A. INTRODUCTION

This chapter will analyze whether and how the ambiguity in Article XX should be resolved in light of its role in facilitating evolutionary coherence between different branches of international law. How should the ambiguity be resolved in the short term, medium term and long term?

In the case of conflicts between WTO rules and MEAs, the best short-term solution may be to do nothing. After all, the problem is theoretical. There have been no disputes involving MEA-WTO conflicts. Moreover, the existing rules and dispute settlement mechanisms may prove to be adequate should any real conflict arise. The Shrimp jurisprudence, regarding the circumstances in which unilateral measures can be justified, can be applied to MEA measures taken against third parties. The current rules also appear to be adequate to address the issue of unilateral measures employed to induce participation in MEAs, provided such measures are allowed only as a last resort in accordance with the doctrine of necessity. To choose to do nothing is to recognize that “more law is not necessarily better.”

In the medium term, the WTO dispute resolution system is available to resolve ambiguities on a case-by-case basis. The value of this approach is that it would generate new ideas, produce a larger body of jurisprudence and allow flexible practices to develop over time. This “litigation” option facilitates an evolutionary approach to developing coherence between WTO law and other branches of interna-

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1 I do not know whether to attribute this phrase to Robert Hudec or to Joel Trachtman. The insight belongs to the former while the words were written by the latter. See Joel P. Trachtman, Robert E. Hudec (1934–2003), 97 AM. J. INT’L L. 311, at 313 (2003).
tional law, akin to the course of evolution followed by GATT dispute resolution over its first four decades. The strength of this approach is its flexibility. The principle weakness lies in the lack of predictability. The ambiguity remains. Moreover, pursuant to DSU Article 3(2), panel decisions “cannot add to or diminish the rights and obligations provided in the covered agreements.” Nor do they bind future panels, since the authority to adopt formal interpretations is reserved to the Ministerial Conference and the General Council. Thus, beyond the case at hand, panel decisions have persuasive value only. Moreover, panels may choose to exercise “judicial restraint” and explicitly or implicitly leave the matter for the members themselves to resolve. For example, in the Tuna case the Panel stated:

if the Contracting Parties were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the Contracting Parties were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the Contracting Parties to impose such limits and develop such criteria.

Judicial restraint is not an excuse to fail to take all the relevant non-WTO rules into account in judicial opinions so that greater coherence may be achieved between different branches of international law. Nevertheless, given the limitations of panel interpretations and the prospect of judicial restraint, the litigation option provides a limited means to resolve ambiguities in the relationship between trade and environmental law.

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2 WTO Agreement, art. IX(2).