CHAPTER 10

THE DOCTRINE OF NECESSITY

A. INTRODUCTION

Both the Shrimp rulings and international environmental law indicate a clear preference for multilateral measures over unilateral measures. However, both recognize that this may not be possible in all circumstances. With respect to WTO law, measures taken under MEAs against MEA parties and third parties are better able than unilateral measures to meet concerns regarding the effect of market power on access to Article XX rights and the compatibility of international environmental trade measures with the concept of special and differential treatment of developing countries. Unilateral measures should therefore be more strictly circumscribed than MEA measures taken against MEA parties or third parties, even though the Shrimp analysis is capable of justifying both types of measures. The customary international law doctrine of necessity may be used to distinguish between MEA measures taken against parties to the MEA, MEA measures taken against third parties and unilateral measures. Bringing the doctrine of necessity into the mix provides a method for distinguishing the treatment of MEA measures and unilateral measures that promotes further coherence between WTO law, international environmental law and WTO law.

The principle of necessity may be invoked under customary international law “to excuse the non observance of international obligations” in exceptional circumstances. The jurisdictional nexus that the importing country has with the environmental problem is relevant to determining whether necessity applies. This provides a link between the ruling in Shrimp 21.5 and the general body of international law regarding jurisdictional competence and necessity.

1 Judge Dionisio Anzilotti, Oscar Chinn, [1934] PCIJ, A/B 63, 113.
This chapter proposes that the three types of environmental trade measures be addressed in distinct ways under GATT Article XX(g), based on a combination of requirements of WTO law, international environmental law and general international law. By definition, international environmental measures address transboundary or global environmental problems. Thus, according to the analysis in Chapter 5, Article XX(g) is the applicable heading, rather than Article XX(b).

B. THE TREATMENT OF MEA PARTY, THIRD PARTY AND UNILATERAL MEASURES

MEAs establish a legal interest in the subject matter for their members that establishes a jurisdictional nexus for the parties to the MEA, thus providing a basis for provisional justification under Article XX(g) for global and transboundary environmental problems. The application of MEA trade measures between parties remain subject to the requirements of the Article XX chapeau in order to ensure against abuse: mainly the duty to negotiate, flexible application that takes prevailing conditions into account and transparency/due process. In this category, the MEA satisfies the duty to negotiate—thus satisfying the duty in international environmental law and in WTO jurisprudence. The application of MEA trade measures to third parties are also judged according to the chapeau analysis set out in the Shrimp cases, with the urgency of the environmental problem affecting the parameters of the duty to negotiate with non-members. For both categories, national implementation of MEA obligations satisfies the Article XX(g) requirement that there be domestic restrictions, while the MEA establishes that the measures “relate to” resource conservation.

Unilateral measures differ from the first two types of measures in that there may be no MEA that establishes a legal interest in the problem. Thus, in order to qualify for provisional justification under Article XX(g), there must be a jurisdictional nexus based on a territorial connection to the problem. The territorial connection must be proved in order to resolve cases where it is difficult to distinguish between local and transboundary or global problems. In the absence of a MEA, the Article XX(g) requirements that the measures “relate to” resource conservation and be accompanied by domestic restric-