not new phenomena, neither is the debate over their effectiveness and adequacy.<sup>7</sup> The sanctioning aspect and inflexible nature of the measures are still perceived negatively, largely by the targets of the measures and especially in the South, where developing countries raise the issue of the unequal balance of power. In general, the abusive use of unilateral measures in the overall context of international economic relations has been and remains a very sensitive issue for developing states.<sup>8</sup> In addition, the legitimacy of inherently individualistic measures is questionable when it comes to resolving issues of common interest.

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3 Fishermen's Protective Act of 1967, 22 U.S.C.A. paras. 1971-1980 (1964, Suppl. 1973), as amended by Pub. L. 95-541, 42 Stat. 2057 (1978).

4 International Convention relating to Intervention in High Seas in Cases of Oil Pollution Casualties, repr. in 7 ILM 466 (1969).

5 See *Pacific Fur Seal Arbitration*, Moore's *Int'l Arb. Awards* (1893) 755. This case dealt with a dispute between the United States and Great Britain. In response to Great Britain's purported over-exploitation of fur seals in areas beyond its national jurisdiction, the US asserted a right to exercise jurisdiction over the natural resources outside its territorial waters to ensure the conservation of the seals. The award rejected the US argument. See Sands, P., *Principles of International Environmental Law I, Frameworks, Standards and Implementation* (Manchester University Press, Manchester, New York, 1994) 28-29.

6 See *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, 1974 I.C.J. Rep. 3.

7 See Bilder, *supra* n. 2.

8 See Boisson de Chazournes, L., *Les contre-mesures dans les relations internationales économiques* (IHEI, Pedone, Paris, 1992).

## II. UNILATERAL TRADE MEASURES ARE INCREASINGLY CONTENTIOUS

Unilateral trade measures resorted to for environmental purposes are more contentious today than they were in the past. They are now the centre of attention on the agenda of the trade and environment debate. Whatever their importance in real terms, such trade measures have acquired a high symbolic status. For example, Austria's adoption of legislation on 5 June 1992, requiring ecolabelling of imported tropical timber, produced strong reaction from timber exporting countries, particularly Malaysia and other members of the Association of South East Asian Nations (ASEAN), provoking the latter to complain to the GATT Council.<sup>9</sup> One may also recall the US embargo on Mexican tuna caught using purse-seine nets, a method prohibited under US legislation because of the high incidental taking of dolphins, and the US embargo on shrimps caught in countries (India, Malaysia, Pakistan and Thailand) that do not mandate turtle-excluder devices on fishing vessels, as required by US legislation. The affected parties and representatives of international civil society reacted to these embargos both within and outside the GATT/WTO forum. Unilateral measures are also part of the environmental scene within the European Community (EC), where their application has given rise to disputes before the European Court of Justice,<sup>10</sup> and they have been used in EC external relations, despite the potential interstate disputes to which they may give rise. For example, in 1991 the EC decided to ban imports of certain animal furs from countries that allow the use of leghold traps. The effect of the decision was delayed, however, and ultimately did not take place because of doubts as to its compatibility with international trade rules.<sup>11</sup>

While some states plead the right to conduct their own environmental policy without being barred by trade-restriction considerations,<sup>12</sup> others consider trade measures to be a mere cover for protectionism and a vehicle for green imperialism.<sup>13</sup> It is interesting to note that in the 1970s, similar measures did not raise much concern, because on the one hand, they were not as numerous, and on the other the general awareness of trade-related effects of environmental measures was not as politicized as it is today.<sup>14</sup>

While the debate appears to be almost classical, unilateralism in the trade area is undeniably the focus of increased attention today. The reasons why unilateralism has become more visible, not to say more contentious, are discussed next.

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9 See Dawkins, 'Ecolabelling: Consumer Right-to-Know or Restrictive Business Practice?' in Wolfrum *supra* n. 1 501 at 551.

10 See Krämer, L., *E.C. Treaty and Environmental Law* (3rd edn., Sweet and Maxwell, London, 1998) 140-141.

11 *Ibid.* at 28-29.

12 For an advocacy of such a policy, see Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', (1993) 66 *Temple L. Rev.* 751.

13 For such assertions, see Ruiz, 'Green Protectionism: The North's Latest Trade Weapon', *Third World Network Features*, 8/6/1997; Bello, 'View and Comment: The Rise of Green Unilateralism', *Business World* (10 June 1997).

14 For an appraisal of the current situation of the overall trade and environment relationship see Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement', (1999) 33 *Journal of World Trade* 87.

### III. THE INCREASING VISIBILITY OF UNILATERAL MEASURES

The development and increased importance of institutions, principles and rules related to the protection of the environment are frequently noted. The number of conventions, treaty provisions and other instruments dealing with environmental issues has grown dramatically.<sup>15</sup> This evolution has influenced the content of international law applicable to environmental protection, and had a significant impact on the interpretation of international law in general. This evolution was highlighted by the WTO Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*<sup>16</sup> when it noted with respect to the notion of ‘exhaustible natural resources’ as contained in Article XX of the GATT 1994 that:

‘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 the light of contemporary concerns of the community of nations about the protection and conservation of the environment<sup>17</sup> [...] From the perspective embodied in the preamble of 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”.<sup>18</sup>

The Conference on Environment and Development (Rio de Janeiro, 1992) significantly shaped and developed the international legal order. Instruments such as the Rio Declaration on Environment and Development,<sup>19</sup> the Programme of Action Agenda 21<sup>20</sup> and the Conventions on Climate Change<sup>21</sup> and on Biological Diversity<sup>22</sup> entrenched notions and principles such as ‘sustainable development’ and the ‘precautionary principle’. The words of the WTO Appellate Body in the *Shrimp Turtle* case illustrate these developments, in noticing that the negotiators of the WTO Agreement:

‘[e]vidently believed, however, that the objective of “full use of the resources of the world” set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990s. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words: ... while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.<sup>23</sup>

[...]

We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the

15 In 1993, it was estimated there were about 800 such treaties and treaty provisions, see Brown-Weiss, E., ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’, (1993) 81 *Georgetown L. J.* 675.

16 WT/DSS8/AB/R, 12 October 1998, reproduced in 38 ILM 118 (1999).

17 *Ibid.*, para. 129.

18 *Ibid.*, para. 130. As to the need to take into account the development of international law in the implementation of treaties, see also the case concerning the *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment*, 1997 ICJ Rep. 7 at 67, para. 112.

19 Rio Declaration on Environment and Development, reprinted in 31 ILM 874 (1992).

20 UN Conference on Environment and Development: Agenda 21, U.N. Doc. A/CONF.15/4 (1992).

21 Framework Convention on Climate Change (9 May 1992), reprinted in 31 ILM 849 (1992).

22 Convention on Biological Diversity (5 June 1992), reprinted in 31 ILM 818 (1992).

23 *Supra* n. 16, para. 152.

objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add color, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.<sup>24</sup>

One of the problems is the definition of these notions and principles. The meaning of sustainable development, for instance, may differ from one region to another, notably between North and South. In the decades since the United Nations Conference on the Human Environment (Stockholm, 1972), which was the first truly international effort at broaching environmental concerns, the priority to be given to the environment has been a source of dissension between developing and developed states. The pressing need for development has been opposed to the development of an environmental ethic.<sup>25</sup> Twenty years later, at the Rio United Nations Conference on Environment and Development, the same conflict resurfaced. There was little consensus on the environmental issues, the significance of the terms 'environment' and 'development' and indeed on the nature of the 'environment-development' interaction.<sup>26</sup>

Despite these differences, a consensus developed around the concept of 'sustainable development'. Defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs,<sup>27</sup> sustainable development acquired a preliminary rhetorical power for bridging gaps. Subsequent practice has shown the virtue of the concept of sustainable development for reconciling different interests and for establishing links between different areas of international regulation.<sup>28</sup>

The environmental regimes that were created have been consolidated over time. The increased focus on the effective implementation of environmental rules has led to the elaboration of various compliance and enforcement mechanisms.<sup>29</sup>

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24 *Ibid.*, para. 153.

25 The Report of the UN Conference on the Human Environment reads in part as follows:

'Considerable emphasis was placed by speakers from developing countries upon the fact that for two-thirds of the world's population the human environment was dominated by poverty, malnutrition, illiteracy and misery [...] The priority of developing countries was development. Until the gap between the rich and the poor countries was substantially narrowed, little if any progress could be made... support for environmental action must not be an excuse for reducing development.'

UN. Doc. A/CONF.48/14 and Corr. 1 (1972), reprinted in 11 ILM 1416 (1972).

26 Adil, 'The South in International Environmental Negotiations' (1994) 31 *Int'l Studies* 427 at 441. While the industrialized countries sought progress on climate change, biodiversity, forest loss and fishery issues, developing states placed more emphasis on market access, trade, technology transfer, development assistance and capacity building.

27 See Principles 3 and 4 of the Rio Declaration on Environment and Development, *supra* n. 19.

28 Sands, P., 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) 3 *Max Planck Yearbook of United Nations Law* 363.

29 Boisson de Chazournes, L., 'La mise en œuvre du droit international dans le domaine de la protection de l'environnement: Enjeux et défis', (1995) 99 *RGDIP* 35. For an assessment of the CITES regime and an account of state practice, see Sand, P., 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', (1997) 8 *EJIL* 29.

Conventional regimes have developed their own means for improving compliance, some of them diplomatic, aiming at reaching a solution agreeable to all parties concerned, others by way of sanctioning tools applied when a state is reluctant to comply with its commitments. In the latter case, measures are taken by virtue of the collective approval or endorsement of the other state parties.<sup>30</sup> Nevertheless, the call for increased scrutiny of implementation remains central: more attention should be given to the means and processes put in place in order to ensure compliance with international law. An increasing number of actors is involved in designing and implementing policies, while interactions among States, international organizations and non-state actors are more numerous. In addition, non-state actors are becoming increasingly involved both formally and informally in decision-making processes.<sup>31</sup> These elements should be taken into account when assessing unilateralism for environmental purposes, because unilateralism has become an attractive tool for many of these actors.

#### IV. EMERGENCE OF THE PRECAUTIONARY PRINCIPLE AND THE RESORT TO UNILATERAL MEASURES

The emergence of the precautionary principle means that 'doubt', as a matter of law, must now be taken into consideration when conducting international relations. Principle 15 of the Rio Declaration on Environment and Development provides that: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'<sup>32</sup> The precautionary principle has received wide support, being included in almost every recent treaty and policy document related to the protection of the environment. Although its content is the subject of debate,<sup>33</sup> national and international practice show that the precautionary principle influences, and will continue to influence, the decision-making process and policies in trade, economy, health and other areas. It is also called upon for reassessing certain past practices.

The precautionary principle may be invoked in an attempt to justify unilateral measures. The WTO Appellate Body's decision in the *EC Measures concerning Meat and Meat Products (Hormones)*<sup>34</sup> case provides a vivid example of the

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30 A question may arise as to the legality of measures taken by one member state without prior authorization of the competent body of a convention, such as for example, the US measures taken against Singapore within the context of the CITES regime. See Sand, *ibid.*

31 An issue is whether environmental protection is benefiting from new developments in international law with respect to criminalization and individual responsibility for environmental crimes. On this issue see Boyle, A., 'Remediating Harm to International Common Spaces and Resources: Compensation and Other Approaches', in *Harm to the Environment* (P. Wetterstein (ed.), Clarendon Press, Oxford, 1997) 83.

32 Rio Declaration on Environment and Development, *supra* n. 19.

33 Boisson de Chazournes, L., 'Le principe de précaution: Nature, contenu et limites', in *Le principe de Précaution: Aspects de Droit International et Communautaire* (C. Leben & J. Verhoeven (eds), Panthéon Assas, Paris, 2002) 65-94.

34 Report of the Appellate Body, 16 January 1998, *supra* n. 16.

consequences that such action may entail. The European Community invoked the precautionary principle to justify its import restrictions. The United States challenged the action before the dispute settlement bodies of the GATT/WTO, which authorized countermeasures under Article 22 of the GATT/WTO DSU. Another example is the debate over biosafety, potentially leading to conflicts between the US, the European Community and other countries about the status of the precautionary principle *vis-à-vis* trade matters in living modified organisms (LMOs). This debate highlights the stakes associated with the precautionary principle and raises, among other things, the possibility for a state to resort to unilateral measures alleging the protection of its sanitary or environmental interests.<sup>35</sup>

## V. UNILATERALISM, ENVIRONMENTAL PROTECTION AND THE WTO: A RIGHT TO RESORT TO UNILATERAL MEASURES?

It is interesting at this point to look more closely at the case law of the WTO Dispute Settlement Body to identify the legal parameters qualifying a trade measure as unilateral and limiting resort to it. This will be done through two cases: The *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *Shrimp-Turtle I*)<sup>36</sup> and the *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the Dispute Settlement Understanding)* (hereinafter *Shrimp-Turtle II*).<sup>37</sup>

The international principles of jurisdiction are key to assessing the legality of resort to unilateral measures. The trade and environment debate has often been considered through the prism of 'extra-territorial jurisdiction'. This is not the place to provide detailed examination of the issue,<sup>38</sup> but what for some may merely be an issue of domestic application of legislation may for others be an issue of 'universal application' of a domestic statute,<sup>39</sup> that is to say the unilateral imposition of domestic standards on other entities. The Appellate Body in *Shrimp-Turtle I* appears to have favoured the second understanding:

'161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail".

35 See 'La Chine engage une épreuve de force avec les Etats-Unis sur l'importation de soja génétiquement modifié' and 'Les petits pays réticents aux OGM subissent de fortes pressions de Washington', *Le Monde du Mardi* (15 janvier 2002). See also, Boisson de Chazournes, L. & Mbengue, M. M., 'Le Rôle des Organes de Règlement des Différends de l'OMC dans le Développement du Droit: à Propos des OGM' in *Le Commerce International des OGM* (J. Bourrinet & S. Maljean-Dubois (eds), La Documentation française, Paris, 2002).

36 *Supra* n. 16.

37 *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the Dispute Settlement Understanding)*, Appellate Body Report, 22 October 2001, Doc. WT/DS58/AB/RW.

38 For discussion on the Helms-Burton Act, see Stern, 'Can the United States Set Rules for the World? A French View', 31 *J. World Trade* 5 (1997); Mani, 'Unilateral Imposition of Sanctions through Extra-Territorial Application of Domestic Laws: A Tale of Two US Statutes', (1998) 38 *Indian J. Int'l L.* 1.

39 See Pellet, A., 'Conclusions' in *Sanctions Unilatérales, Mondialisation du Commerce et ordre juridique international* (Paris, Montchrestien, 1998) 321.

Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries. However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.<sup>7</sup>

Another important factor qualifying a measure as unilateral is its 'exclusive' character. 'Exclusive' means that it leaves no room for flexibility, or for 'equivalency' of measures aimed at reaching the same objective, albeit not necessarily using similar means to this end:

'162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States. Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States program. Furthermore, the harvesting country must have in place a "credible enforcement effort". The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the *only* way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B). Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles", in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.

163. The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.<sup>7</sup>

An additional consideration is the proportionality of the measure with respect to the countries that are the target of the unilateral measures. In this respect, it is interesting to note that the Appellate Body used the notion of economic embargo to

condemn measures ignoring the specificity of a country. This allusion to coercive measures seems to imply that a unilateral measure should not be disproportionate.<sup>40</sup> The fulfilment of this criterion will depend on the specific circumstances of the country in question:

'164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members [...].

Moreover, the necessity to engage in meaningful negotiations toward the conclusion of commonly agreed solutions with other countries is a prerequisite to unilateral measures, especially when dealing with migratory species that ignore 'political borders'.

'166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members [...].

168. Second, the protection and conservation of highly migratory species of sea turtles, the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21.'

The preference for a multilateral approach to inducing respect for environmental protection should be understood in an inclusive manner. The state willing to adopt measures to protect the environment should thus try to reach an agreement on concerted action with all other concerned states, and not only with some of them. Not doing so may violate the principle of non-discrimination:

'172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the

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40 On the notion of embargo, see Dubouis, L., 'L'embargo dans la pratique contemporaine', (1967) 13 *AFDI* 99-152.

United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements. The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.<sup>7</sup>

The Appellate Body in *Shrimp-Turtle II* provided some clarifications on how to interpret the necessity for behaving in a 'multilateral' manner. Should it be understood as an obligation to negotiate or as an obligation to negotiate and reach an agreement? The Appellate Body favours the first interpretation when negotiations are conducted in good faith. It thus left the door half-open for resort to unilateral measures:

'122. We concluded in *United States – Shrimp* that, to avoid "arbitrary or unjustifiable discrimination" the United States had to provide all exporting countries "similar opportunities to negotiate" an international agreement. Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. The negotiations need not be identical. Indeed, no two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.

123. Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

124. As we stated in *United States – Shrimp*, “the protection and conservation of highly migratory species of sea turtles... demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations”. Further, the “need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations”. For example, Principle 12 of the Rio Declaration on Environment and Development states, in part, that “[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus”. Clearly, and “as far as possible”, a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding “arbitrary or unjustifiable discrimination” under the chapeau of Article XX. We see, in this case, no such requirement.’

## VI. CONCLUDING REMARKS ABOUT THE LEGITIMACY OF UNILATERAL MEASURES

Whether it is possible to prevent countries from resorting to unilateral trade measures for environmental purposes is one thing, whether it is desirable is another: depending on the specific circumstances and the field of concern, unilateral measures may be better suited, i.e., more effective in achieving protection, if only because of the objectives pursued. Their legitimacy should, however, be harnessed by international law, whether through the application of substantive norms or through possible resort to checks and balances for assessing their legality. As the two WTO cases here reveal, dispute settlement mechanisms play a key role in this respect. Moreover, the elaboration of such legal processes contributes to leveling the playing field among partners of different economic power.

Another question relates to the legitimacy, in exceptional circumstances, of unilateral measures which are illegal *per se*, but which may be coupled with the claim of being necessary ‘civil disobedience’ actions. Such an issue may arise when essential interests are at stake. The invocation of these essential interests thus seeks to excuse a violation of international law, or possibly even to ground a right to protect such interests, thereby countering the challenge to their lawfulness. Such an argument is not innovative. It echoes the ‘fundamental rights’ theory developed in the nineteenth century, with the worrisome risks of abuse that it entails. Consequently, the public policy framework of action developed in the second half of the twentieth century<sup>41</sup> should be kept in mind as a means of restricting such potentially abusive conduct. In this respect, despite its demonstrated usefulness, the WTO system cannot be the forum for resolving all public policy issues that might give rise to unilateral measures.

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41 See Gowlland-Debbas, V., ‘The Right to Life and Genocide: The Court and an International Public Policy’, in *International Law, The International Court of Justice and Nuclear Weapons* (Boisson de Chazournes, L. & Sands, P. (eds), Cambridge University Press, Cambridge, 1999) 315.

