CHAPTER 6
UNILATERAL MEASURES AND ARTICLE XX

A. INTRODUCTION

In Shrimp and Shrimp 21.5, the WTO Appellate Body interpreted GATT 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. Given previous interpretations of Article XX(g) in the Tuna cases (which occurred under the old GATT dispute resolution system and were never adopted), the conventional view held by many trade experts before the Shrimp rulings, and the lack of consensus on this issue among the WTO membership, this is a remarkable development. The Shrimp rulings raise important questions regarding the proper interpretation of Article XX and the relationship between trade law, environmental law and the general principles of public 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.

This chapter analyzes the consistency of unilateral environmental trade restrictions with customary international law regarding the jurisdictional competence of states, international environmental law and WTO law. Against the backdrop of this analysis, this chapter will consider to what extent WTO law permits the use of unilateral trade measures to address international environmental problems. The chapter first determines the jurisdictional nexus that is required to justify unilateral measures under Article XX. It then considers other conditions that should be met for such measures to pass the tests in Article XX. This analysis leads to the conclusion that unilateral environmental trade measures can be justified under Article XX in a manner that is consistent with the jurisdictional competence of states and international environmental law. However, this analysis will not be the final word on the compatibility of Shrimp analysis with
other aspects of WTO law and general international law, which are addressed in later chapters.

B. THE TUNA AND SHRIMP RULINGS ON JURISDICTION

The issue of whether there is an implied jurisdictional limitation in GATT Article XX was raised in the _Tuna_ cases and the _Shrimp_ cases. This section reviews the evolution of Article XX interpretations with respect to this issue in the context of key principles of general international law and international environmental law.

In _United States—Restrictions on Imports of Tuna_ (1991) (_Tuna I_), the United States had banned tuna imports from several countries, including Mexico, pursuant to its Marine Mammal Protection Act of 1972 (MMPA). The stated purpose of the United States tuna embargo was to discourage fishing methods that kill dolphins in international waters. However, the MMPA provisions gave no regard to whether the foreign fishing activity that resulted in the incidental taking of marine mammals was conducted wholly within the waters of another state and was consistent with that state’s domestic and international law obligations. In all of the cases in which import bans were imposed, the fishing activity of the foreign fishermen was consistent with that state’s international legal rights pursuant to international treaty and customary international law. While the dolphins being protected were listed as at risk of becoming endangered under the Convention on International Trade in Endangered Species (CITES), CITES neither required nor authorized the ban on trade in tuna. Mexico challenged the embargo as a disguised trade barrier that was inconsistent with the U.S. obligations under the GATT. In _United States—Restrictions on Imports of Tuna_ (1994) (_Tuna II_), the European Economic Community (EEC) and the Netherlands challenged provisions of the MMPA, since amended by the International Dolphin Conservation Act of 1992, which imposed trade restrictions on imports of tuna from “intermediary” nations.

In _Shrimp_, the United States banned shrimp imports from WTO members that did not comply with American legal requirements regarding the protection of sea turtles from incidental death in the shrimp harvesting process. The United States negotiated and con-