

# Comparative International Environmental and Trade Law:

## The Journey of Unilateral Measures

by

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### I. INTRODUCTION

The trade-environment debate has been characterized as a clash of cultures, clash of paradigms, and a clash of judgments.<sup>1</sup> From one side of the negotiating table, the “free-traders” argue that environmental protection threatens free trade.<sup>2</sup> The response from the “environmentalists” on the other side of the negotiating table is that free trade threatens the environment.<sup>3</sup> The relationship between trade and the environment is much more complex than those polarized arguments, however, and a system that is mutually supportive of trade and environment requires appreciation for the interdependency of trade liberalization and environmental protection.<sup>4</sup>

The purpose of this paper is to examine both the international trade regime and the trade regime of the United States to determine which better accounts for the complexity of the trade-environment debate, and is more sensitive to regulations that seek to protect the environment. This paper seeks to accomplish this through a comparative analysis of each system’s treatment of unilateral measures as a solution to an environmental conundrum that traverses the territorial borders of the government that hopes to enforce it. It is a well-established principle in international environmental law that the solutions to global environmental problems

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<sup>1</sup> DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 36-40 (1994).

<sup>2</sup> DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1248 (3d ed. 2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1251.

are better devised on a global scale.<sup>5</sup> This notion responds to the contention championed by the free traders that environmental protection measures that are unilateral in nature stymie the free movement of goods: “Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.”<sup>6</sup>

In Part II of this paper, the trade-environment debate is introduced, and the World Trade Organization (“WTO”), the multilateral institution that governs the international trade regime,<sup>7</sup> and the dormant Commerce Clause, the legal doctrine that governs trade between the United States,<sup>8</sup> are explained. Part III of this paper reviews the jurisprudence of the international trade system in order to ascertain how the WTO, acting through its judicial organs, appraises unilateral measures. A detailed analysis of United States Supreme Court cases follows, and differences between the two systems are highlighted. Part IV concludes that despite the changes for the better WTO jurisprudence and committee decisions subsequent to the *United States – Restrictions on Imports of Tuna* (“*US – Tuna/Dolphin*”) case has effected on the relationship between international trade and the environment, the nuanced approach taken by the United States Supreme Court is better at deciding whether a States’ unilateral measures are an appropriate solution to an environmental harm appurtenant to the community at large.

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<sup>5</sup> Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 11; Report of the Committee on Trade and Environment, WTO Doc. WT/CTE/1 (Nov. 12, 1996); Report of the U.N. Conference on Environment and Development, June 3-14, 1992, Annex II, Agenda 21, U.N. Doc A/CONF.151/26 (Aug. 12, 1992); U.N. Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1. (June 14, 1992).

<sup>6</sup> Rio Declaration, princ. 12.

<sup>7</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

<sup>8</sup> *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

## II. TWO TRADE REGIMES, ONE ENVIRONMENT

The heart of the trade-environment debate from the perspective of the environmentalists is that trade advances economic growth, which causes unsustainable production of waste and consumption of resources.<sup>9</sup> Further, they contend that liberalization of trade barriers results in the elimination of environmental regulations because such regulations are perceived as protectionist.<sup>10</sup> This creates a “race to the bottom” effect, in which governments lower their environmental standards in order to prevent countries with low environmental standards from gaining a competitive advantage in the market.<sup>11</sup> Another argument against liberalized trade is that it has the potential to jeopardize national security.<sup>12</sup> National security may be jeopardized not only by reliance on foreign goods and services,<sup>13</sup> but government subsidies to the defense industry may run afoul of rules prohibiting trade barriers.<sup>14</sup>

The international organization that provides the legal and institutional framework for the multilateral trading system is the WTO.<sup>15</sup> The predecessor institution to the WTO that regulated trade among nations was the General Agreement on Tariffs and Trade (“GATT”), born out of the Bretton Woods Conference in 1944 as an effort to avoid the economic protectionism that led to

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<sup>9</sup> ETSY, *supra* note 1, at 42.

<sup>10</sup> *Id.* at 43.

<sup>11</sup> Richard Revesz, *Rehabilitating Interstate Competition*, 67 N.Y.U.L. REV. 1210, 1210.

<sup>12</sup> HUNTER, *supra* note 2 at 1242.

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., Another nose in the trough Boeing gets huge illegal subsidies, the WTO rules*, THE ECONOMIST, Sept. 16, 2010, available at <http://www.economist.com/node/17043144>; *see, e.g., U.S., EU skirmish at appeal over Airbus subsidies*, REUTERS, Nov. 18, 2010, available at <http://www.reuters.com/article/idUSTRE6AH40L20101118>. In 2004, the United States initiated a WTO dispute against the European Communities for the allegedly illegal subsidies it provides to AIRBUS, its primary civil aircraft producers, and the European Communities initiated a WTO dispute against the United States for allegedly illegal subsidies provided to Boeing by the U.S. Department of Defense. Six years later, the WTO Panel ruled both subsidies illegal under the WTO Subsidies and Countervailing Measures Agreement. Both the United States and the European Communities have appealed the Panel’s rulings against the European Communities in the AIRBUS subsidy case; thus, the skirmish presses on.

<sup>15</sup> WTO Agreement.

World War II.<sup>16</sup> Trade conflicts do not occur solely at the international level; in the United States, the tension between state regulations that inhibit commerce, and free commerce among states is dealt with under the United States Constitution's dormant Commerce Clause.<sup>17</sup> Given the contentions from the environmentalist side of the debate, the question becomes whether, and to what extent, these two existing trade regimes account for environmental considerations.

The function of the WTO system and the dormant Commerce Clause is to liberalize barriers to trade.<sup>18</sup> A state regulation, by directly discriminating against foreign goods or services, or by incidentally burdening foreign goods or services, puts foreign competitors at a disadvantage and thus acts as a barrier to trade.<sup>19</sup> Modern dormant Commerce Clause jurisprudence liberalizes such barriers by recognizing that the corollary to the Constitution's express grant of authority to Congress to regulate interstate commerce is that the states are not separate economic units, and that "one state in its dealings with another may not place itself in a position of economic isolation".<sup>20</sup> The Supreme Court of the United States has developed a test under which it evaluates the constitutionality of state regulatory measures that affect interstate commerce.<sup>21</sup> In contrast, the GATT, one of the multilateral trade agreements binding on all members of the WTO,<sup>22</sup> expressly prohibits certain types of barriers to international trade.<sup>23</sup> While the general rule in both systems is that regulatory measures that discriminate against, or place a burden on, foreign producers are prohibited, both systems provide for exceptions that

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<sup>16</sup> See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 31-78 (2d ed. 1997).

<sup>17</sup> See, e.g., *Pike v. Bruce Church*, 397 U.S. 137 (1970).

<sup>18</sup> Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 *VAND. L. REV.* 1401, 1402 (1994).

<sup>19</sup> *Id.* at 1402.

<sup>20</sup> *City of Philadelphia* 437 U.S. at 623 (citing *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935)).

<sup>21</sup> See, e.g., *City of Philadelphia*, 437 U.S. at 622-23.

<sup>22</sup> WTO Agreement art. II:2.

<sup>23</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, Legal Instruments – Results of the Uruguay Round vol. 1, 33 *I.L.M.* 1154 (1994) [hereinafter GATT].

account for the interests of the regulatory state.<sup>24</sup> Under both the WTO system and dormant Commerce Clause jurisprudence, a tribunal must determine whether the barrier to trade created by the regulatory measure is justified.<sup>25</sup>

### **III. WHICH TRADE REGIME BETTER ALLOWS FOR ENVIRONMENTAL PROTECTION?**

#### **Unilateral Measures to Solve a Global Environmental Problem**

This section of the paper includes an inquiry of each system's stance on the legality of unilateral measures to solve an environmental problem. In the context of international trade, a unilateral measure often has an extraterritorial effect. A unilateral measure is one that is "[o]nesided; relating to only one of two or more persons or things".<sup>26</sup> "Extraterritorial" is described as "beyond the geographic limits of a particular jurisdiction".<sup>27</sup> At the international level, unilateral measures with extraterritorial effect prescribe a certain production or process method, or other restriction, on foreign imports.<sup>28</sup> In the context of intra-national trade in the United States, it is a measure that imposes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter".<sup>29</sup> One tenet of international environmental law, grounded in multilateral environmental agreements and declarations, is the principle that multilateral solutions based on international consensus are the best way for governments to remedy environmental problems that are transboundary or global in nature.<sup>30</sup> It is no secret, however, that multilateral environmental agreements often take many years, sometimes as long

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<sup>24</sup> Farber, et. al., *supra* note 19, at 1402.

<sup>25</sup> Farber, et. al., *supra* note 19, at 1402.

<sup>26</sup> BLACKS LAW DICTIONARY 746 (3d ed. 2006).

<sup>27</sup> *Id.* at 273.

<sup>28</sup> *See, e.g.*, Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 5 (1993) [hereinafter *US – Tuna/Dolphin*].

<sup>29</sup> *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

<sup>30</sup> *See, e.g.*, Report of the U.N. Conference on Environment and Development, June 3-14, 1992, Annex II, Agenda 21, para. 2.22(i), U.N. Doc A/CONF.151/26 (Aug. 12, 1992).

as a decade, to conclude.<sup>31</sup> Many environmental problems are time-sensitive, however. As an example, the United Nations Environment Programme has designated climate change as a priority area,<sup>32</sup> requiring immediate short-term action.<sup>33</sup> However, due to the often-lengthy multilateral negotiating processes, and complications arising out of implementation and enforcement of multilateral environmental agreements, some nations have chosen to address global or transboundary environmental harms through unilateral action.<sup>34</sup>

Although action on a multilateral level may be the preferable means to mitigate a global commons problem, one justification for unilateral action when multilateral action and international consensus proves too cumbersome is federalism, or the principle that policies should be addressed at the most local level possible.<sup>35</sup> This was the approach applied in at least one Supreme Court dormant Commerce Clause case.<sup>36</sup> Despite the fact that the environmental problem at issue in the case had a transboundary dimension, the manner in which it the problem

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<sup>31</sup> HUNTER, *supra* note 2, at 303. The United Nations Conference on the Law of the Sea convened to write a treaty in 1973. Nine years later, in 1982, the Conference adopted the final product of negotiations: the United Nations Convention on the Law of the Sea (See The United Nations Convention on the Law of the Sea (A Historical Perspective), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm), for more information about the history of the United Nations Convention on the Law of the Sea).

<sup>32</sup> U.N. Env't Programme, Climate Change, <http://www.unep.org/climatechange/>.

<sup>33</sup> U.N. ENV'T PROGRAMME, UNEP CLIMATE CHANGE STRATEGY 3 (2008); *see, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden, C.E. Hanson eds.) (2007), *available at* [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/contents.html](http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html). In the 2007 Intergovernmental Panel on Climate Change Fourth Assessment Report, it was stated that recent warming is significantly impacting both terrestrial and marine biological systems, natural systems, hydrological systems, and human systems. The report equivocally demonstrates that the effects of climate change are boundless, and expeditious implementation of mitigation and adaptation measures are vital.

<sup>34</sup> Richard B. Stewart, International Trade and the Environment, 49 WASH & LEE L. REV. 1329, 1348 (1992). The United States trade restrictions on imports of tuna and shrimp are prime examples of unilateral action employed when multilateral action appears unattractive for any number of reasons.

<sup>35</sup> Daniel Bodansky, What's So Bad About Unilateral Action to Protect the Environment?, 11 EUR. J. INT'L LAW 339, 345 (2000). In the European Union, the concept that policy is better created at the most local level possible is known as the concept of subsidiarity. *Id.*

<sup>36</sup> *See Sporhase v. Nebraska*, 458 U.S. 941 (1982).

was being managed at the State and intrastate level was reasonable considering the unique needs of the State.<sup>37</sup> Thus, while solutions develop that involve the cooperation of all parties affected by an environmental issue, action should be undertaken in the meantime at a national level in the context of global environmental problems, and at the statewide level in the context of environmental problems that plague the United States as a whole.

Once an environmental problem is identified as one that impacts the globe, whether a measure that prescribes a process or production method, or otherwise imposes restrictions on foreign imports, should be used to address that problem should depend on whether the measure is an appropriate solution to the problem, or whether it further exacerbates the problem.<sup>38</sup> Likewise, once it is apparent that an environmental problem impacts the entire United States, whether a state law that prescribes a process or production method or otherwise imposes restrictions on out-of-state imports should be used to correct that problem must turn on whether the law helps solve the problem, or whether it aggravates the problem.<sup>39</sup> Professor Daniel Esty suggests that “a more rigorous showing of injury should be required before trade measures based on harm to shared global resources are accepted as justified”;<sup>40</sup> however, “[w]here the harm results from transboundary pollution spillovers, the threshold for establishing a legitimate environmental

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<sup>37</sup> *Id.* at 595-97.

<sup>38</sup> Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* 139 (Thomas Cottier, Petros C. Mavroidis and Patrick Blatter eds.) (2000); *ETSY*, *supra* note 1, at 121-125.

<sup>39</sup> Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* 139 (Thomas Cottier, Petros C. Mavroidis and Patrick Blatter eds.) (2000) [hereinafter *Howse Article*].

<sup>40</sup> *ETSY*, *supra* note 1, at 124.

interest should be relatively low.”<sup>41</sup> Additionally, “[w]here the harm arises within and directly affects the country setting the challenged environmental standard, the legitimacy of using trade restrictions to respond to environmental injuries is at its maximum.”<sup>42</sup> Therefore, the purpose of an inquiry into each system’s position on the legality of unilateral measures is to determine to what extent each system takes into account the scope of harm addressed by the environmental regulation.

### **Unilateralism and Environmental Protection in the International Trade System**

*US – Tuna/Dolphin* was the first case decided under the GATT to throw fuel on the trade-environment fire.<sup>43</sup> The controversy that surrounded the decision was based on the Panel’s conclusion that a unilateral measure, whereby one country’s laws applied extraterritorially to methods by which another country processed or produced a good, could not be justified under GATT provisions.<sup>44</sup> In *US – Tuna/Dolphin*, Mexico alleged that the United States’ Marine Mammal Protection Act (MMPA) violated Article III:4 of the GATT<sup>45</sup> by banning imports of tuna from Mexico caught using the purse-seine method, and by banning importation of tuna caught with commercial fishing technology that resulted in the incidental kill of dolphins in excess of United States standards.<sup>46</sup> Because dolphins frequently swim above schools of tuna, fishermen surround schools of dolphins with purse-seine nets, which incidentally results in the

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<sup>41</sup> *Id.* at 123.

<sup>42</sup> *Id.* at 122.

<sup>43</sup> ETSY, *supra* note 129.

<sup>44</sup> Robert Howse, PPMs, trade law and the environment, TRADE AND ENVIRONMENT: A RESOURCE BOOK 74, (Adil Najam, Mark Halle, Ricardo Meléndez-Ortiz eds., Int’l Ctr. for Trade & Sustainable Dev.) (2007) [hereinafter Howse Article in ICTSD Resource Book].

<sup>45</sup> GATT art. III:4

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. *Id.*

<sup>46</sup> *US – Tuna/Dolphin*, *supra* note 28, at 5.

death of dolphins caught in the net.<sup>47</sup> Importantly, Mexico contended that the challenged amendments “represented a unilateral imposition by the United States of extraterritorial restrictions on fishing by other contracting parties in their own economic zones, under the pretext of protecting natural resources located abroad.”<sup>48</sup> The United States argued that the MMPA import ban was justified under Article XX(b); necessary to protect the life and health of dolphins, and also justified under Article XX(g); related to the conservation of dolphins as an exhaustible natural resource.<sup>49</sup> The Panel delivered a devastating blow to the environmental community in its holding on the Article XX defenses invoked by the United States. In its examination of the drafting history of the Article XX(b), the Panel announced it was the intent of the Members to restrict the application of the subsection to the protection of the health and life of humans, plants, and animals occurring within the jurisdiction of the country instituting the trade barrier.<sup>50</sup> The Panel made a similar finding with respect to Article XX(g): “[a] country can effectively control the production or consumption of an exhaustible natural resource *only to the extent* that the production or consumption is under its jurisdiction [emphasis added].”<sup>51</sup> Thus, the Panel concluded that the challenged sections of the MMPA violated another GATT provision, and rejected the United States’ Article XX(b) and (g) defense by stating that unilateral measures, extraterritorial in effect, could not be justified under Article XX.<sup>52</sup>

Fierce criticism from the environmental community ensued in the wake of the Panel’s decision; this case effectively disallowed a WTO Member from adopting a conservation measure directed at resources occurring outside its jurisdiction. It communicated the message that rules

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 17.

<sup>49</sup> *Id.* at 13-15.

<sup>50</sup> *US – Tuna/Dolphin*, *supra* note 28, at 35.

<sup>51</sup> *Id.* at 36.

<sup>52</sup> *Id.* at 40.

prohibiting trade barriers would always trump legitimate environmental laws necessary to protect the global commons.<sup>53</sup> Fortunately, the blow served to environmental regulations that seek to protect or regulate activity occurring outside the territorial jurisdiction of the nation-State has softened over time since *US – Tuna/Dolphin*.<sup>54</sup>

*United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp/Turtle*”) blunted the Panel’s holding in *US – Tuna/Dolphin*. This Appellate Body holding effected a change in the trade-environment relationship:<sup>55</sup> the Appellate Body opined that environmental extraterritorial measures could fall within the realm of those justifiable under Article XX.<sup>56</sup> The dispute involved a challenge brought by India, Malaysia, Pakistan, and Thailand to section 609 of the Endangered Species Act of 1973.<sup>57</sup> Section 609 of the Act banned importation of shrimp harvested with commercial fishing technology that adversely affected sea turtles.<sup>58</sup> If a harvesting nation received a certification from the State Department, then the import ban was not imposed.<sup>59</sup> One way to receive certification from the State Department was to adopt a regulatory program governing the incidental taking of sea turtles during shrimp trawling comparable to the United States program, and if the incidental take-rate of sea turtles was comparable the take-rate of United States shrimp trawling vessels.<sup>60</sup> The State Department evaluated the regulatory program to determine whether it was comparable to the United States

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<sup>53</sup> Howard Mann & Yvonne Apea, Dispute Resolution, in *TRADE AND ENVIRONMENT: A RESOURCE BOOK* 67-69, (Adil Najam, Mark Halle, Ricardo Meléndez-Ortiz eds., Int’l Ctr. for Trade & Sustainable Dev.) (2007).

<sup>54</sup> Howse Article in *ICTSD Resource Book*, *supra* note 44, at 74.

<sup>55</sup> U.N. ENV’T PROGRAMME, *ENVIRONMENT AND TRADE – A HANDBOOK* 32 (2002).

<sup>56</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 133, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US – Shrimp/Turtle*].

<sup>57</sup> *Id.* at ¶ 1.

<sup>58</sup> *Id.* at ¶ 3.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at ¶ 4.

program based on whether the program required use of Turtle Excluder Devices that were similar in effectiveness to those used in the United States.<sup>61</sup>

The United States defended section 609 on the grounds that, under Article XX (g), it was related to the conservation of sea turtles as an exhaustible natural resource.<sup>62</sup> The Panel decided the case in line with the holding of the Panel in *US – Tuna/Dolphin*; unilateral measures, extraterritorial in application, are not justifiable under Article XX.<sup>63</sup> On appeal, the Appellate Body reversed the Panel’s finding, and although it did not expressly overrule the controversial holding in *US – Tuna/Dolphin*, it reduced the impact of its harsh result by determining that the unilateral measure at issue was within the ambit of measures justifiable under Article XX.<sup>64</sup> The Appellate Body did not “pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation.”<sup>65</sup> Rather, it said that for purposes of Article XX(g), there was a “sufficient nexus” between the turtle population involved and the United States.<sup>66</sup>

Despite the implication from Appellate Body’s interpretation of Article XX(g) that measures that sought extraterritorially to address an environmental harm are not *per se* unjustifiable, the Appellate Body found the United States’ unilateral approach failed to meet the standards set forth in the Chapeau of Article XX.<sup>67</sup> Fatal to the United States’ case was a

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at ¶ 125.

<sup>63</sup> *See id.* at ¶ 115.

<sup>64</sup> Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environmental Debate*, 27 COLUM. J. ENVTL. L. 491, 498 (2002).

<sup>65</sup> *US – Shrimp/Turtle*, *supra* note 58, at ¶ 133.

<sup>66</sup> *Id.* at ¶ 144.

<sup>67</sup> *Id.* at ¶ 186. The Chapeau to Article XX of the GATT states

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...

direction in Section 609(a) to the State Department to initiate negotiations for bilateral or multilateral treaties on the protection of sea turtles, and an incomprehensive effort on behalf of the State Department to pursue negotiations.<sup>68</sup> The Appellate Body called on language from Rio Declaration, Agenda 21, the Convention on Biological Diversity, Convention on the Conservation of Migratory Species of Wild Animals, and the WTO Report of the Committee on Trade and the Environment as examples of support for the notion that global commons problems are best solved on a global scale.<sup>69</sup> In this respect, the Appellate Body did indeed consider the scope of the environmental harm in its determination of whether Section 609 and its implementing guidelines were justifiable under Article XX.<sup>70</sup> It recognized that

[T]he protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on 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.<sup>71</sup>

*US – Shrimp/Turtle* paved a way for a WTO Member to impose a unilateral GATT-compliant measure with extraterritorial effect.<sup>72</sup> While the WTO system does not rule out the possibility that the scope of the harm to the environment will be assessed in determining whether a unilateral measure is justified,<sup>73</sup> WTO jurisprudence does not compel an analysis of whether the unilateral measure at stake is an appropriate way to address the cost to the environment, or

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<sup>68</sup> *Id.* at ¶ 172.

<sup>69</sup> *Id.* at ¶ 168-172.

<sup>70</sup> *Id.* at ¶ 166.

<sup>71</sup> *Id.* at ¶ 168.

<sup>72</sup> Howse Article in ICTSD Resource Book, *supra* note 44, at 74-75.

<sup>73</sup> *US – Shrimp/Turtle*, *supra* note 58, at ¶ 168-172.

whether it has a “beggar-thy-neighbor” effect.<sup>74</sup> The Appellate Body in *US – Shrimp/Turtle* declared that, consistent with principles set forth in international environmental treaty law, global and transboundary environmental problems should be addressed on a multilateral level through international consensus.<sup>75</sup> Thus, the Appellate Body considers the nature of the environmental harm to be addressed by the unilateral measure in determining whether the measure constitutes unjustifiable discrimination.<sup>76</sup> However, the Appellate Body does not actually under take an analysis of whether the unilateral measure at stake may indeed be an appropriate way to mitigate the harm, despite the fact that an environmental harm may be global or transboundary in nature. The United States Supreme Court, on the other hand, takes into consideration whether an environmental problem is purely local or transboundary in scope.<sup>77</sup> In assessing the respondent State’s alleged legitimate interest, the Court examines whether the unilateral measure is at least one appropriate way to address the problem, or whether the unilateral measure further exacerbates the environmental harm.<sup>78</sup>

### **Unilateralism and Environmental Protection within the United States**

To determine whether a State law is unconstitutional under the dormant Commerce Clause, the Supreme Court has distinguished between laws that discriminate against interstate commerce either on their face or in effect, and those that incidentally burden interstate

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<sup>74</sup> Howse Article, *supra* note 39, at 149-50.

<sup>75</sup> *US – Shrimp/Turtle*, *supra* note 58, at ¶ 168-172.

<sup>76</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, WT/DS10/AB/R, WT/DS11/AB/R, (Oct. 4, 1996) (Although Panel reports are only binding with respect to the resolution of a particular dispute between the Members to that dispute, the Appellate Body has acknowledged that Panel reports are often considered by subsequent Panels. Accordingly, it may be reasonably expected that in future cases in which an environmental measure is at stake, the Panel will follow the analytical approach used by the Appellate Body and consider the scope of the environmental harm.

<sup>77</sup> Howse Article, *supra* note 39, at 148.

<sup>78</sup> *Id.*

commerce.<sup>79</sup> If a law falls within the former category, the State has the burden of demonstrating that the law serves a legitimate local purpose, and that no less discriminatory measure to achieve the purpose exists.<sup>80</sup> In circumstances in which the law falls within the latter category, the measure will be held constitutional unless the incidental burden on interstate commerce is clearly outweighed by the benefits flowing from the law.<sup>81</sup> Historically, the trend in dormant Commerce Clause jurisprudence has been to strike down unilateral measures that seek to protect the environment in order to adhere to the principle of nondiscrimination the Court has held to be intrinsic to the Commerce Clause.<sup>82</sup> However, key to the determination of the constitutionality of a state environmental measure is the Supreme Court's characterization of the measure, and whether there is an existing federal regulatory scheme to address the environmental harm at issue.<sup>83</sup>

In *Chemical Waste Management, Inc. v. Hunt* (“*Chemical Waste Management, Inc.*”), the Supreme Court held that Alabama's unilateral measure for reducing importation of hazardous waste was an inappropriate way to address a harm of environmental concern to the entire nation.<sup>84</sup> The existing federal regulatory scheme in the backdrop of the Alabama law challenged in *Chemical Waste Management, Inc.* was the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>85</sup> The RCRA authorized the Environmental Protection Agency to create a system

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<sup>79</sup> See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., *Pike*, 397 U.S. at 142.

<sup>82</sup> Joseph A. MacDougald, *Why Climate Law Must Be Federal: The Clash between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1439; See, e.g., *City of Philadelphia*, 437 U.S. at 626-27 (“[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”)

<sup>83</sup> Howse Article, *supra* note 39, at 148-49.

<sup>84</sup> *Id.* at 149.

<sup>85</sup> *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 338 (1992).

regulating, *inter alia*, the disposal of hazardous waste.<sup>86</sup> The Alabama law at issue imposed a disposal fee on hazardous waste originating from out outside of Alabama and disposed of at a hazardous waste plant within Alabama.<sup>87</sup> The environmental harm was the danger posed by hazardous waste: “[s]uch waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals which can cause birth defects, genetic damage, blindness, crippling, and death.”<sup>88</sup> Chemical Waste Management, Inc. contended that the Alabama law violated the Commerce Clause.<sup>89</sup> The Supreme Court characterized the environmental harm at issue as one present throughout the entire United States.<sup>90</sup> It acknowledged that the concerns raised by Alabama, including the protection of the health and safety of its citizens and conservation of the environment were indeed legitimate, but reasoned that due to the nature of hazardous waste, the degree of danger it poses do not vary in relation to its place of origin.<sup>91</sup> Thus, the Court declared that “[n]o State may attempt to isolate itself from a problem common to the several states by raising barriers to the free flow of interstate commerce.”<sup>92</sup> Accordingly, the Supreme Court held that the Alabama law discriminated against interstate commerce on its face, and reasoned that because the environmental problems posed by hazardous waste are identical notwithstanding the origin of the waste, the law was not justified by local interest.<sup>93</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 336.

<sup>88</sup> *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 337 (1992) (quoting *Hunt v. Chemical Waste Mgmt., Inc.*, 584 So. 2d 1367, 1373 (Ala. 1991).

<sup>89</sup> *Chemical Waste Mgmt., Inc.*, 504 U.S. at 339.

<sup>90</sup> *See id.* 343-44. The Court noted that the local interests served by the law were legitimate, but stated that “only rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate hazardous waste to meet these goals. ...[T]here is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. *Id.* at 344.

<sup>91</sup> *Id.* at 343-44.

<sup>92</sup> *Id.* at 339-40.

<sup>93</sup> *Id.* at 349.

*Sporhase v. Nebraska* (“*Sporhase*”) also exemplifies the disparity between the bright line rule against unilateral environmental measures to address a global commons problem under WTO jurisprudence, and the Supreme Court’s willingness to consider past remedies of the environmental problem at issue in order to ascertain whether the State’s discrimination is for legitimate, reasonable purposes. Dissimilar from the factual circumstance in *US – Shrimp/Turtle*, there was no existing scheme in the backdrop regulating the commodity at issue to serve as an indicator that the environmental problem was transboundary or national in scope.<sup>94</sup> The Appellants, owners of contiguous tracts of land in Nebraska and Colorado, used water well located on the Nebraska tract for irrigation of both the tract in Nebraska and Colorado.<sup>95</sup> The Nebraska law being challenged required any person intending to withdraw water from any well in Nebraska in order to transport it to an adjoining state apply for a permit.<sup>96</sup> The permit was to be granted upon a finding by the Department of Water Resources for the State of Nebraska determined that the withdrawal of water is reasonably, not contrary to conservation and use of ground water, and is not detrimental to the public welfare.<sup>97</sup> *Sporhase* contended that the Nebraska law violated the dormant Commerce Clause because it imposed an impermissible burden on interstate commerce.<sup>98</sup> Because there was no federal framework regulating withdrawal and transport of ground water, the Supreme Court began its analysis by determining whether ground water constituted an article of commerce, and thus subject to regulation by Congress.<sup>99</sup>

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<sup>94</sup> See *Sporhase v. Nebraska*, 458 U.S. 941 (1982). After imposing the import restrictions on shrimp harvested using commercial fishing technology adverse to sea turtles the United States, along with the majority of the countries in South and Central America, concluded the Inter-American Sea Turtle Convention. International trade of sea turtles is prohibited under CITES. Thus, there was equivocal international consensus that sea turtle extinction was a commons problem.

<sup>95</sup> *Id.* at 944.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 943.

<sup>99</sup> *Id.*

The Court found it necessary to address this issue because no violation of the dormant Commerce Clause exists if Congress does not have the power to regulate the subject matter in question.<sup>100</sup> The Court concluded that because ground water could be bought and sold in the United States, it constituted an article of interstate commerce.<sup>101</sup> As a result, the Court concluded that Congress could regulate the withdrawal and transport of ground water if it so chose.<sup>102</sup> The Court characterized ground water overdraft as a national environmental problem, and declared “Congress has the power to deal with it on [a national] scale.”<sup>103</sup>

The Supreme Court’s analysis did not conclude once it determined that ground water is an article of interstate commerce, however; “[f]or the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within that State, or indeed, of interstate commerce in water.”<sup>104</sup> The next step comprised an analysis of whether the permit requirement effectuated a legitimate local interest, and whether the legitimate local interest was outweighed by the incidental burden on interstate commerce.<sup>105</sup> Despite the commons dimension of conservation and preservation of ground water, the Court found that the limitations created by the permit requirement were a rational and a legitimate way to regulate ground water.<sup>106</sup> In arriving at this determination the Court reasoned that a State’s power to regulate use of water in times of shortage in order to protect its citizens is well established under its police power.<sup>107</sup> Furthermore, the Court referred to equitable apportionment decrees and the negotiation and enforcement of interstate compacts to arrive at the recognition of the “relevance

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<sup>100</sup> *See id.* at 943-54.

<sup>101</sup> *Id.* at 949-50.

<sup>102</sup> *Id.* at 953.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 954.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 945-57.

<sup>107</sup> *Id.* at 956.

in state boundaries in the allocation of scarce water resources.”<sup>108</sup> The Court opined that water scarcity could reasonably be dealt with on a local level due to the nature of the problem: some geographic regions of the United States are more arid than others, and therefore more susceptible to water shortages.<sup>109</sup> Thus, the law in question, as a solution to the environmental problem of water scarcity, did not create a “beggar thy neighbor” effect and exacerbate the commons dimension of the problem.<sup>110</sup>

While the law on its face did not impermissibly burden interstate commerce, the Court held that the requirement contained within the law that the state in which the water is to be used grant reciprocal rights to withdraw and transport ground water from that state for use in Nebraska was facially discriminatory.<sup>111</sup> The reciprocity requirement created an explicit barrier to commerce between Colorado and Nebraska because Colorado had an export prohibition on ground water.<sup>112</sup> In its determination that the reciprocity requirement was not narrowly tailored to serve the conservation and preservation interest advanced by Nebraska, the Court reasoned that the reciprocity requirement might require a State experiencing a water shortage to import ground water to an area in Nebraska where ground water is abundant.<sup>113</sup> Nebraska contended that Congress’ deference to State water law and to interstate compacts dealing with water indicated that Congress had authorized States to impose impermissible burdens on interstate commerce.<sup>114</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 952-53.

<sup>110</sup> *See id.* at 957 (“A facial examination of the first three conditions set forth in [the statute] does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.”) Conceivably, had the Nebraska law interfered with a State’s ability to control its water use and transport, thereby transferring the problem of water scarcity from Nebraska to the affected State (the “beggar thy neighbor” effect), the Court would have stated that the law impermissibly burdened interstate commerce.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 958.

<sup>114</sup> *Id.*

Unconvinced, the Court neither of those factors are “pervasive evidence that Congress consented to the unilateral imposition of unreasonably burdens on commerce.”<sup>115</sup>

*Maine v. Taylor* (“*Maine*”) presents an example of a case in which the Supreme Court determined that although the law facially discriminated against interstate commerce, the law was upheld as constitutional because it served a legitimate local purpose, and there were no reasonably available less discriminatory means to achieve the legitimate purpose.<sup>116</sup> Unlike the environmental harm posed by hazardous waste in *Chemical Waste Management, Inc.*, the environmental threat present in Maine was unique to the State.<sup>117</sup> The State of Maine imposed a ban on the importation of live baitfish,<sup>118</sup> arguing that importation of live baitfish would result in significant harm to Maine’s fragile fisheries.<sup>119</sup> The threat to Maine’s fisheries included introduction of three types of parasites found in out-of-state baitfish, yet not found in Maine’s wild baitfish.<sup>120</sup> Additionally, Maine’s aquatic ecological system would be disturbed to an unknown extent by species nonnative to Maine incidentally included in the shipments of imported baitfish.<sup>121</sup> The Court opined that due to the threat to Maine’s fisheries posed by out-of-state baitfish, Maine had a legitimate local purpose to justify its import ban.<sup>122</sup> Interestingly, the Court did not require Maine to quantify the risk to the environment: “[The] principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such

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<sup>115</sup> *Id.* at 960.

<sup>116</sup> *Maine*, 477 U.S. at 151-52.

<sup>117</sup> *Chemical Waste Mgmt., Inc.*, 504 U.S. at 348.

<sup>118</sup> *Maine*, 477 U.S. at 132.

<sup>119</sup> *Id.* at 140-41.

<sup>120</sup> *Maine*, 477 U.S. at 141.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 148.

consequences.”<sup>123</sup> As the second part of dormant Commerce Clause analysis when the law is facially discriminatory, the Court held that there were no reasonable means to achieve Maine’s goal of preserving biodiversity available, and thus upheld the constitutionality of the law.<sup>124</sup>

*Maine* was a practical application of the concept that where the harm to the environment arises from and directly impacts the State seeking to address the harm, trade restrictions are a legitimate means by which to respond to the environmental harm.<sup>125</sup> The primary difference between the Court’s rejection of the disposal fee on imported hazardous waste in *Chemical Waste Management, Inc.*, and approval of the embargo on out-of-state baitfish in *Maine*, was the nature of the harm at issue and the means by which the State sought to address that harm. In *Chemical Waste Management, Inc.*, the harm was ubiquitous throughout the United States, and did not vary according to the origin of the waste.<sup>126</sup> In contrast, the environmental harm to Maine’s fisheries was exclusive to Maine; parasites prevalent in out-of-state baitfish were not prevalent in Maine’s local wild baitfish populations.<sup>127</sup> Thus, the nature of the environmental harm influenced the Supreme Court’s deference to the trial court as the finder of fact, and to the Maine legislature.<sup>128</sup> Notably, the laws at issue in all three aforementioned cases were deemed facially discriminatory. The Supreme Court in *Maine* diverged from the general rule that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”<sup>129</sup> Although *Maine* Court agreed with the lower courts’ that the import ban

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<sup>123</sup> *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (quoting *United States v. Taylor*, 585 F. Supp. 393, 397 (D. Me. 1984).

<sup>124</sup> *Maine*, 477 U.S. at 151-152.

<sup>125</sup> See *supra* notes 40-42.

<sup>126</sup> *Chemical Waste Mgmt., Inc.*, 504 U.S. at 343-44.

<sup>127</sup> *Maine*, 477 U.S. at 141.

<sup>128</sup> Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 22 (2003).

<sup>129</sup> *City of Philadelphia*, 437 U.S. at 624.

was discriminatory on its face,<sup>130</sup> the Court’s deference to the weight given to expert testimony at the trial court level is indicative of a less stringent standard for a State’s legitimate interest where the environmental harm directly arises from and directly affects the State.

#### IV. CONCLUSION

Justice O’Conner’s concurrence in *C & A Carbone, Inc. v. Town of Clarkstown* (“*Carbone*”) captures the heart of the dormant Commerce Clause and the constitutionalization of free trade. In *Carbone*, she wrote, “pervasive flow control [of hazardous waste] would result in the type of balkanization the Clause is primarily intended to prevent.”<sup>131</sup> Yet the Court’s careful consideration of the reasonableness of the export restrictions in *Sporhase*, and deference to Maine’s legislative purpose and empirical evidence is indicative of a nuanced approach of environmental law under the dormant Commerce Clause. Notwithstanding the dormant Commerce Clause rule of *per se* invalidity of facially discriminatory laws, the Court undertook an analysis of whether the means was an appropriate way to address the environmental problem at stake.<sup>132</sup> This more nuanced approach is in contrast to the Appellate Body’s analysis of Article XX in *US – Shrimp/Turtle*. The Appellate Body acknowledged that evaluating measures under Article XX is a delicate task, one that requires balancing the right of a Member to invoke an exception, and the right of a Member under the substantive provisions of the GATT.<sup>133</sup> However, the Appellate Body did not proceed to assess the justifiability of the measure based on whether it was an appropriate solution to a global commons problem; it merely looked to international

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<sup>130</sup> *Maine*, 477 U.S. at 138.

<sup>131</sup> *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y., 511 U.S. 383, 406.

<sup>132</sup> See *City of Philadelphia*, 437 U.S. at 343-44; See *Maine*, 477 U.S. at 140; See *Sporhase*, 458 U.S. at 957.

<sup>133</sup> *US – Shrimp/Turtle*, *supra* note 58, at ¶ 159.

environmental law to conclude that global commons problems must be solved on a multilateral scale.<sup>134</sup>

It is clear that the trade-environment relationship has shifted significantly since the *US – Tuna/Dolphin* decision in 1991. The WTO established the Committee on Trade and the Environment in 1994 in its Uruguay Round Agreement Decision on Trade and the Environment;<sup>135</sup> the Preamble to the WTO Agreement proclaims that use of the world’s resources must be in accordance with sustainable development;<sup>136</sup> extraterritorial environmental protection is no longer categorically invalid;<sup>137</sup> and the Appellate Body has emphasized the importance of coordinating policies on the environment and trade.<sup>138</sup> Yet, despite the progress, the WTO system as it stands currently falls short of considering the nature of the environmental harm in relation to the solution proposed by the challenged measure.

Although the Supreme Court of the United States does not expressly require an investigation of whether the challenged environmental law exacerbates the commons problem, or appropriately mitigates the problem, as part of the dormant Commerce Clause analysis, its careful consideration of the reasonableness of the law in *Sporhase*, and deference to the State legislature and expert testimony on empirical evidence in Maine suggest that the Court will indeed consider whether the law appropriately mitigates the environmental harm. Therefore,

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<sup>134</sup> *Id.* at ¶ 168.

<sup>135</sup> World Trade Organization, Decision on Trade and Environment, LT/UR/D-6/2 (Apr 15, 1994).

<sup>136</sup> WTO Agreement Preamble. Also, it is worth noting that a principle of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties is that a treaty is to be interpreted in light of its Preamble. Therefore, the Appellate Body’s analysis suggests that, in accordance with the Vienna Convention on the Law of Treaties, the Preamble to the WTO Agreement is a new framework for interpretation of the provisions of the covered WTO multilateral trade agreements.

<sup>137</sup> See *US – Shrimp/Turtle*, *supra* note 58, at ¶ 144.

<sup>138</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

notwithstanding the fact that the WTO explicitly provides for the legitimate interest of States,<sup>139</sup> the trade regulation system created by dormant Commerce Clause jurisprudence better accounts for the complexities of the trade-environment relationship. As a recommendation to policy-makers, I suggest that the more meticulous technique utilized by the United States Supreme Court in assessing the wisdom of unilateral measures to solve a commons problem be applied on an international scale at the WTO. Such a feat is surely possible; as the Appellate Body declared in *US – Shrimp/Turtle*, the language of Article XX “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>140</sup>

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<sup>139</sup> GATT art. XX.

<sup>140</sup> *US – Shrimp/Turtle*, *supra* note 58, at ¶ 129.