Protecting Trade and Turtles: The WTO and the Coherency of International Law in 1 Translex

David D. Caron
Hans Rudolf Trüeb

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By David D. Caron and Hans Rudolf Trüeb

Introduction

On October 12, 1998, the WTO Appellate Body delivered its fifteenth decision. As in previous cases, the Panel Report under review addressed the relationship between the trade regime and environmental policies. The objectives in conflict in this dispute are the elimination of quantitative restrictions on trade and the preservation of a species threatened with extinction. The Panel’s April 6, 1998 report on a complaint by India, Malaysia, Pakistan and Thailand found that a U.S. import ban on shrimp and shrimp products violated the GATT and that no justification for the measures in dispute was available under Article XX. The U.S. prohibits the importation of shrimp harvested with technologies that adversely affect certain sea turtles. To avoid such an import ban by the U.S., a foreign country need not guarantee a specific incidental takes rate; rather, U.S. guidelines allow for the certification of a foreign country as possessing a comparable conservation program if shrimp are harvested using a specific technique, the so-called Turtle Excluder Device (TED).

The Appellate Decision

As in all but one prior case, the Appellate Body upheld the Panel’s conclusions. At the same time it criticized large parts of the Panel’s legal arguments and offered substitute reasoning. The central issue was the interpretation of Article XX(g) of the GATT. The Panel had concluded that it could not look merely at the individual measure’s compliance with Article XX(g). Instead, the Panel concluded that “we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.” The Appellate Body disagreed with this conclusion, and instead directed future panels to look not at the types of measures, but rather at the specific design of each. In the case of the U.S. import prohibition for non-turtle-safe shrimp, the Appellate Body found that the measure was well within the scope of Article XX(g), given that turtles are exhaustible natural resources and that the import ban was both related to the protection of these resources and made effective in conjunction with internal restrictions.

The Appellate Body went on to evaluate the import prohibition in the light of the introductory clause (the “chapeau”) to Article XX. The chapeau was triumphantly re-discovered in the 1996 case, United States—Standards for Reformulated and Conventional Gasoline. Since then, a two-tiered legal analysis has been utilized. In a first step, it is asked whether a restriction comes within one or more of the justifications set out in Article XX(a) through (i). In a second step, it is asked whether the measure either is applied in a way as to constitute an arbitrary or unjustifiable discrimination between countries, where the same conditions prevail, or operates as a disguised restriction on Settlement Understanding (DSU) prevents a Panel from considering arguments contained in third party briefs. In the instant case, the Panel received two amicus curiae briefs, one jointly by the Center for Marine Conservation (CMC), the Center for International Environmental Law (CIEL), the Environmental Foundation Ltd., the Philippine Ecological Network and the Red Nacional de Acción Ecológica, the other by the World Wide Fund for Nature (WWF). Parts of the CMC/CIEL brief were designated as an attachment to the second submission of the U.S. The entire brief is reproduced at <http://www.igc.org/ciel/amitoc.html>.

international trade. As in prior cases, the thrust of the appellate review was in the “soft national treatment” and “soft MFN” tests established under the chapeau. While the full semantics of the chapeau and the interrelations between “arbitrary discrimination,” “unjustified discrimination,” and “disguised restriction” on international trade are still open to debate, the Appellate Body addressed each of these issues separately. It concluded that the import ban as applied by the U.S. constituted unjustifiable discrimination inasmuch as it was not flexible enough, foresaw different phase-in periods, and was not preceded by “serious, across-the-board negotiations.” Moreover, it amounted to arbitrary discrimination since the certification procedure lacked transparency and violated the exporting countries rights for due process pursuant to Article X(3).

While the interpretation of the chapeau, due to the high standards applied by the Appellate Body, may be subject to discussion and criticism, such a focus will overlook a very notable facet of the decision. For the first time, the objective of sustainable development as referred to in the Preamble to the WTO Agreement was used to support the understanding of the Article XX exceptions. In addition, the Appellate Body looked at a number of multilateral environmental agreements (such as CITES, the Rio Declaration, Agenda 21, UNCLOS III, and the Biodiversity Convention) to clarify the scope of the trade disciplines. Whereas in recent times, similar arguments have been dismissed as irrelevant under Article 7.2 of the Dispute Settlement Understanding, the Appellate Body in the U.S.-Shrimp/Turtles case sought guidance in environmental treaties. In a seminal dictum and unprecedented step in GATT jurisprudence, it stated that the terms of the GATT are not static and should be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” This is an extremely important development for the long term adequacy and acceptability of the trade regime.

This quite remarkable report concludes with a remark addressed to those concerned with the environmental and human rights impacts of the multilateral trade system:

“In reaching these conclusions, we wish to underscore what we have not decided in this appeal. 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. 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 international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”

Obviously, a desirable resolution of the dispute would be multilateral cooperation, perhaps agreement, leading to effective preservation of the species while obviating any need for unilateral quantitative restrictions. In our view, however, both the Appellate Body and the Panel stop short of facilitating such a mutually beneficial solution. We suggest that three questions need be addressed: First, how significant is the threat posed to trade by unilateral quantitative restrictions under circumstances such as those presented in this case? Second, how significant is the practice of unilateral measures for the evolution of international environmental governance? Third, how significant is the challenge to the coherency of international law posed by the insularity of the trade regime?

The Threat to Trade of Unilateral Quantitative Restrictions

The reasoning of both the Appellate and the Panel reports focuses on the question of whether the exceptions of Article XX can justify an import ban violative of Article XI of the GATT. It is beyond the scope of this article to critique fully the two different approaches. Suffice it to say that while the Panel looked to the object and purpose of the trading regime as such, the Appellate Body focused on the specific measure in dispute, on its non-discriminatory design, even-handedness, and transparency.

Underlying the Panel’s narrow view of Article XX was its stated belief that unilateral measures inducing other countries to adopt comparable policies are a threat to the multilateral trading system. In the Panel’s view, any attempt to export local preferences in order to “harmonize” production processes should be met with great caution. Whereas the Appellate Body is less rigid in its approach and seems ready to accommodate protective measures of a single country as a matter of principle, the formal and material requirements necessary to justify such a measure seem, to the extent they are articulated, quite high. A national legislator is faced with the formidable task of carefully weighing the interests of all exporting countries and striking a close-to-perfect balance. Given the limited resources and the compromises inherent in all democratic acts, it is not at all clear that such standards will be met often, if at all.

Nonetheless, caution and high standards can be understood, not so much because any particular measure is a threat to the trading system but rather because there are likely to be a number of similar unilateral steps. Yet, if the measures to be allowed track the dramatic juxtaposition of trade and environmental concerns present in the Shrimp-Turtle case, then there will not be many other unilateral steps. The sea turtle is a shared global resource and is acknowledged politically, legally (as evidenced in a number of multilateral agreements) and scientifically to be an endangered species. The sea turtle is not the target of fishing, but rather is merely a by-catch that dies and is thrown back into the ocean. The means to prevent this needless killing of sea turtles are readily available, are cheap, do not significantly reduce the catch of shrimp, and can be locally produced. The unilateral measure at issue applies the same requirements both to the domestic and the foreign industry, and—despite the alleged rigidity of the measure—encourages mutual recognition of equally effective devices. This set of circumstances is not likely to arise again soon. As a consequence, the concern expressed in the Panel’s report that this situation may encourage a flood of non-distinguishable unilateral measures is not persuasive.

7. The Appellate Body found that the phrase “countries where the same conditions prevail” encompasses both a comparison between different exporting countries and between exporting countries and the importing country, see Appellate Report U.S.-Shrimp/Turtle, Chapter VI/C/1, note 8. Accordingly, both national treatment and most-favored-nation status need to be reconsidered under the chapeau to Art. XX, albeit in a “soft” or “diluted” fashion.
9. Art. 7.2 of the DSU reads as follows: “Panels shall address the relevant provisions in any covered agreement’s cited by the parties to the dispute.”

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12. As to the transparency and due process requirements pursuant to Art. X:3 GATT, the Appellate Body provides merely hints, and adjourns the task to formulate clear guidelines to some future occasion.
To its credit, it should be stressed that the Panel stated that its “findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted.” Rather, the Panel noted that the evidence submitted by the U.S. as to its attempts to negotiate with the complainants in this case was not sufficient. Even after the Appellate Report, this “back-door” remains open, or at least ajar. In our view, prior to adopting unilateral measures affecting third countries, the viability of a cooperative approach indeed must be explored.

The Significance of Unilateral Measures for International Environmental Governance

Underlying the Panel’s narrow view of Article XX was the belief that multilateral cooperation, rather than unilateral measures, will induce other countries to adopt comparable policies. Unfortunately, there is the very real possibility that both the Panel and the Appellate Body misperceive the dynamics of international environmental negotiation, ignore the substantial collective action problems present, and may thereby actually discourage the international cooperation they eloquently advocate. Even if an optimal solution might be found by interacting, a party might still find it preferable to free ride on an agreement or to hold out in order to get greater concessions.

Such strategic behavior can be overcome if one country or a “club” acts as leaders. For example, they might commit themselves to asymmetric obligations, while at the same encouraging other parties to join them. Incentives can range from a voluntary learning process to reciprocity mechanisms, and involve both carrots (transfer payments) and sticks (trade measures). Indeed, it is quite often the case that unilateral sticks have preceded multilateral environmental agreements.

While cooperation is the preferred solution, striking down the unilateral measure does not necessarily encourage it. To the contrary—cooperation in all likelihood will be more difficult than it was before. The U.S., for example, will have two choices. First, it may comply with the ruling and commence negotiations while lifting its ban against at least some non-certified nations. Lengthy talks will ensue. But without a trade incentive, strategic behavior by competing fishing nations will likely flourish. This is particularly troublesome since time is of the essence for the sea turtle. Neither the Panel nor the Appellate Body considers how long the negotiation process might take or what the impact of such a period of time might be for the environmental claim at issue. It is notorious that international environment and conservation agreements, even with substantial good faith, take a significant amount of time to negotiate and to implement. An agreement a decade from now will be of little value to the sea turtle. Second, the U.S. may choose not to comply. In all likelihood, this will mean that some solution will be found within a reasonable time period. But at the same time, the multilateral trade system—particularly in terms of yet greater support for the notion of “justified disobedience”—will suffer a set back.

Jurisdictional Competence as Choice of Law—The Threat to the Coherence of International Law and Relations

The difficulty of course is that the WTO Agreement in limiting the jurisdiction of the panels to questions concerning the various trade agreements in essence operates as a choice of law clause potentially isolating the panels from the entire legal context of the dispute before them. For example, if the International Court of Justice were to consider the same Shrimp-Turtle dispute, the situation would be quite different even if it were to agree with the Panel’s interpretation of Article XX. First, interim measures, both for protection of the turtles and trading interests, would be available. In this sense, the interim measures order would serve as a de facto interim regime. Second, the Court looking not only to the GATT, but also to the customary law of state responsibility, would consider the possibility that even if the U.S. quantitative restrictions were a breach of the GATT, that the threat to the turtles constituted a circumstance precluding wrongfulness. The proliferation of tribunals of competence limited not only to a substantive area, but perhaps also to only the conventional aspect of that area, threatens to splinter the coherency of international law. Moreover, if that coherency is a reflection of the many factors that need to be balanced politically, then the insularity of the trade regime ironically may pose a threat to the regime itself.

Yet while there is, in the view of many, little doubt that such interests eventually must be accommodated in the adjudication of trade disputes, it is less clear how such accommodation should be pursued for the immediate future. Although, the range of procedural options are limited because of the fundamental relationship of the panels to the Dispute Settlement Body (DSB), the WTO-dispute settlement rules are flexible so as to allow solutions benefiting all the parties. The issue in our view is how panels might encourage negotiation of an international agreement while allowing some measure of interim protection to, as in this instance, the endangered species.

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14. Appellate Body Report U.S.-Shrimp/Turtles, Chapter VI/C-2, note 25 et seq., requiring a party to pursue serious negotiations will all exporting members on essentially the same terms.
15. See Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 22 Cornell Int’l L.J. 459 (1994), at 493. The author even offers the hypothesis that unilateralism may be a condition for multilateralism.

16. Clearly, Art. 3.7 of the DSU mentions the withdrawal of the measures as the first objective. At the same time, a positive solution which is mutually acceptable has priority. Art. 19.1 of the DSU gives a Panel or the Appellate Body certain discretion to specify the means by which compliance is to be secured.

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of the United States or Mexico, or if a resident of a third country, has stayed the requisite number of days in the U.S. or Mexico to pay this country the respective taxes. It should be pointed out that the U.S. and Mexico have entered into a treaty to avoid double taxation. Another case may be when an MB-USC may invest or conduct business in Mexico involving a considerable amount of money which has not been reported to the IRS. This may trigger an investigation based on the U.S.-Mexico Protocol for the Prevention of Fiscal Evasion with respect to Taxes on Income.18

Similar cases may arise in the criminal law, family law and military service areas. An MB-USC may commit a felony in the U.S. and then flee to Mexico. When the U.S. requests extradition, Mexico may deny it based on the fact that the individual in question is a Mexican national. It may even affect a dual national sentenced to the death penalty since Mexico does not have this extreme sanction. In family law, one may foresee certain issues arising when a dual national, married to a U.S. citizen and involved in a divorce suit, for instance, decides to go back to Mexico, taking with him/her the couple's children. This may generate binational civil litigation involving not only custody over the children but also possible kidnapping charges.

Finally, one may anticipate an MB-USC enlisting in the Marine Corps fleeing to Mexico when the dual national is ordered to go abroad with his/her military unit to engage in military combat. What may happen when the U.S. requests this dual national to be extradited?

This is not an exhaustive list. All of the legal repercussions enumerated here represent illustrations to call the attention of specialists from both countries to the need to study and analyze these cases. It will fall upon these experts to advance suggestions to resolve such issues, taking into account that the bilateral relations between the United States and Mexico will continue to be enhanced in both the legal and judicial areas.19

Resources

The website of the Mexican General Consulate in New York City (8 East 41st Street, New York, NY 10017) <http://www.quicklink.com/mexico/requisitos/nacion.htm> contains information on the requirements for obtaining a Declaration of Mexican Nationality.


18. Id.

Jorge A. Vargas is Professor of Law at the University of San Diego School of Law where he has been a member of the faculty since 1983. He is the author of numerous books and articles on international law topics, including foreign investment, law of the sea, constitutional law and human rights. He maintains a website on Mexican Law at <http://www.mexlaw.com>.

David D. Caron is the C. William Maxeiner Distinguished Professor of International Law, University of California at Berkeley.

Hans Rudolf Triebs is Attorney at Law in Zurich, Dr. iur. (Zurich University), LL.M. (Boalt Hall Law School).