

The Promotion of Health and Environmental Policies in the Jurisprudence of the WTO

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General initial remarks

- ▶ Right to regulate in IEL
 - ▶ Trade and investment regimes
- ▶ Focus on GATT Article XX
 - ▶ Mindful of similar exception in other WTO agreements (GATS, TBT) and regional trade agreements (Mercosur).
 - ▶ Focus on selected paradigmatic cases (there are more!)
- ▶ General question: How does the trade regime respond to mounting demand over environmental protection, health, animal welfare, etc, provided that:
 - ▶ An international env. Court does not exist;
 - ▶ The trade regime was designed primarily aimed at trade liberalization, and not at persuing these non-trade interests.



Objectives of the Presentation

- ▶ **To argue** that, contrary to conventional wisdom, the Appellate Body has reshaped the interpretation of key provisions within the WTO Agreements, **offering Members more policy space to promote other societal values.**

II. Sustainable Development Pre-WTO: Rules

- ▶ 1947, GATT Article XX.
 - ▶ Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary** or **unjustifiable discrimination** between countries where the same conditions prevail, or a **disguised restriction on international trade**, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
 - ▶ (a) **necessary** to protect public morals;
 - ▶ (b) **necessary** to protect human, animal or plant life or health;
 - ▶ (g) **related to** the conservation of exhaustible natural resources if such measures are **made effective in conjunction with** restrictions on domestic production or consumption.

II. Sustainable Development Pre-WTO: Disputes

- ▶ *Canada – Herring and Salmon* (GATT Panel, 1989)
 - ▶ Canadian measure prohibiting exports of unprocessed herring and salmon, justified under GATT Art. XX (g).
 - ▶ Panel: “*primarily aimed at*” test for letter g:



II. Sustainable Development Pre-WTO: Disputes

- ▶ *Canada – Herring and Salmon* (GATT Panel, 1989)
 - ▶ **Relating to:** "While a trade measure did not have to be **necessary or essential** to the conservation of an exhaustible natural resource, it had to be **primarily aimed** at the conservation of an exhaustible natural resource to be considered as **relating to** conservation within the meaning of XX (g)." Para. 4.6
 - ▶ **Made effective in conjunction with:** "A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was **primarily aimed** at rendering effective these restrictions." *Id.*




II. Sustainable Development Pre-WTO: Disputes

- ▶ *United States – Tuna I*
(GATT Panel, 1991)
 - ▶ US measure prohibiting imports of tuna caught with purse-seine nets, which ended up killing dolphins, justified under GATT Art. XX (b) and (g).



II. Sustainable Development Pre-WTO: Disputes

- ▶ *United States – Tuna I* (GATT Panel, 1991)
 - ▶ **Primarily aimed at (XX g)**: Noting that the US measures effectively dealt with populations of dolphins outside of its **jurisdiction**, the Panel reasoned that the US embargo could not be “made effective in conjunction with” (or *primarily aimed at*) restrictions on domestic production or consumption. Paras. 5.30-5.33*
 - ▶ **Necessary (XX b)**: “The United States has **not** demonstrated to the Panel – as required of the party invoking an Article XX exception – that it had **exhausted all options reasonably available to it** to pursue its dolphin protection objectives through measures consistent with the GATT, in particular through the negotiation of international cooperative agreements.” Para. 5.28.
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II. Sustainable Development Pre-WTO: Disputes

- ▶ *United States – Tuna II* (GATT Panel, 1994)
 - ▶ **Necessary XX b:** the Panel concluded that a measure could not be considered “necessary” under XX (b) if it is meant to “[force] other countries to change their policies within their own jurisdictions...”
 - ▶ **Relating to XX g:** the Panel reiterated the strict interpretation used in the *Herring and Salmon* case, adding that this test “referred not only to the purpose of the measure but also to the actual effect of the measure on conservation of natural resources.”
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Synthesis

- ▶ **Consensus:** The multilateral trading system is about **TRADE LIBERALIZATION**
 - ▶ Against this background, GATT Art. XX exceptions were ineffective.



III. Sustainable Development Post-WTO: Rules

- ▶ A **new consensus** emerges:
 - ▶ Main drivers: Growing environmental awareness in general (1992 Rio Conference) + in relation to trade (Tuna-Dolphin backlash).
- ▶ 1994, Preamble to the Marrakesh Agreement establishing the WTO
 - ▶ Establishes the objective of Sustainable Development in the WTO.
- ▶ 1994, Ministerial Decision on Trade and Environment
 - ▶ Coordinates trade and environmental policies;
 - ▶ Creates the Committee on Trade and Environment.

III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Reformulated Gasoline (1998)*
 - ▶ US measure imposing restriction on imports of reformulated gasoline, justified under Art. XX (g).
- ▶ Panel:
 - ▶ **Related to:** “Relates to” means that a measure is **primarily aimed at** the conservation of exhaustible natural resources.
 - ▶ The Panel saw no direct connection between less favorable treatment of imported gasoline and the US objective of improving air quality.



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Reformulated Gasoline (1998)*
 - ▶ Appellate Body:
 - ▶ Relaxed the “*primarily aimed at*” test of letter g: - NOT TREATY LANGUAGE!
 - ▶ “The relationship between the baseline establishing rules and the non-degradation requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Art. III:4;” P. 633.
 - ▶ “We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the US for the purposes of XX (g). *Id.*”



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Reformulated Gasoline (1998)*
 - ▶ Appellate Body:
 - ▶ Relaxed the “**Made effective in conjunction with restrictions on domestic production**” requirement: it should be read as a requirement that the measures concerned impose restrictions not only in respect to imported gasoline, but also with respect to domestic gasoline (***even-handedness requirement***). P. 624.



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Reformulated Gasoline (1998)*
 - ▶ Appellate Body:
 - ▶ Faulted the US for not meeting the requirements of Art. XX, chapeau
 - US failed to pursue the possibility of entering into cooperative arrangements with importers;
 - US failed to take into account the costs to the foreign producers.
 - ▶ Balanced its report against the Preamble of the WTO Agreement and the Ministerial Decision on Trade and Environment.
 - ▶ *Obiter dicta*: “WTO treaty provisions are not to be read in clinical isolation from public international law.” P. 17.



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Shrimp I* (1998)
 - ▶ US measure imposing import barriers to shrimp and shrimp products, justified under Art. XX (g).
 - ▶ Appellate Body: **XX (g)**
 - ▶ 1) Interpreted the expression “**exhaustible natural resources**” of GATT Art. XX, letter g in an evolutionary manner.
 - ▶ 2) **Relates to:** “[t]he means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible natural resource, and, in fact, endangered species, **is observably a close and real one, a relationship that is every bit substantial.**” Para. 141.
 - ▶ 3) **Made effective in conjunction with:** Similar process requirements were imposed on domestic producers (*even-handedness requirement*).



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Shrimp I (1998)*
 - ▶ Appellate Body: **Chapeau**
 - ▶ Faulted the US for not meeting the requirements of GATT Art. XX, chapeau:
 - The actual application of the measure requires WTO Members to adopt a regulatory program that is essentially the same as that applied to US shrimp trawl vessels;
 - The US failed to engage the appellees and others in serious across the board negotiations with the objective of concluding an agreement for the protection of sea turtles.
 - ▶ Clarified that the preamble to the Marrakesh Agreement gives colour, texture and shading to the interpretation of WTO Agreements.



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Shrimp I* (1998)
 - ▶ **Unjustifiable discrimination:** “[I]t is not acceptable [...] for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program [...], without taking into consideration different conditions which may occur in the territories of those other Members. [...] We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”
§§ 164-165.



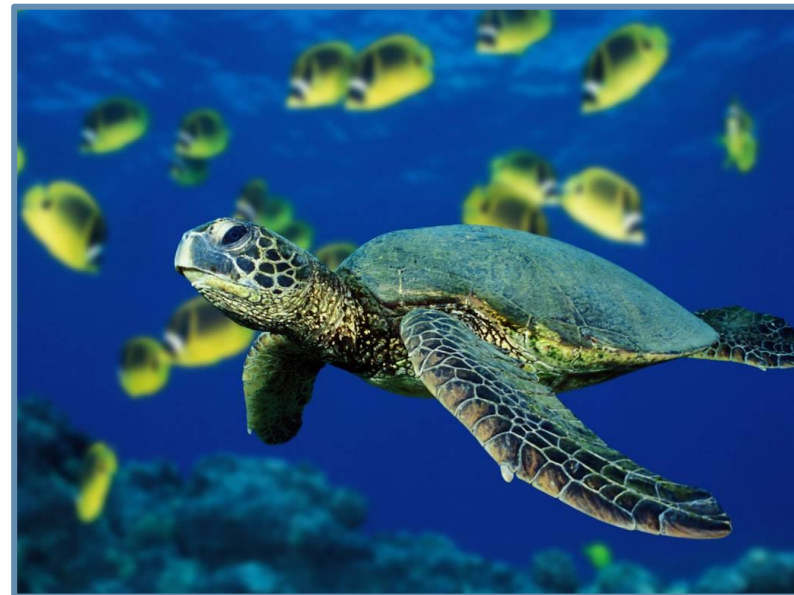
III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Shrimp I* (1998)
 - ▶ **Arbitrary discrimination:** because the US import measure was applied with rigidity and inflexibility, in denial of basic fairness, due process and transparency. Paras. 177, 181.



III. Sustainable Development Post-WTO: Disputes

- ▶ *United States – Shrimp II* (2001)
- ▶ Reaffirmed the **comparable in effectiveness standard** of *Shrimp I*:
 - ▶ A measure comparable in effectiveness to that of the importing Member gives “sufficient latitude to the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory, and consequently allows for sufficient flexibility in the application of the measure so as to avoid arbitrary or unjustifiable discrimination. Para. 149.



III. Sustainable Development Post-WTO: Disputes

- ▶ *Brazil – Retreaded Tyres (2007)*
 - ▶ Brazilian ban on imports of retreaded tires for environmental and health reasons, justified under GATT Art. XX (b).
 - ▶ Appellate Body:
 - ▶ Recognized that not all Members have the necessary technical and technological capacities to provide accurate projections of a measure's contribution to the achievement of a health and environment policy. Para. 151.
 - ▶ Affirmed that the extent to which a measure is in fact *reasonably available* is conditioned on the level of development of the Member invoking a health and environmental exception.*
 - The complaining Member bears the **burden** of identifying possible alternatives to the measure at issue. Para. 156 + US-Gambling, Para. 311.



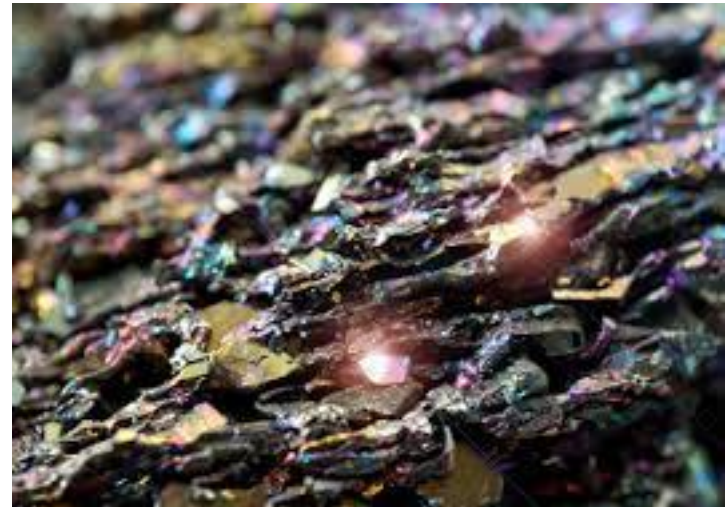
III. Sustainable Development Post-WTO: Disputes

- ▶ *Brazil – Retreaded Tyres (2007)*
 - ▶ Appellate Body:
 - ▶ **New necessity test**: Replaces Korea Beef’s three-prong weighting and balancing test* for a **material contribution** standard:
 - ▶ “A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be *indispensable*. However, its contribution to the achievement of the objective must be *material*, not merely marginal or insignificant.” Para. 210.
 - ▶ **Art. XX, Chapeau...**



China – Raw Materials (DS394, 395, 398) (2012)

- ▶ Export restraints imposed on different raw materials.
- ▶ Products at issue: Certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc.



China – Raw Materials (DS394, 395, 398) (2012)

- ▶ Panel: concluded that China’s export restraints were not justified under XX(b) and (g). – **Not appealed!**
 - ▶ China appealed the Panel’s interpretation of “*made effective in conjunction with*” of Art. XX(g) – in which the Panel had revived the *primarily aimed* test of *Canada – Herring and Salmon*.
 - ▶ Appellate Body:
 - ▶ “**Made effective in conjunction with**” – does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption. (Para. 356)* - back to *US – Gasoline*.
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China – Rare Earths (DS431, 432, 433) (2014)

- ▶ Export restrictions on a number of rare earths, tungsten, and molybdenum.



China – Rare Earths (DS431, 432, 433) (2014)

- ▶ Panel: The export quotas were not justified under the exception in GATT XX(g).
 - ▶ China did not appeal the overall finding, but the Panel’s interpretation of “**relating to**” and “**made effective in conjunction with.**”
 - ▶ Appellate Body:
 - ▶ “**Relates to**”: “while panels are not required to examine empirical or actual effects [such as the effects of quotas in the marketplace] in their assessment of whether a measure ‘relates to’ conservation within the meaning of Article XX(g), panels are not precluded from doing so.”
Para. 5.113.
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China – Rare Earths (DS431, 432, 433) (2014)

▶ Appellate Body:

- ▶ “**Made effective in conjunction with**”: “finds that the Panel **erred**, to the extent that it interpreted Article XX(g) as imposing a separate requirement of ‘even-handedness’ that must be fulfilled in addition to the conditions expressly specified in subparagraph (g) as requiring Members seeking to invoke XX(g) to prove that the burden of conservation is evenly distributed, for example between foreign consumers, on the one hand, and domestic producers, on the other hand...”
Para. 6.2




EC – Seal Products (DS400, 401) (2014)

- ▶ Regulations of the EU generally prohibiting the importation and placing on the market of seal products, with certain exceptions, including for seal products derived from hunts conducted by Inuit or indigenous communities (**IC exception**) and hunts conducted for marine resource management purposes (**MRM exception**).



EC – Seal Products (DS400, 401) (2014)

- ▶ GATT Art. XX(a) – “**necessary to protect public morals**”
 - ▶ **Reasonably available alternative measures:** Certification system to enforce stringent animal welfare requirements.
 - ▶ **Panel:** Any such system would require “accurate differentiation” between humanely and inhumanely killed seals, and the more stringent the regime, the larger the costs and/or logistical demands on those participating in the hunt and subsequent marketing products.” Panel report, Para. 7.497
 - ▶ Relevant precedents (*reasonably available measures*):
 - ▶ *EC – Asbestos*: a responding Member cannot be expected to accept an alternative measure that makes less of a contribution to its objective than the challenged measure. Para. 5.273.
 - ▶ *US – Gambling*: “[a]n alternative measure may be found not to be **reasonably available** ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.” Para. 5.276.
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EC – Seal Products (DS400, 401) (2014)

- ▶ GATT Art. XX Chapeau –
- ▶ **Issue # 1:** Whether the EU has sufficiently explained how the manner in which the EU Seal Regime treats **IC hunts as compared to “commercial” hunts** can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.
 - ▶ 1) “[T]he EU did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from ‘commercial’ hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare.” Para. 5.338.
 - ▶ 2) The AB “found considerable ambiguity in the ‘subsistence’ and ‘partial use’ criteria of the IC exception.” Id.*



EC – Seal Products (DS400, 401) (2014)

- ▶ GATT Art. XX Chapeau –
- ▶ **Issue # 2:** Whether the manner in which the IC exception affects **Inuit communities in different countries** amounts to “arbitrary or unjustifiable discrimination.”
 - ▶ 1) The AB was “not persuaded that the EU has made “**comparable efforts**” to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.” Id.



IV. Conclusion

- ▶ **Question:** How does the trade regime respond to mounting demand over environmental protection, health, animal welfare?
 - ▶ **It has varied:**
- ▶ 1) In the GATT years, **GATT** panels were not mindful of the role played by sustainable development in disputes involving environmental and health values, and the interpretation of GATT provisions by GATT panels **limited the policy space for health and environment**
- ▶ 2) In the **WTO**, the AB has reshaped the interpretation of key provisions within the WTO Agreements, offering Members **more policy space to promote other societal values**
 - ▶ **Provided that countries operate changes in the way the environmental/health measures are applied, they can legally achieve their non-trade interests (US-Shrimp; Brazil-Tires; EC-Seals).**