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2019

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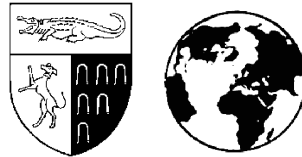
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# The Yale Journal of International Law Online



## The Vital Role of the WTO Appellate Body in the Promotion of Rule of Law and International Cooperation: A Case Study

By Padideh Ala'i<sup>†</sup>

President Trump's 2018 Trade Policy Agenda ("2018 Trade Agenda") proclaims that "[t]he United States will not allow the WTO—or any other multilateral organization—to prevent us from taking actions that are essential to the economic well-being of the American people."<sup>1</sup> As part of this agenda, the United States has targeted the Appellate Body of the World Trade Organization (WTO) in particular.<sup>2</sup> The United States claims that the Appellate Body has disregarded the rules as set by WTO Members and has adopted a "non-text based interpretation"<sup>3</sup> of WTO provisions through an "activist approach."<sup>4</sup> The 2018 Trade Agenda concludes, "[t]he United States has grown increasingly concerned with the activist approach of the Appellate Body on procedural issues, interpretative approach, and substantive interpretations."<sup>5</sup>

The United States' position is based on Article IX.2 of the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement") and Article 3.2 of the WTO Dispute Settlement Understanding ("DSU"). Article IX.2 of the Marrakesh Agreement reserves to "[t]he Ministerial

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1. OFF. U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 2 (2018) [hereinafter 2018 TRADE POLICY AGENDA], [https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018 Annual Report FINAL.PDF](https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF).

2. *Id.* at 22 ("The most significant area of concern has been panels and the Appellate Body adding to or diminishing rights and obligations under the WTO Agreement."); *see also id.* at 22-28.

3. *Id.* at 24 ("In a number of disputes, the United States has expressed concerns that the Appellate Body's non-text-based interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement has seriously undermined the ability of Members to use safeguards measures. The Appellate Body has disrespected the agreed WTO text and read text into the Agreement, applying standards of its own devising.")

4. *Id.* at 28.

5. *Id.*

Conference and the General Council . . . the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”<sup>6</sup> Additionally, Article 3.2 of the DSU states that the rulings of the dispute settlement body (“DSB”) “cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>7</sup>

On the other hand, Article 3.2 of the DSU also provides:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law* . . . .<sup>8</sup>

As a result of the text of the WTO Charter discussed above and Article 3.2 of the DSU, the dispute settlement panels and Appellate Body have the difficult, if not impossible, task of (1) “clarifying” but not “adopting” interpretations of the WTO Agreements; and (2) “preserving” but not adding or diminishing rights and obligations under the WTO Agreements. Needless to say, it is very difficult to clearly distinguish between a clarification and an interpretation. At times, “judicial activism” results from the Appellate Body’s attempt to clarify provisions of the WTO Agreements through the application of the customary rules of interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT).<sup>9</sup>

The United States’ criticism of the Appellate Body predates the Trump administration.<sup>10</sup> It is not alone in this regard—numerous other countries have also been critical of the dispute settlement system.<sup>11</sup> Given the United States’ role as one of the architects of the dispute settlement system, however, its opposition has been particularly devastating. Specifically, the United States has

6. Marrakesh Agreement Establishing the World Trade Organization art. IX.2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. The Ministerial Conference and the General Council are composed of representatives of WTO Members. *See* Marrakesh Agreement art. IV.1-2.

7. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

8. *Id.* art. 3.2 (emphasis added).

9. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

10. *See, e.g., 2015 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body—Report to the Congress Transmitted by the Secretary of Commerce at 2, cited in 2018 TRADE POLICY AGENDA, supra note 1, at 23; Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, May 23, 2016* [hereinafter 2016 U.S. DSU Statement], [https://www.wto.org/english/news\\_e/news16\\_e/us\\_statement\\_dsbmay16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/us_statement_dsbmay16_e.pdf).

11. Other countries, such as Argentina, Australia, Canada, Chile, Costa Rica, Guatemala, Japan, Mexico, Norway and Turkey, have also expressed concerns about the Appellate Body’s approach and delay in resolution of disputes. *See, e.g.,* World Trade Organization Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on July 15, 2011, §§ 12-13, WTO Doc. WT/DSB/M/299; World Trade Organization Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on July 28, 2011, §§ 12-15, WTO Doc. WT/DSB/M/301; World Trade Organization Dispute Settlement Body, Minutes of Meeting Held on October 5, 2011, §§ 11, 15-20, WTO Doc. WT/DSB/M/304; World Trade Organization Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on June 13, 2012, §§ 23, 30, WTO Doc. WT/DSB/M/317; World Trade Organization Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on June 19, 2015, §§ 7.16-17, WTO Doc. WT/DSB/M/364.

blocked the appointment of new Appellate Body members to replace those whose terms have expired.<sup>12</sup> As a result, the Appellate Body currently operates with only three of the seven members required under the DSU.<sup>13</sup> Should any one of the Appellate Body members be conflicted in a particular case, the Appellate Body will cease to function, since a minimum of three members are required to hear any dispute.<sup>14</sup> To compound the problem, the terms of two of the three remaining members will expire December 2019.<sup>15</sup> Inasmuch as the DSU gives Member States the “right to appeal,” a non-functioning Appellate Body will threaten the dispute settlement mechanism of the WTO as a whole, including its panel process.

Notwithstanding the abovementioned criticism and blocking of new appointments to the Appellate Body, the United States continues to participate in the WTO dispute settlement process.<sup>16</sup> In fact, the 2018 Trade Agenda expressly acknowledges the importance of dispute settlement in international trade agreements. For example, the 2018 Trade Agenda states that “when the WTO dispute settlement system functions according to the rules as agreed by the United States and other WTO Members, it provides a *vital* tool to enforce WTO rights and uphold a rule based trading system.”<sup>17</sup> The United States also laments

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12. For the recent U.S. decision to block future appointment of Appellate Body members, see 2016 U.S. DSU Statement, *supra* note 10; Jan Dahinten, *U.S. Blocks WTO Judge Reappointment Amid Looming Trade Crisis*, BLOOMBERG (Aug. 27, 2018), <https://www.bloomberg.com/news/articles/2018-08-27/u-s-blocks-wto-judge-reappointment-amid-looming-trade-crisis>; Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018), <https://www.reuters.com/article/us-usa-trade-wto/us-blocks-wto-judge-reappointment-as-his-term-nears-an-end-idUSKCN1LC190>. The United States is particularly concerned with the Appellate Body practice that allows its members to continue serving until the cases they have been assigned are finished, even if the actual term of the member has expired, based on Rule 15 of the Appellate Body Working Procedures. The 2018 Trade Policy Agenda specifically states that “[t]he United States is resolute in its view that Members need to resolve [the Rule 15] issue before moving on to the issue of replacing former Appellate Body members.” 2018 TRADE POLICY AGENDA, *supra* note 1, at 25-26.

13. The current members of the Appellate Body are Ujal Singh Bhatia of India and Thomas R. Graham of the United States, whose terms of office will finish on December 10, 2019, and Hong Zhao of China, whose term of office will finish on November 30, 2020. See *Appellate Body Members*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Feb. 11, 2019). The WTO’s founding agreements provide that “[the Appellate Body] shall be composed of seven persons, three of whom shall serve on any one case . . . .” DSU, *supra* note 7, art. 17.1.

14. DSU, *supra* note 7, art. 17.1.

15. The terms of office of Ujal Singh Bhatia and Thomas R. Graham will expire on December 10, 2019. See *Appellate Body Members*, *supra* note 13.

16. The United States currently has 123 cases at the WTO as a complainant. See *Disputes by Members*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Jan. 27, 2019). Those cases include U.S. attempts to use the WTO Dispute Resolution System against Members who have imposed retaliatory tariffs in response to the United States’ use of the national security exception to impose tariffs on steel and aluminum imports. See, e.g., Request for the Establishment of a Panel by the United States, *Canada – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/2 (Oct. 19, 2018); Request for the Establishment of a Panel by the United States, *China – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/2 (Oct. 19, 2018); Request for the Establishment of a Panel by the United States, *Mexico – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS560/2 (Oct. 19, 2018). The United States has also not shied away from using the WTO dispute system to seek resolution on contentious issues. See Constitution of the Panel Established at the Request of the United States: Note by the Secretariat, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/9 (Jan. 17, 2019).

17. 2018 TRADE POLICY AGENDA, *supra* note 1, at 22 (emphasis added).

the fact that NAFTA's labor and environmental side agreements have an "essentially toothless dispute settlement mechanism."<sup>18</sup> These words, however, are not very significant when the *actions* of the United States are inflicting irreparable harm to the future of the dispute settlement mechanism and a rule-based system of international trade—in favor of a purely power-based system that allows large countries and important markets to bully others unilaterally.

If U.S. policy ultimately leads to a non-functioning WTO dispute settlement system and de facto elimination of the Appellate Body, the result will be a great setback for the advancement of international law and the rule-based trading system that promotes peaceful co-existence between nations. To illustrate the Appellate Body's importance to the peaceful balancing of interests between nations, this Essay looks at one important trade dispute from the early years of the Appellate Body: *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("U.S.-Shrimp").<sup>19</sup> This case exemplifies the important role that the Appellate Body has played in the promotion of international law. It does so through an application of the customary international law principles on treaty interpretation that takes into account "context" as well as "object and purpose" of a treaty.<sup>20</sup>

In *U.S.-Shrimp*, the Appellate Body acknowledged that its activism can largely be attributed to the failure of Member States and the WTO's Committee on Trade & Environment ("CTE") to issue guidance on the inevitable policy tensions between trading rules and conservation goals. *U.S.-Shrimp* is an example of the Appellate Body being compelled to address issues before it by relying on customary rules of interpretation of public international law.<sup>21</sup>

#### I. THE PANEL DECISION IN *U.S.-SHRIMP*

In *U.S.-Shrimp*, Malaysia, India, Pakistan, and Thailand brought an action against the United States at the WTO, arguing that Section 609 of the Endangered Species Act (ESA) ("Section 609") and its implementing regulations were inconsistent with Article XI.1 of the General Agreement on Tariffs and Trade (GATT).<sup>22</sup> Section 609(b) banned imports of shrimp and shrimp products into the United States as a method of limiting the incidental killing of sea turtles.<sup>23</sup> Meanwhile, Article XI.1 broadly forbids "prohibitions or restrictions other than duties, taxes or other charges, whether made effective

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18. *Id.* at 7.

19. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *U.S.-Shrimp*].

20. *See id.* ¶¶ 155, 158 (citing the VCLT, *supra* note 9, arts. 31-32).

21. It has been the U.S. position that the Appellate Body should just abstain from deciding issues in cases when there is not enough guidance from the Members. Amb. Michael Punke, Remarks to the students from American University, Washington College of Law (WCL), in Geneva, Switzerland (July 14, 2016).

22. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R, at 7 (adopted May 15, 1998) [hereinafter *U.S.-Shrimp* Panel Report].

23. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, § 609(b), 103 Stat. 988, 1037 (1989) (codified at 16 U.S.C. § 1537 (2012)).

through quotas, import or export licenses, or other measures . . . on the importation of any product . . . or on the exportation or sale for export of any product.”<sup>24</sup> The United States responded to the complainants by asserting that Section 609 was part of a conservation measure designed to preserve and protect endangered species, and that it was therefore justified as an exception under subparagraph (g) of General Exceptions (Article XX) of GATT 1994.<sup>25</sup> Subparagraph (g) specifically provides an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,” so long as the measure is not applied in a discriminatory manner that is unjustifiable or arbitrary, or is a disguised restriction on trade.<sup>26</sup>

Section 609(b), which banned imports of shrimp and shrimp products, provided an exemption for imports from “certified” countries.<sup>27</sup> The State Department’s written guidelines issued pursuant to Section 609 permitted countries to obtain certification in two ways: first, if they had a “fishing environment [that] . . . does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting”;<sup>28</sup> or second, if they provided

documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of [shrimp trawling] that is *comparable* to the United States program; *and* [where] the average rate of that incidental taking [of sea turtles] by their vessels of the harvesting nation is *comparable* to the average rate of incidental taking of sea turtles by United States vessels . . . .<sup>29</sup>

In applying Section 609, the State Department initially issued guidelines that limited the scope of the import ban to the Caribbean/Western Atlantic region.<sup>30</sup> This geographical limitation prompted negotiations between the United States and Caribbean and Western Atlantic countries, which ultimately resulted in the “Inter-American Convention for the Protection and Conservation of Sea Turtles” (“Inter-American Convention”).<sup>31</sup> Unfortunately, one month prior to the effective date of the import ban, the United States Court of International Trade (CIT) ruled that the State Department guidelines were wrong, and thus, the ban became applicable worldwide.<sup>32</sup> This CIT ruling led to disparate treatment because the complainants were not included in the Inter-American Convention,

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24. General Agreement on Tariffs and Trade 1994 art. XI.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereafter GATT 1994].

25. *U.S.-Shrimp* Panel Report, *supra* note 22, ¶ 3.3. *See generally* GATT 1994, *supra* note 24, art. XX.

26. *Id.* art. XX(g).

27. § 609(b).

28. Pub. L. No. 101-162, § 609(b)(2)(C), 103 Stat. 988, 1038 (1989).

29. § 609(b)(2)(A), (B) (emphasis added).

30. The 1991 Guidelines specifically mention Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil, 56 Fed. Reg. 1051 (Jan. 10, 1991).

31. *U.S.-Shrimp*, *supra* note 19, ¶ 167; Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, T.I.A.S. No. 01-502, 2164 U.N.T.S. 29 (entered into force May 2, 2001).

32. *See* Earth Island Institute v. Christopher, 913 F. Supp. 559, 572 (Ct. Int’l Trade 1995).

and were thus treated differently than the Convention's non-U.S. signatories.

The DSB panel in *U.S.-Shrimp* held that Section 609 failed the chapeau of Article XX.<sup>33</sup> The chapeau states that exceptions under Article XX must not be applied “in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>34</sup> The panel applied the multilateral trading system test to interpret this chapeau language and held that,

if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.<sup>35</sup>

As a result, the panel never analyzed Section 609 under subparagraph (g) of Article XX. This is because the panel saw Section 609 as a type of unilateral measure intended to pressure other countries into adopting the same conservation policies as the United States. The panel reasoned that the coercive approach of Section 609, if adopted by other Members of the WTO, would undermine the multilateral trading system and could therefore never be justified under Article XX.

## II. THE APPELLATE BODY IN *U.S.-SHRIMP*: REASONING AND IMPACT

On appeal, the Appellate Body adopted a long-term perspective and corrected the panel's analysis in significant ways. It ultimately affirmed, however, that Section 609 was inconsistent with the United States' WTO obligations. First, the Appellate Body reversed the panel's holding that Section 609 was a type of unilateral measure that could never be justified under Article XX subparagraph (g). It actually argued instead that Section 609 was precisely the type of measure for which Article XX subparagraph (g) was intended. The Appellate Body admonished the panel for beginning its analysis with the chapeau of Article XX rather than subparagraph (g), in contravention of the direction given by previous Appellate Body decisions.<sup>36</sup> The Appellate Body then applied the rules of interpretation set forth in the VCLT to interpret the “context” of subparagraph (g) in light of the preamble of the Marrakesh Agreement.<sup>37</sup>

In applying the VCLT, the Appellate Body introduced flexibility into the words of Article XX(g), even though the words had remained unchanged since they were originally drafted after World War II and incorporated into GATT 1947. While acknowledging that the words “exhaustible natural resource” were

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33. *U.S.-Shrimp* Panel Report, *supra* note 22, ¶¶ 7.44-7.62.

34. GATT 1994, *supra* note 24, art. XX.

35. *U.S.-Shrimp* Panel Report, *supra* note 22, ¶ 7.45 (emphasis added).

36. See *U.S.-Shrimp*, *supra* note 19, at ¶¶ 118-19 (“The analysis is . . . two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.”) (citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* 22, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996)).

37. See *id.* ¶¶ 125-45.

drafted “more than 50 years ago,” the Appellate Body insisted that the phrase “must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and preservation of the environment.”<sup>38</sup> Indeed, the Appellate Body noted, “[t]he International Court of Justice stated that where concepts embodied in a treaty are ‘by definition, evolutionary’, their ‘interpretation cannot remain unaffected by the subsequent development of law . . . .’”<sup>39</sup> Thus, although the language of Article XX has not changed, it must be read in light of the new preamble of the Marrakesh Agreement, which recognizes that the expansion of the production of trade in goods and services should “allow[] for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking to both protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Parties’] respective needs and concerns at different levels of economic development.”<sup>40</sup>

Importantly, the Appellate Body used the language of the preamble of the WTO Charter to infuse meaning into the words of both the subparagraph and the chapeau of Article XX. The Appellate Body also drew on international conventions and declarations relating to environmental conservation, such as the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, the United Nations Conference on Environment and Development’s Agenda 21, the Convention on the Conservation of Migratory Species of Wild Animals, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>41</sup> By relying on the preamble, the Appellate Body departed from past interpretations of Article XX subparagraph (g). Contrary to the panel’s analysis, it concluded that Section 609 fulfilled the requirements of Article XX subparagraph (g), as it was “primarily aimed at” preserving an exhaustible natural resource and rendering effective domestic restrictions on production and consumption.<sup>42</sup>

In interpreting the text of the chapeau, the Appellate Body explicitly cited Article 31(3)(c) of the VCLT and remarked, “our task here is to interpret the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.”<sup>43</sup> Applying its interpretation, it ultimately agreed with the panel that Section 609 failed the requirements of the article’s chapeau, but only because of the way the United States had *applied* the measure—not, as the panel had determined, because it undermined the multilateral trading system and thus could not be justified under Article XX.<sup>44</sup>

38. *Id.* ¶ 129.

39. *Id.* ¶ 130 (citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21)).

40. Marrakesh Agreement, *supra* note 6, pmb1.

41. See *U.S. Shrimp*, *supra* note 19, ¶¶ 130, 132.

42. *Id.* ¶ 160 (“[A]lthough the [U.S.] measure itself falls within the terms of Article XX(g), nevertheless [it] constitutes ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or ‘a disguised restriction on international trade.’”).

43. *Id.* ¶ 158 (citing VCLT, *supra* note 9, art. 31(3)(c)).

44. *Id.* ¶ 186 (summarizing conclusion that although the United States was pursuing a legitimate objective, it violated the non-discrimination principle).



Once again, in discussing the chapeau, the Appellate Body referred to the preamble of the Marrakesh Agreement. It emphasized that the requirements of Article XX's chapeau must be read in conjunction with—and in light of—the preamble of the Marrakesh Agreement and its new emphasis on sustainable development.<sup>45</sup> According to the Appellate Body, “[a]s this new preambular language reflects the intentions of the negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretations of agreements annexed to the WTO Agreement, in this case, the GATT 1994.”<sup>46</sup>

Section 609 failed to meet the requirements of the chapeau of Article XX because the United States never even attempted to negotiate an international agreement with the complainants. In practice, the United States required identical policies from the complainants rather than policies comparable in effectiveness, as mandated by the words of Section 609. Further, the certification process it mandated was singularly informal and casual, which also violated the transparency norms of the WTO Agreement.<sup>47</sup> The Appellate Body decision in *U.S.-Shrimp* pushed the United States to modify its behavior and start negotiations with the complainants for an international agreement. The United States revised its certification policies in an effort to increase transparency and flexibility, which included the creation of the Shrimp Exporter's Declaration Forms.

A few years after *U.S.-Shrimp*, Malaysia brought a compliance action before a WTO panel (subsequently appealed to the Appellate Body) claiming that the United States had not complied fully with the ruling in *U.S.-Shrimp*. Malaysia argued that the United States had not withdrawn Section 609 nor concluded an international agreement on sea turtles with Malaysia.<sup>48</sup> In this compliance context, the Appellate Body ruled in favor of the United States and upheld Section 609 as justified under both subparagraph (g) of Article XX and the chapeau.<sup>49</sup>

The Appellate Body's flexible approach to the interpretation and application of Article XX allowed it to accommodate U.S. conservation and environmental goals while criticizing the United States' coercive, unilateral approach. The Appellate Body mentioned that it was forced to address these issues because the Members had themselves failed to confront the tensions between environmental/conservation measures and trade regulation.<sup>50</sup> The Members had recognized the importance of this issue and created the CTE to address “any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on one hand and

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45. *Id.* ¶ 152.

46. *Id.* ¶ 153.

47. *See id.* ¶ 182 (“[I]t is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure . . .”).

48. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001) [hereinafter *U.S.-Shrimp Recourse*].

49. *U.S.-Shrimp*, *supra* note 19, ¶ 153(b).

50. *U.S.-Shrimp*, *supra* note 19, ¶ 155.

acting for protection of the environment and the promotion of sustainable development on the other.”<sup>51</sup> However, the Appellate Body argued that the CTE provided little guidance to it at the time, forcing the Appellate Body to resort to its own interpretative rules via the VCLT.<sup>52</sup> Specifically, the Appellate Body stated:

Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure qualifies for justification under Article XX.<sup>53</sup>

Therefore, whatever “activism” the Appellate Body practiced in this case can be attributed to the failure of the CTE and the Members to provide adequate guidance and the Appellate Body’s mandate to “clarify” existing provisions “in accordance with customary rules of interpretation of public international law.”<sup>54</sup>

In sum, the Appellate Body report in *U.S.-Shrimp* is significant for the following reasons. First, it discouraged unilateral action by an economic superpower, which has detrimental effects on developing countries. The United States not only responded to the complaint but also felt obliged to comply with the ruling by modifying the application of a domestic conservation law. Second, the decision enhanced the impact and significance of both public international law and international environmental law by incorporating the VCLT and international environmental agreements and declarations. Third, the Appellate Body’s approach encouraged movement towards an international agreement that is arguably more effective in conserving endangered sea turtles than unilateral action.

#### CONCLUSION

Appellate Body reports, like those of any other judicial and arbitral body, are not all uniformly sound and perfectly reasoned. However, the Appellate Body achieved its status as the “jewel in the crown”<sup>55</sup> of the multilateral trading system because of decisions like *U.S.-Shrimp*, in which it resolved a dispute in a manner that facilitated Member compliance and upheld the rule of law.

*U.S.-Shrimp* demonstrates how the Appellate Body utilizes the principles of public international law—such as those set forth in the VCLT—to infuse

51. Trade and Environment, Ministerial Decision of 14 April 1994, 33 I.L.M. 1267 (1994).

52. Richard G. Tarasofsky, *The WTO Committee on Trade and Environment: Is It Making a Difference?*, 3 MAX PLANCK UNITED NATIONS Y.B. 479-80 (1999).

53. *U.S.-Shrimp*, *supra* note 19, ¶ 155.

54. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization Art. 3(2), Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

55. Press Release, World Trade Org., WTO Disputes Reach 400 Mark (Nov. 6, 2009), [https://www.wto.org/english/news\\_e/pres09\\_e/pr578\\_e.htm](https://www.wto.org/english/news_e/pres09_e/pr578_e.htm) (“‘The dispute settlement system is widely considered to be the jewel in the crown of the WTO,’ said [Director-General Pascal] Lamy.”).

flexibility into the provisions of WTO agreements. By adopting a flexible reading of Article XX, the Appellate Body in *U.S.-Shrimp* improved the panel decision in significant ways. The Appellate Body decision forced the United States to modify the application of Section 609 and to engage in negotiations for a multilateral solution without abandoning the measure altogether. The U.S. response allowed the Appellate Body to eventually determine that Section 609 was justified under Article XX(g).<sup>56</sup> The Appellate Body's approach, while not perfect, permitted the United States to save face and maintain a conservation measure through a multilateral approach.

The disproportionate impact of Appellate Body reports is largely due to political stalemate and a non-functioning legislative body at the WTO. The best way to avoid "activist judging" is for governments to have successful trade negotiations and avoid bringing cases to the WTO dispute settlement system that implicate difficult balancing issues or are essentially intractable disputes that have not been amenable to diplomatic solutions. Unfortunately, WTO Members are doing the opposite by increasingly invoking the heretofore sparingly used national security exception in trade disputes.<sup>57</sup>

The Appellate Body has worked diligently to balance the competing goals of providing flexibility to the multilateral trading system and maintaining its security and predictability. Only a standing Appellate Body is capable of taking such a long-term view. As illustrated by the preceding discussion of *U.S.-Shrimp*, such decisions have been instrumental in improving global trade relations, and we must not "throw out the baby with the bathwater." The Appellate Body can still be the jewel in the crown of the global trading system, and it should be allowed to do its job.

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56. See *U.S.-Shrimp Recourse*, *supra* note 48.

57. At its meeting on November 21, 2018, the DSB agreed to requests from seven Members for the establishment of panels to examine tariffs imposed by the United States on steel and aluminum imports: China, the European Union, Canada, Mexico, Norway, Russia, and Turkey. The DSB also agreed to four U.S. requests for panels to examine countermeasures imposed on U.S. imports by China, Canada, the European Union, and Mexico in response to the steel and aluminum tariffs. See *Panels Established to Review U.S. Steel and Aluminum Tariffs, Countermeasures on U.S. Imports*, WORLD TRADE ORG. (Nov. 21, 2018), [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_19nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm).