A. INTRODUCTION

The academic debate in the field of trade and environment is a relatively recent phenomenon. The early 1970s saw significant international legal developments regarding the intersection of trade and environmental issues, notably the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). International efforts to address environmental concerns on a global basis also began in this period, the most notable being the Declaration of the United Nations Conference on the Human Environment. Prior to this period, international environmental protection efforts generally took the form of agreements to conserve exhaustible natural resources for their economic value, rather than their ecological value. Thus, in 1947, the General Agreement on Tariffs and Trade (GATT) made room for the conservation of exhaustible natural resources by providing a general exception to GATT obligations in Article XX(g).

However, the wording of this GATT provision did not limit the exception to conservation for economic value alone. Article XX(g) was not tested in a modern environmental context until a GATT dispute occurred between Mexico and the United States over an American ban on Mexican tuna imports that was meant to protect dolphins from Mexican tuna fishermen. This case raised a host of issues regarding the proper interpretation of GATT Article XX(g), as well as Article XX(b) (which permits measures necessary to protect humans, animals and plants). The GATT Panel struck down the American measure as a violation of GATT obligations and ruled that it did not fit either exception. However, the ruling of the Panel was never adopted and thus lacks normative value.¹ This 1991 decision, together with the numerous academic articles

the dispute spawned, marks the beginning of sustained academic interest in the trade and environment debate.

A central issue in the trade and environment debate concerns the use of trade barriers by one country to induce changes in the environmental policies of another. Such trade barriers might be used in the context of a multilateral environmental agreement (MEA), such as CITES, which requires restrictions on trade in endangered species, or the Montreal Protocol on Substances that Deplete the Ozone Layer, which requires signatories to restrict trade in ozone-depleting chemicals. When such trade barriers are applied to other signatories of the same MEA, their use is not controversial. However, when trade barriers are imposed unilaterally by one country to induce another country to change its domestic environmental law, the matter becomes much more complicated, both in terms of international politics and international law.

Two rulings of the WTO Appellate Body in United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp and Shrimp 21.5) have tackled this issue by interpreting Article XX(g) to permit the United States to unilaterally impose trade barriers to pressure Malaysia to change its domestic environmental regime for the protection of sea turtles. These rulings have been described as a “revolution in WTO jurisprudence.”2 Given previous interpretations of Article XX(g) in the Mexican tuna cases (which occurred under the old GATT dispute resolution system), the conventional view held by many trade experts before the Shrimp rulings, and the lack of consensus on this issue among the WTO membership, a revolution has indeed occurred. The Shrimp rulings raise important questions regarding the proper interpretation of Article XX, the relationship between trade law, environmental law and the general principles of public international law, and the role of the WTO judiciary in the development of international law. As such, these rulings have important implications not only in the field of trade and environment, but more generally in the realm of public international law and global governance.

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