AN ANALYSIS OF CUSTOMARY INTERNATIONAL LAW AND THE IMPORTANCE OF DISPUTE SETTLEMENT: A STUDY OF ENVIRONMENTAL LAW EXCEPTIONS UNDER ARTICLE XX

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ABSTRACT

Customary international law plays a significant role in the World Trade Organization (WTO) Disputes Settlement System. Further, WTO jurisprudence has gained enormous importance and influences international law to a great extent, which has resulted in the development of new jurisprudence. This research is of significance as it explores the relationship between the rules of international law, particularly customary international law, and the WTO Disputes Settlement System. In particular, it examines state sovereignty and the role and application of customary international law to WTO disputes. It also explores the jurisprudence of the non-intervention principle under customary international law. Thus, this research tests the principle of sovereignty and non-intervention in relation to economic coercion. Further issues examined include whether unilateral trade barriers are covered under the scope of necessity and the status of the precautionary principle in WTO jurisprudence. Finally, it evaluates the legitimacy of the decisions made by WTO and examines case law involving environmental exceptions under the WTO Agreement.

I INTRODUCTION

Over the years, the WTO[1] jurisprudence has been witnessing a manifold increase in the influence of international law. Therefore, it is argued that an examination of the current

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trends in the interplay between international and WTO law, and the impacts that are visible in the judicial pronouncements is thus inevitable for ascertaining the development of new jurisprudence. The relationship between trade liberalisation and the environment is of significance. However, there have been conflicts between the General Agreement on Tariffs and Trade ('GATT')[2] and trade measures under Multilateral Environmental Agreements ('MEAs'). These conflicts have been resolved to some extent by relying on exceptions under Article XX of GATT.[3]

The source of jurisprudence of interpretation issued under the WTO Agreement is derived from Articles 31 – 32 of the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*).[4] In particular, the reliance of Article 31 of the *Vienna Convention* has been acknowledged when the Appellate Body has referred to it in their judgment for *United States – Standards for Reformulated and Conventional Gasoline (U.S. – Gasoline)* case.[5] In fact, Article 32 has also been acknowledged as having attained the status of a customary rule of interpretation of public international law.[6] This equation of customary rules of interpretation of public international law in Article 3 (2) of the Understanding of Rules and Procedure Governing the Settlement of Disputes (DSU), along with Articles 31 – 32 of the *Vienna Convention*, is founded ultimately on the need to ensure certainty and clarity in the process of interpretation of the WTO Agreements.[7] According to Hart's 'rule of recognition', it would therefore render Articles 31 – 32 of the *Vienna Convention* as having a binding effect on WTO members who are not party to the *Vienna Convention*.[8]

The use of the above *Vienna Convention* has been recently explained by the WTO Panel in *European Communities – Measures Affecting the Approval and Marketing of Biotech*

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[1] See Agreement establishing the World Trade Organisation, (WTO) 33 I.L.M. 1125 (1994).
[2] See *General Agreement on Tariffs and Trade* (GATT), 55 U.N.T.S.187 (1947).
[3] Tania Voon, 'Sizing up the WTO: Trade-Environment Conflict and the Kyoto Protocol' (2000) volume 10, No. 1, *Journal of Transnational Law and Policy*, 72, 73; see also Marino Marcich, 'Trade and Environment: What Conflict?' 31 *Law and Policy International Business* (2000) 917, 920.
[4] *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[5] *United States – Standards for Reformulated and Conventional Gasoline ('US - Gasoline'),* WTO Doc WT/DS2/AB/R (29 April 1996) (Report of the Appellate Body).
It has been cited by the Appellate Body as follows:

> …attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU [Understanding on Rules and procedures Governing the Settlement of Disputes], to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization…That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.

[6] See for example *Mexico – Telecommunication,* WTO Doc WT/DS204/R (2 April 2004) para 7.15 (Report of the Panel); *US-Cotton Yarn,* WTO Doc WT/DS192/R (2001) para 7.17 (Report by the Panel Adopted on 5 November 2001); *US-Sardines,* WTO Doc WT/DS231/R (29 May 2002) para 7.12 (Report of the Panel); *Japan – Taxes on Alcoholic Beverages,* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 10 (Report of the Appellate Body); *US – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico,* WTO Doc WT/DS282/R (20 June 2005) para 7.4-7.5 (Report of the Panel).
[7] Asif H. Qureshi, *Interpreting WTO Agreements, Problems and Perspectives* (2006) 3-4.
[8] See H.L.A Hart, *The Concept of Law* (2nd ed. 1994) 100.

Products (*EC – Biotech*) dispute.[9] Although the Panel defined the sources of law that it considered were 'relevant rules of international law applicable in the relations between the parties', and thereby covered under Article 31 (3) (c), they declined to cross-fertilise WTO law with relevant treaty-based sources of public international law. In this sense, they found that the obligation to take account of these sources only applied to those rules that were binding on all WTO members, and not, for example, those treaty-based rules of international law that were binding between the disputant but not all other members. As pointed out by Caroline Henckels,[10] in doing so 'it appears that the Panel may have obfuscated the distinction between the use of external sources of international law to inform the interpretation of the relevant terms of the Sanitary and Phytosanitary (quarantine) Agreement (SPS) agreement in order to clarify member's rights and obligations under it, and the use of other rules of international law as separately justifiable or as prevailing over member's substantive obligations under the SPS agreement'. In addition, the narrow reading of the Panel's applicable sources of treaty law would thus hinder the WTO law to be able to be responsive to the ongoing evolution of international law.[11]

As a result of its narrow reading, the Panel took a conservative approach to using international environmental law as an interpretative aid. This has been reflected by the Panel's view that exogenous rules of international law could assist in treaty interpretation 'in the same way that dictionaries do', rather than 'because they are legal rules'.[12] The Panel went on to state that such sources were only useful in terms of 'establishing, or confirming, the ordinary meaning of the treaty terms and thus concluded that it did not find it useful to take the *Convention on Biological Diversity*[13] or the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (*Cartagena Protocol*)[14] into account, because they were not informative.[15]

[9] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (*'EC - Biotech'*) WTO Doc WT/DS291, WT/DS292, WT/DS293 (29 September 2006) [4.132]-[4.1333], [4.194], [4.253] (Report of the Panel).
[10] Caroline Henckels, 'GMOs in the WTO: A Critique of EC - Biotech' (2006) 7 *Melbourne Journal of International Law,* 278, 292.
[11] Ibid 293.
[12] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*'EC-Biotech'*) WTO Doc WT/DS291, WT/DS292, WT/DS293 (29 September 2006) [7.92] (Reports of the Panel).
[13] *Convention on Biological Diversity,* opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[14] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 5 June 2000, UNTS 17 2004 (entered into force 11 September 2003).
[15] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*'EC-Biotech'*) WTO Doc WT/DS291, WT/DS292, WT/DS293 (29 September 2006) [7.74-7.75] (Reports of the Panel).

II WTO AND THE ROLE OF PUBLIC INTERNATIONAL LAW

As stated by Joost Pauwelyn, the WTO compact is not a 'self-contained' legal regime.[16] The relation between the WTO Disputes Settlement System and other rules of international law is still evolving. Article 13 of DSU requires the Panel and the Appellate Body to make decisions in accordance with customary rules of interpretation of public international law.[17] They are, however, precluded from making recommendations or rulings that add or diminish member's rights and obligations under WTO law. In addition, they do not have jurisdiction to rule on claims of breaches of non-WTO rules of international law, such as rules of international environmental law contained in MEAs.[18] This limited jurisdiction maintains the internal legitimacy of the decision-making of both the Panel and the Appellate Body, by not allowing members' rights and obligations under WTO Agreement to be affected by separately justifiable obligations arising from treaties exogenous to the WTO.[19] While the jurisdiction of the Panel and the Appellate Body is limited, the DSU does not limit the sources of law that they may apply when interpreting WTO agreements.[20] Indeed, it can be argued that the Panel's obligation to 'make an objective assessment of the matter before it'[21] means that external sources of international law should inform the interpretation of WTO agreements.[22]

III SOVEREIGNTY OF STATES

The principle of state sovereignty under customary international law is an established one, meaning that all states are equal and have an autonomy to exercise their power over both its territory and the people living in that territory. In fact, it is an integral part of the principles of equality of states, territorial integrity and political independence that is referred to in Article 2 of the *United Nations Charter*.[23] Further, according to Martin

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[16] Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 536, 577.

[17] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 2005), annex 2 (understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401, Article 3.2.

[18] Henckels, above n 10, 284.

[19] Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO' (2005) 26 *University of Pennsylvania Journal of International of Economic Law* 693, 726-7.

[20] Pauwelyn, above n 16, 538. However, Pauwelyn further notes that 'the limited *jurisdiction* of panels has led to unjustified restrictions on the distinct matter of *applicable law* before a panel': at 577 (emphasis in original).

[21] The exact language of Article 11 (Function of Panels) of the DSU states as follows:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. The Panel should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

[22] Henckels, above n 10, 284.

[23] *Charter of the United Nations*, A 1979 resolution confirmed the application of this principle. See *Inadmissibility of the Policy of Hegemonism in International Relations*, GA Res 34/103 (14 December 1979). Article 2 (1) reads 'based on the principles of the sovereign equality of all its members.'

Dixon and Robert McCorqoudale,[24] 'as a collar to a State's own sovereignty, it has responsibilities to respect the sovereignty of other states and, perhaps, not to abuse its sovereignty, for example, by causing environmental damage'.

As Lorraine Elliot points out,[25] 'sovereignty is usually characterised as having four inter-connected dimensions that are embedded in empirical (or material) and normative (or ideational) practices such as internal, external, formal and effective'. First, internal sovereignty defines and identifies the ultimate authority within the state and the relationship between rulers and the ruled. This 'internal relationship' is best illustrated by the classic explanation of the prominent jurist John Austin, as he explained 'the sovereign is that person or body of persons which is habitually obeyed by the bulk of society and which does not habitually obey any other person or body'.[26] 'The sovereign may therefore be a specific person, such as absolute monarch, or a body of persons, such as democratically elected parliament'.[27] In either case, Austin goes on to explain that 'the sovereign can be identified as that person or a body of person which habitually receives obedience and does not itself display obedience'.[28] In this sense, sovereignty is a juridical principle that establishes the 'entitlement to rule over a bounded territory'[29] and determines that 'only one sovereign power can prevail within any single territory'.[30] Second, external sovereignty means that states are subject to no higher or other authority, that they are free of external authority structures.[31] It inscribes a state as equal with all others, and generates the principle of political independence and autonomy. Third, formal sovereignty can be taken to mean the legal possession of sovereign status – a *de jure* sovereignty – established by international law and acknowledged through recognition by other, equally juridical sovereign states. In effect, states constitute each other as formally sovereign. Formal sovereignty is an absolute category – a political entity (in this case a state) is either sovereign or it is not.[32] Fourth, effective (or de facto) on the other hand, refers to the 'capacity to exercise those rights',[33] and includes the ability of states to regulate and maintain authority over transactions across their borders; to control what comes in and what goes out.

[24] See Martin Dixon and Robert McCorqoudale, *Cases and Materials on International Law* (4th Ed, 2003) 235.
[25] Lorraine Elliot, 'Sovereignty and the Global Politics of the Environment: Beyond Westphalia' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-envisioning sovereignty the end of Westphalia*? (2008) 193, 194.
[26] Cited in Denise Meyerson, *Essential Jurisprudence* (Routledge, Cavendish 2006) 10.
[27] Ibid.
[28] Ibid.
[29] Steve Smith, 'Globalisation and Governance of Space: A Critique of Krasner on Sovereignty' (2001) 1 *International Relations of The Asia Pacific* 199, 220, 226.
[30] Andrew Linklater, 'Citizenship and Sovereignty in the Post-westphalian European State', in Daniele Archibugi, David Held and Martin Kohler (eds) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (1998), 129.
[31] Robert O. Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40(4) *Journal of Common Market Studies* 743-65, 744.
[32] Elliot, above n 25, 194-195.
[33] Marc Williams, 'Rethinking Sovereignty' in Eleonore Kofman and Gillian Young (eds) *Globalisation: Theory and Practice* (1996) 113.

As noted above, although the principle of sovereignty remains a central pillar of international environmental law, it is submitted that the traditional principle of sovereignty of a state is becoming increasingly fragile by the threat of trade liberalisation within the context of a WTO agreement as well as the MEAs. The fundamental principle of state autonomy to self-determine its environmental policy is being challenged by not only the unilateral measure (to induce environmental change of one state) but also, to certain circumstances, in the MEAs. The sovereign right to policy autonomy is therefore constrained by MEAs, although those agreements were entered into as a sovereign act. For example, decisions by state parties under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) agreement to list and restrict trade in endangered species are not only directly applicable to other state parties on a multilateral basis but also have consequences for states that are not parties. This is because state parties are restricted in their trade with non-parties as well. Another similar example can be seen in the Montreal Protocol on ozone-depleting substances because it also places a restriction on trade in such substances with non-parties. Therefore, as pointed out by Lorraine Elliot, 'MEAs could have consequences for states that exercise their sovereign right not to commit to a particular international environmental agreement'.[34] It would thus constitute a sovereignty bargain where a state could enhance its sovereignty by choosing not to ratify particular MEAs, but at the same time suffer losses with this option and as such MEAs would have restrictive consequences attached to them indirectly.

There is debate over whether the rulings in the *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps)*[35] represent an instance of deference to or intrusion upon national sovereignty. For example, Sands characterises the *Turtle-Shrimp*[36] ruling as an example of 'the active role of courts in identifying the existence of norms where the international legislature…has refrained from doing so' or to 'fill in the gaps' of international law.[37] He argues that the 'new international judiciary' of permanent courts and tribunals that have been established in recent years has 'in many instances, shown itself unwillingly to defer to traditional conceptions of sovereignty and state power (the WTO judiciary representing but one example).'[38] The creation of an international judiciary means that states have given up 'a degree of control in the "making" of international law, since the line between interpretation and legislation can

[34] Elliot, above n 25, 203.

[35] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[36] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[37] Philippe Sands, 'Turtles and Tortures: The Transformation of International Law', Inaugural Public Lecture as Professor of Public International Law, University of London, (6 June 2000) <http://www.nyu.edu/pubs/jilp/main/issues/33p.pdf>, pp. 527-559, at 552 at 19 February 2003.

[38] Ibid 553.

often be hard to draw'.[39] Howse, on the other hand, argues that the *Turtle-Shrimp*[40] ruling does not represent a case of judicial activism, but rather an example of deference to the national sovereignty of the United States in the absence of clear WTO rules prohibiting the use of trade measures to achieve international conservation objectives.[41]

Jurisdictional competence is one manifestation of the concept of sovereignty. Another is the principle of the sovereign equality of states. Article I of the UN Declaration requires states to conduct trade relations in accordance with the principles of sovereign equality and non-intervention.[42] In the event of any inconsistency between the UN Charter and other treaties, the former prevails.[43] These principles constitute customary international law.[44] DSU Article 3 (2) requires the interpretation of WTO Agreements in accordance with the customary international law, which incorporates these principles by reference. Thus, under international law, the exceptions in GATT Article XX must be interpreted and applied to conform to the principles of sovereign equality and non-intervention. Under GATT 1994, the United States has argued that it has not ceded its national authority to the GATT/WTO to adopt international environmental policies independently (that is, unilaterally). This position was reflected in *United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)*[45] as follows:

> The United States stated that in becoming Contracting Parties to the General Agreement, countries did not agree to surrender their ability to take effective action to protect the environment, including the global commons.[46]

This argument was reiterated in *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*:[47]

> [T]he United States pointed out that the United States measure did not affect Malaysia's sovereignty – the United States could not force any nation to adopt any particular policy. In contrast, claims the United States, control of a nation's borders is a fundamental aspect

[39] Ibid, 555.

[40] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[41] Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491.

[42] Article I of the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res 2131, UN GAOR, 20th Session, Supp No 14, UN Doc A/6220 (1965) provides, 'state shall conduct their international relations in the economic…and trade fields in accordance with the principles of sovereign equality and non-intervention'.

[43] *Charter of the United Nations*, Article 103 provides 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under the present Charter shall prevail.'

[44] See *Military and Paramilitary Activities* (*Nicaragua v United States*), 1986 ICJ 14.

[45] *United States – Restrictions on Imports of Tuna,* GATT Doc DS29/R (1994) 33 ILM 839 (Report by the Panel unadopted).

[46] Ibid, para 3.10.

[47] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel).

> of sovereignty, and the United States measure is simply an application of its sovereign right to exclude certain products from importation. Whether or not the United States, in acceding to the WTO Agreement, agreed to refrain from such actions is the subject of this dispute. And… the Appellate Body found that the United States has a jurisdictional nexus with the respect to the sea turtles found in [Malaysia's] waters, and…found that the general design and structure of Section 609 falls within the scope of Article XX (g).[48]

The Appellate Body appears to have accepted the United States characterisation of the sovereignty issue. In the *Turtle-Shrimp*[49] cases, it was clear that marking out this legal boundary between areas where WTO members have ceded sovereignty and where they have retained it is a principle function of GATT Article XX.[50] However, it is also clear that the boundary shifts with the facts of each case and the legal framework existing at the time of interpretation.[51] A more clearly defined boundary might defeat the purpose and role of Article XX; hence the ambiguity of the language used in Article XX.[52] The Panel in *Turtle-Shrimp II* appears to have accepted the argument of the U.S., that it did not agree to refrain from using trade restrictions to protect the global commons when it acceded to the WTO, but avoided getting into a debate over the nature of sovereignty:

> Malaysia contests the requirement of a 'comparable programme' as an interference with its sovereign right to determine its environmental policy. The Panel does not read the Appellate Body Report as supporting Malaysia's view. The Appellate Body Report did not contest the right of the United States to restrict imports of shrimp for environmental reasons…[53]

At present, Malaysia does not have to comply with the United States' requirements because it does not export to the U.S. If Malaysia exported shrimp to the U.S., it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances:

> While we cannot, in light of [this] interpretation…find in favour of Malaysia on this 'sovereignty' issue, we nonetheless consider that the 'sovereignty' question raised by

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[48] Ibid, para 3.145.

[49] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[50] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*'Turtle-Shrimps I'*) WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), para 137-138, characterising the view that unilaterally determined policies are, to some degree, a common aspect of the Article XX exceptions as a principle central to the ruling.

[51] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.51-5.52.

[52] The Appellate Body acknowledged ambiguity in *United States – Standards for Reformulated and Conventional Gasoline* (*'US-Gasoline'*) WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body), stating '[t]he text of the chapeau is not without ambiguity'.

[53] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*'Turtle-Shrimps II'*) Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.123.

> Malaysia is an additional argument in favour of the conclusion of an international agreement to protect and conserve sea turtles which would take into account the situation of all interested parties.[54]

The Appellate Body did not disagree with the Panel on this point, nor shed much light on the "sovereignty" issue. Rather, the focus of both the Panel and the Appellate Body seems to be on disposing of the case in a way that resolves the immediate dispute and encourages the parties to settle issues of general international law in another forum. In this case, the Panel appears to be saying that the best way for Malaysia to preserve its sovereignty is to exercise it by participating in the negotiation of an international environmental agreement where the situation can be taken into account. If the U.S. fails to negotiate in good faith, then Malaysia can seek a further review of the United States' actions under Article 21.5 of the DSU.[55] In other words, the Panel implicitly adopted the view that Malaysia's complaint was premature, because Malaysia should have first sought to defend its interest in the multilateral environmental negotiations before bringing a complaint to the WTO.[56] Moreover, the Panel implied that Malaysia chose the wrong forum to argue that the U.S. measure was inconsistent with sovereign equality and non-intervention.

Some interpret a statement by the Panel in *Tuna-Dolphin I*[57] - that '[a] contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from his own' - as an application of the principle of sovereign equality in the trade and environmental context.[58] In this instance, the Panel implied that access to WTO rights should not depend on the uniformity of environmental policies. This decision can also be viewed as denying the right to use economic coercion to intervene in the internal affairs of other states in the context of GATT. Given the acceptance of the principle of sovereign equality in customary international law[59] and in WTO law, it is odd that this principle was ignored in the *Turtle-Shrimp* cases. Given its role in compensating for the inequality that flows from levels of economic development, it is even odder that this principle was not considered in the context of a dispute

[54] Ibid para 5.103.
[55] See ibid para 5.86, where the panel emphasised that the United States is 'provisionally' entitled to apply the measure, 'subject to further control under Article 21.5 of the DSU'.
[56] In addition, Malaysia was encouraged to seek American certification of its turtle protection programme in order to export shrimp to United States. In effect, this required Malaysia to consent to the intrusion of American officials in its internal affairs. Malaysia's consent could preclude the wrongfulness of the American actions under international law. See Article 20 of the *Draft Articles on Responsibility of the States for Internationally Wrongful Acts*, Report of the International Law Commission, below n 112.
[57] *United States – Restriction on Imports on Tuna*, GATT BISD, 39th SUPP, 155, GATT Doc DS21/R (1991) (Report by the Panel not adopted), 30 ILM 1594 (1991).
[58] Ibid, para 6.2. Also see, Kriangsak Kittichaisaree, 'Using Trade Sanction and Subsidies to Achieve Environmental Objectives in the Pacific Rims' (1993) 4 *Colorado Journal of International Environmental Law & Policy* 296, 306: 'it is doubtful whether, in international law, the United States can assert the right to protect the life or health of human and animals in international areas or within the territory of other states. Compliance with domestic law of another state in spite of the fact that there is no international legal obligation to do so is contrary to the notion of sovereign equality.'
[59] See *Military and Paramilitary Activities* (*Nicaragua v United States*), [1986] ICJ Rep 14.

involving the intrusion on the internal affairs of a developing country, even if the WTO judiciary believed the issue to fall outside of its jurisdiction.[60]

IV THE DOCTRINE OF NON-INTERVENTION AND UNILATERALISM

The jurisprudence of the non-intervention principle under customary international law is derived from the rule of *pacta sunt servanda*. This rule has been endorsed by the *Vienna Convention* under Article 26 which states that 'every treaty in force is binding upon the parties to it and must be performed by them good faith'. In simple terms, it means that the state parties to a particular treaty are duty bound to fulfil their obligations as well as to respect other state parties of a similar treaty. The principles of non-intervention therefore place a limitation on one state to interfere with the internal affairs of another state. This principle is echoed in the statement under Article 1 of the *Declaration on Principles of International Law concerning friendly Relations and Cooperation among states in Accordance with the Charter of the United Nations*.[61] Further, Article 3 has acknowledged that the principles of the Declaration 'constitute basic principles of international law'. With respect to the United Nations, the principle of non-intervention is stated in the *United Nations Charter* Article 2 (7).[62]

Although the doctrine of non-intervention is clearly reflected under the above declaration and charter, it would remain to be abused by the state with significant economic power to use economic coercion or justify their unilateral measure based on the doctrine of necessity. Thus, the principle of sovereignty and non-intervention would be tested in this study with respect to economic coercion and the doctrine of necessity within the context of trade liberalisation under the WTO Agreement. Until *Turtle-Shrimps II*,[63] trade bans are successfully challenged under GATT as violations of trade rules that were not saved by exceptions for environmental measures in GATT Article XX. The holding in *Turtle-Shrimps II*[64] appears to be at odds with customary international law regarding

[60] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*'Turtle-Shrimps II'*) Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.103.

[61] Annex to Resolution 2625 (XXV) of the United Nations General Assembly, adopted without vote October 1970. It provides:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other states…No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantage of any kind…Nothing in the foregoing…shall be construed as affecting…provision…relating to the maintenance of international peace and security.

[62] Article 2 (7) of the *United Nations Charter* reads that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measure under Chapter VII.

[63] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[64] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

jurisdictional competence because the U.S. measure seeks to regulate the acts of non-citizens outside its territory with the principle of non-intervention, because it permits one state to intervene in the internal affairs of another.[65]

Once a state enters a trade agreement, it assumes the obligations that it is bound to fulfil with respect to all other signatories of the agreement. That is, the state consents to limits on its freedom to regulate international trade unilaterally. The rule, *pacta sunt servanda*, is incorporated in the *Vienna Convention* by Article 26 as 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.[66] The principle of non-intervention limits the ability of one state to interfere in the internal affairs of another. Article I of the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States In Accordance with the Charter of the United Nations* states as follows:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of State… No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

Article 3 provides that the principles of the Declaration 'constitute basic principles of international law'. One scholar, Brownlie, notes that the 'legal significance of the Declaration lies in the fact that it provides evidence of the consensus among Members States of the United Nations on the meaning and elaboration of the principles of the Charter'.[67] The principle of non-intervention restricts the ability of all states to regulate acts outside their territorial limits or inside the territorial of another state. *The Restatement of the Law (Third) Foreign Relations Law of the United States (1986)* incorporated this principle through the codification by the following wordings:

> A state has jurisdiction to prescribe with respect to:
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interest in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) The activities, interest, status, or relations of its nationals outside as well as within its territory; and
> (3) Certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.
> Section 403 states as follows:

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[65] The Panel in *Turtle – Shrimps II* appears to have recognized this problem when it said, 'if Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances'. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article* 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.103.

[66] Article 26 of The *Vienna Convention*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[67] See Ian Brownlie, *Basic Documents in International Law* (2nd ed 1972) 32.

Even when one of the bases for jurisdiction under s 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. Reasonableness is not only 'a basis for requiring states to consider moderating their enforcement of law that they are authorised to prescribe, but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe'. [68] It should be noted that extraterritorial laws are invalid under international law. According to customary international law, a state acts in excess of its own jurisdiction when its measures purport to regulate acts that are done outside its territorial jurisdiction by persons who are not its nationals and that have no, or no substantial, effect within its territorial jurisdiction.[69] This prohibition of extraterritoriality, which may also be described as an aspect of the principle of non-intervention, would qualify as a 'customary rule of international law,' within the meaning of Article 38 of the *Vienna Convention*.[70] Both the WTO agreement and MEAs would therefore have to be interpreted in a manner that is compatible with the prohibition of extraterritoriality. However, the United States and, to a lesser extent, the European Union, have not resisted the temptation to exercise their economic power to induce changes to the internal political or legal regimes of other states.

Generally, each county's jurisdiction ends at its territorial limits, which includes the sea 12 nautical miles from the shore, with the exception of powers to regulate certain matters within the 200-nautical-mile exclusive economic zone in coastal waters.[71] Hence, no single country has jurisdiction to regulate the common areas of the world. Resources in international waters have been considered as common wealth. Nevertheless, the property rights of states in these resources are counterbalanced by an obligation of reasonable use that requires them to take into consideration conservation needs.[72] The obligations of reasonable use, however, have been too ambiguous and general to be of practical use.[73] Laws regulating the global commons emerge through the customary practice of the nations of the world or through treaties.[74] Even where a treaty exists, a country that refuses to participate in the treaty generally will not be bound by its rules,[75] unless the treaty expresses a customary rule of international law that is recognised as binding all

[68] *The Restatement of the Law (Third) Foreign Relations Law of the United States* §403 *(1986)*.
[69] Ian Brownlie, *Principles of Public International Law* (2nd ed 1973) 299-301.
[70] Ibid 302. Also see Article 38 of the *Vienna Convention* which states 'rules in a treaty becoming binding on third States through international custom. Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognised as such'.
[71] See *United Nations Convention on the Law of the Sea*, Article 3, 55-57.
[72] See *Icelandic Fisheries*, [1947] ICJ Rep. 3.
[73] See Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (1992), 119.
[74] See, for example, *United Nations Convention on the Law of the Sea* and *Treaty on Principles Governing the Activities of States in the Exploration* and *Use of Outer Space, including the Moon and other Celestial Bodies*, reproduced in Brownlie, above n 67.
[75] See Article 34 (Section 4 Treaties and Third States) of the *Vienna Convention* which states 'a treaty does not create either obligations or right for a third States without its consent'.

states.[76] When no country has exclusive jurisdiction, the so-called 'tragedy of the commons'[77] may happen. Over exploration and exploitation of shared resources is not something uncommon, the shared jurisdictional competence of states in the global commons thus can have serious environmental consequences.

A good example is the conflict that happened over cod in the North Atlantic.[78] The members of the North Atlantic Fisheries Organization agreed to limit the quantity of fish that each fishing nation could take each year, in order to preserve the resource for all. Each fishing nation agreed to annual quotas that limited the catch of its fishermen and agreed to enforce those quotas against its citizens. Spain, however, would not agree to limit the number of fish its fleet could catch in international waters. With cod stocks dropping to precarious levels, Canada's fishermen (whose territory is closest to the Grand Banks) were losing their livelihood. From a legal angle nothing could be done to force Spain's fishermen to comply. In response to this, however, Canada chose to seize a Spanish vessel that was seen fishing in international waters, arrest the crew and seize their catch. As a result, Spain alleged Canada of violating international law. In addition, Canada replied that it acted out of necessity due to the Spanish refusal to comply with catch limits. In spite of the dispute, the matter was eventually settled by negotiation. However, the incident proves the limits of international law in dealing with the regulation of the global commons. Therefore, it can be claimed that legal obligations and economic incentives play a significant role to promote the compliance for the international nations of world to exploit international resources in a sustainable manner. Moreover, the countries are unwilling to enter into agreements governing the activities of their citizens in international waters in the circumstances where there is actual or ostensible economic gain at stake.

While no country has jurisdiction to regulate fishing by foreign citizens in international waters, each country may regulate the acts of its own citizens. One way to offer countries with economic incentives to regulate the activities of their fisherman in international waters is to impose trade restrictions in important markets for the products that are thereby produced. Until the case of *Turtle-Shrimps*[79] surfaced, such trade bans were successfully challenged under GATT as violations of trade rules that were not saved by exceptions for environmental measures in Article XX of GATT. At first glance, the

[76] See Article 38 of the *Vienna Convention* which states 'nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such'.
[77] See Garret Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1234, reprinted in Bruce Ackerman et al (eds) *Perspectives on Property Law* (1995) 132.
[78] Bradley J. Condon, *Environmental Sovereignty and the WTO: Trade Sanctions and International Law,* (2006) 248.
[79] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

holding in *Turtle-Shrimps II*[80] appears to be absurd with customary international law in respect to jurisdictional competence. This is due to the effect of United States' measures that seek to regulate the acts of non-citizens outside its territory and with the principle of non-intervention, because it allows one state to intervene in the internal affairs of another. In *Turtle-Shrimps II*[81] the Panel appears to have acknowledged this issue when it mentioned:

> If Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances.[82]

The International Court of Justice (IJC) has recognised the principle of non-intervention as part and parcel of customary international law.[83] This principle of non-intervention flows from the concept that all states are equally sovereign and therefore enjoy the right to freely decide matters happening within their domestic jurisdictions. The other edge of this sword is that states are restricted from intervening, directly or indirectly, in the internal affairs of other states.[84] In its liberal expression, the duty on non-intervention condemns 'any form of interference' against the personality of a state or its political, economic or cultural elements.[85] However, the application of this principle remains ambiguous in the realm of economic coercion that is analysed below.

V Economic Coercion

The principle of economic coercion is reflected in three resolutions under the United Nations as follows:

> 1. *Declaration on principles of International Law Concerning Friendly Resolutions and Cooperation Amongst States in Accordance with the Charter of the United Nations.*[86]

[80] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[81] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[82] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel) para 5.103.
[83] *Military and Paramilitary (Nicaragua v. United States)*, [1986] ICJ Rep. 14, 106.
[84] Ibid 108.
[85] See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, GA Res. 2131, UN GAOR, 20th Session, Supp. No. 14, UN Doc. A/6220 (1965), principle 3, para 1 and General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States, GA Res. 290 (IV), UN GAOR, 4th Session, 13, UN Doc A/1251, 13 (1949), para. 1.
[86] GA Res 2131, UN GAOR, 20th session, Supp No 14, UN Doc A/6220 (1965). It provides 'armed intervention and all other form of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law'.

> 2. *The above declaration fortifies the General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of State.*[87]
> 3. *The Resolution of Permanent Sovereignty Over Natural Resources*[88] and the *Charter of Economic Rights and Duties of States*.[89]
>
> However, it should be noted that under Article 52 of the *Vienna Convention*, the use of economic coercion does not void the treaties simply because the wording of Article 52 limits it to the use of force only and thus omit the economic coercion.[90]

With respect to the economic coercion, the problem arises as to how to reconcile the different perspectives of the application of economic coercion. In this sense, the application of economic coercion may give different meaning and perspective to the developing and developed country. In particular, the developing or exporting country may regard the trade barriers imposed by the developed or importing to induce changes in their environmental policy, which amounts to economic coercion. It could thus violate the basic principle of customary international law that has been reflected in the above resolution of the United Nations. However, the developed or importing country could justify their action of trade barriers not as the economic coercion *per se*, but instead as an attempt to protect the environment from adverse effects of trade liberalisation.

It is interesting to observe that there is a double-edged sword in respect to the sovereignty issue. For example, if one views it from the perspective of developing countries (and in particular, exporting countries), then the use of trade barriers to lure changes to their internal regulatory regime amounts to coercion that goes against the non-intervention norm in international law. Nevertheless, the jurisprudence of international legal opinion in developed and developing countries diverges on the issue of whether economic coercion violates the principle of non-interpretation. Gathii,[91] in favouring the developing countries, agrees with the above perspective. In addition, public international lawyers lay down their arguments on any of the two thoughts: (1) that each country has a sovereign right not only to determine with which countries it may have economic interactions, but also to impose whatever economic restrictions it wishes on other states or (2) that, if a norm prohibiting the exercise of economic coercion between states exists, the exercise of one country's economic sovereignty against another could be considered a legitimate reprisal or countermeasure. Gathii, however, does not argue that coercion violates the non-intervention norm in customary or treaty law. Instead he puts forward his argument on three United Nations General Assembly resolutions that recognises

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[87] GA Res 290 (IV), UN GAOR, 4th Session, 13 UN Doc A/1251, 13 (1949) paragraph 2. It provides 'no State may use or encourage the use of economic, political, or any other type or measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind'.

[88] GA Res 2635, UN GAOR, 25th Session, Supp No 30, 126, UN Doc. A8028 (1970).

[89] GA Res 3821, UN GAOR, 29th Session, Supp No31, 50, UN Doc A/9631 (1974). Chapter 1 (b) provides 'economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles…sovereign equality of all states'.

[90] Article 52 of the *Vienna Convention* reads 'a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'

[91] See James Thuo Gathii, 'Neoliberalism, Colonialism and Intervention Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996, 2028-2033.

economic coercion as a violation of national economic sovereignty that can be categorised as follows:

> 1. The *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations*, which provides that 'armed intervention and all other forms of interference or attempted threat against the personality of the States or against its political, economic, and cultural elements, are in violation of international law'. This declaration fortifies the General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of State, paragraph 2, which provides: 'No state may use or encourage the use of economic, political, or any other type of measure to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind'.
> 2. The Resolution of Permanent Sovereignty Over Natural Resources; and
> 3. The Charter of Economic Rights and Duties of States. Chapter 1 (b) provides: 'Economic as well as political and other relations among States shall be governed, inter alia, by the following principles…sovereign equality of all states'.[92]

However, the International Court of Justice has declined to hold that a United States embargo constituted a form of indirect intervention. In *Military and Paramilitary Activities (Nicaragua v. United States)*[93] the court held as follows:

> At this point, the court had merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.[94]

One scholar, Cann, argues that '[c]ommon sense suggests that the whole purpose of such coercion…is actually designed to intervene in the internal or external affairs of another nation and to influence the "choices" being made by that sovereign'.[95] From the perspective of the importing country, in particular the developed country that invokes trade barriers or makes market access conditional upon changes to the exporting country's environmental policy, market access simply offers an economic incentive to protect the environment. If one accepts the argument that WTO members have reserved the right to refuse market access for certain classes of products under Article XX, then market access is an incentive rather than a sanction. However, there are those who argue that GATT provides no general positive right of market access, but rather prohibits specific methods of denying market access.[96]

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[92] Ibid.
[93] *Military and Paramilitary Activities (Nicaragua v United States)*, 1986 ICJ 14, 106.
[94] *Military and Paramilitary (Nicaragua v. United States)*, [1986] ICJ Rep. 14, 106, 126.
[95] See Wesley A. Cann, Jr, 'Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between sovereignty and Multilateralism' (2001) 26 *Yale Journal of International Law* 413, 440.
[96] See Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy', (2000) 11 *European Journal of International Law* 249, 257. Also see Sanford E. Gaines, 'Process and Production Methods: How to Produce sound Policy for Environmental PPM – Based Trade Measures?' (2002) 27 *Columbia Journal of Environmental Law* 283, 412.

Since the effectiveness of this category of unilateral trade measure depends on market power, it is not surprising that developed countries tend not to view these measures as a form of economic coercion that violates the non-intervention norm in international law. It is submitted that the intention of such measures is unequivocally an intervention to the internal affairs of other states irrespective of the legal arguments of the other side. Nevertheless, according to Article 32 of the *Vienna Convention*, contrary to the use of force, the use of economic coercion to lure states to enter into treaties does not invalidate those treaties. Moreover, efforts to insert economic coercion to the use of force as a ground for nullifying a treaty under the *Vienna Convention* were unsuccessful.[97] It should be noted that international law is not free from uncertainty in respect to the legality of unilateral trade measures aimed at changing the internal law of another state or luring acceptance of MEA obligations. However, the inconsistency of economic coercion with the principle of non-intervention cannot be established as a customary rule of international law due to the absence of international consensus and the ICJ ruling in the *Nicaragua*[98] case.

The *Turtle-Shrimps*[99] case is an example of national law being used as a means of regulating conduct outside United States territory. Yet not all U.S. environmental laws are regarded as applying extraterritorially.[100] Compare *Amlon Metals Inc v. FMC Corporation*[101] (finding that the Resource Conservation and Recovery Act did not provide a cause of action for damage in the United Kingdom from hazardous wastes shipped from the United States), with *Environmental Defense Fund v. Massey*[102] (finding that the *National Environmental Policy Act* did require an environmental impact statement for major federal actions affecting the quality of the human environment in Antarctica). Where the United States' environmental laws are viewed as applying extraterritorially, an issue arises regarding the property under international law of a state unilaterally using its law to control or influence activities occurring outside its borders.[103] Needless to say, international law recognises the ability of a state to prescribe legislation on the basis of certain principles, such as a territorial principle. National laws that are used to protect or preserve the foreign environment (such as turtles in foreign waters) do not fall neatly in those principles. Even if they did, the national laws must also be reasonable, taking into account factors such as the extent to which another state has an interest in regulating the affected activity.[104]

[97] See Gerardo E. Do Nascimento e silva, *The Widening Scope of International Law, in 21st Century*, 239, 240 in Jerzy Makarczyk (ed), *Theory of International Law of the Threshold of the 21st Century* (1996) 213.
[98] *Military and Paramilitary Activities (Nicaragua v United States)*, 1986 ICJ 14, 125-126.
[99] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[100] Thomas Buerghental and D. Murphy, *Public International Law In A Nutshell* (3rd ed 2002), 320-1.
[101] 775 F. Supp.668 (S.D.N.Y. 1991).
[102] 986 F. 2d 582 (D.C.Cir. 1993).
[103] Buerghental et al, above n 100, 321.
[104] Ibid.

VI DOCTRINE OF NECESSITY

Generally, an action based on necessity could be invoked under certain circumstances to protect the essential interest against a grave and imminent peril, so long as it does not seriously impair an essential interest of the state towards which the obligation exists. The doctrine of necessity has been codified under Article 25 of the *Draft Articles on Responsibility of States for International Wrongful Act*.[105] It is important therefore, to examine whether a unilateral measure of trade barriers under Article XX (b) and (g) is covered under the scope of necessity to ensure it is consistent with the principle of customary international law.

It should be noted that both the *Turtle-Shrimps*[106] ruling and the international environmental law indicate a clear preference for multilateral measures over unilateral measures. Nevertheless, both recognise that this may not be possible in all circumstances. With regard to the WTO rules, measures taken under the MEA against MEA parties or third parties are better able than unilateral measures to meet concerns in respect to the effect of market power access to Article XX rights as well as 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 parties or third parties, even though the *Turtle-Shrimps*[107] analysis is capable of justifying both types of measures. Thus, the doctrine of necessity according to customary international law may be used to distinguish between MEA measures taken against third parties and unilateral measures. It is, therefore, submitted that taking the necessity doctrine into account would offer a mechanism to differentiate the treatment of MEA measures as well as unilateral measures that promote further harmonisation among the three streams of international law – in particular WTO law, international environmental law and also customary international law. The doctrine of necessity may be triggered under customary international law to 'excuse the non-observance of international obligations' in exceptional circumstances.[108] The

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[105] The exact language of Article 25 of the *Draft Articles on Responsibility of States for International Wrongful Act*, Report of the International Law Commission, below n 112, 80 provides as follows:

> 1. Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international of that state unless the act:
> (a) Is the only way for the state to safeguard an essential interest against a grave and imminent peril; and
> (b) Does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if:
> (a) The international obligation in question excludes the possibility of invoking necessity; or
> (b) The state has contributed to the situation of necessity.

[106] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[107] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[108] See Judge Dionisio Anzilotti, *Oscar Chinn*, [1934] PCIJ, A/B 63, 113.

jurisdictional nexus that the importing country has with the environmental problem is relevant to determine whether necessity applies. This provides a link between the *Turtle-Shrimps II*[109] ruling and the general body of international law in respect to jurisdictional competence and necessity.

VII THE JURISPRUDENCE OF NECESSITY DOCTRINE

It should be noted that the type of unilateral measure employed in *Turtle-Shrimps II*[110] is inconsistent with GATT Article XI. The jurisdictional nexus between the United States, the turtles and the transboundary nature of the environmental problem qualifies the measure for provisional justification under Article XX (g). Similar to Article XX, the necessity doctrine may be invoked to excuse actions that are inconsistent with the international obligations of a state. Nevertheless, necessity may not be invoked unless an 'essential interest' of the acting state is involved. Necessity therefore requires a jurisdictional nexus. The necessity doctrine offers a coherent framework in which to resolve the issue of where to draw the line between jurisdiction of one state and another state when they overlap, in the absence of an international agreement. The *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 25 codifies customary international law regarding necessity as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>   (a) Is the only way for the state to safeguard an essential interest against a grave and imminent peril; and
>   (b) Does not seriously impair an essential interest of the State or States towards which obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>   (a) The international obligation in question excludes the possibility of invoking necessity; or
>   (b) The State has contributed to the situation of necessity.[111]

The *Draft Articles* are not concerned with the content of the international obligation in question.[112] The content of WTO trade obligations fall under the jurisdiction of the WTO.[113] However, in order to ensure that interpretations of Article XX are consistent

[109] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[110] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[111] The International Court of Justice held that these conditions reflect customary international law in *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep. 7, 40-41, paras 51-52.

[112] See Article 20 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* and the accompanying commentary, Report of the Commission to the General Assembly on the work of its fifty - third session, *Yearbook of the International Law Commission*, Volume 11, Part 2 (2001), 72.

[113] Ibid.

with customary international law, the application of Article XX to unilateral measures should be consistent with the doctrine of necessity. In the circumstances of the *Turtle-Shrimps*[114] case, justifying the United States measure in a manner consistent with the doctrine of necessity is the only way to ensure that Article XX is thus interpreted. Even if one accepts the argument that the United States did not agree to refrain from using unilateral measures to safeguard the trans-boundary or global environmental concerns, they are thus covered by Article XX. However, the use of such trade measures is problematic in nature. It should be considered as to whether the interpretation of Article XX (g) in the *Turtle-Shrimps*[115] case is consistent with the necessity doctrine and how this doctrine might inform the application of Article XX (b) to unilateral measures in future cases. In order to invoke necessity, there must be 'an irreconcilable conflict between an essential interest…and an obligation of the state invoking necessity'.[116] It is subject to strict limitations in order to safeguard against possible abuse.[117] Therefore, necessity plays the same role as the *chapeau* in Article XX, the conditions of which serve to protect against abuse of the exceptions in Article XX.

In short, the doctrine of necessity could be invoked to excuse actions that are contrary to the international state obligation. However, necessity may only be invoked if the state could prove the element of "essential interest" because it requires a jurisdictional nexus. Therefore the concept of "essential interest" is relevant to determine the jurisdictional nexus as required under section XX (g). It would cover the situation when the environmental problem is transnational, which has impact in the territory of the country. Apart from geographical connection, the legal connection under MEAs could be invoked to establish the country's interest in the matter. For example, *CITES* provides a legal nexus between its parties and the endangered species, whether or not the species occurs in the territory of the country.[118] The peril must be objectively established and has to be imminent in the sense that it is proximate. In the *Turtle-Shrimps*[119] case, the turtles threatened with extinction seemed to be qualified under this condition. Moreover, *CITES* has objectively determined their endangered status. The "only way" condition of the necessity doctrine suggests that a state has a duty to negotiate prior deciding the

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[114] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[115] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[116] Report of the International Law Commission, above n 112, 80.

[117] Ibid.

[118] *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

[119] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

unilateral action.[120] However, the unsuccessful effort to include Malaysia in the negotiation solution in the *Turtle-Shrimps II*[121] resulted in the absence of negotiation to justify the unilateral action. The effectiveness of the chosen measure in resolving the problems is crucial to determine the necessity. In the *Turtle-Shrimps*[122] case, it is unsure that unilateral actions would help prevent the extinction of turtles since the ban on exporting shrimp may simply cause the export diversion to other markets. The fact that *CITES* has recognised turtles as threatened with extinction, and that the consensus was reached in two regional agreements regarding the appropriate conservation methods would thus suggest that other ways of preventing their extinction could not have been effective.[123] However, this issue has not been addressed directly before the Appellate Body in the *Turtle-Shrimps*[124] case. If this issue had been dealt with explicitly, the United States measure could have met the condition of necessity test.

In a nutshell, necessity can only be invoked in circumstances where the test is cumulatively satisfied to justify: (1) that there must be an "essential interest" of the State invoking necessity; (2) that interest must have been threatened by a 'grave and imminent peril'; (3) the act in question must have been the "only way" of safeguarding that interest; (4) the act must not have 'seriously impaired an essential interest of the State towards which the obligation existed'; and (5) the State invoking necessity must not have 'contributed to the occurrence of the state of necessity.' The State invoking necessity is not the sole judge of whether these conditions have been met.[125] In the same vein, these requirements will be analysed in the following study to grasp the sense of their justification.

VIII ESSENTIAL INTEREST

Necessity has been invoked in several cases to address environmental threats, including threats to transnational migratory species in international waters. In the *Russian Fur Seals* controversy of 1893, the Russian government invoked necessity to prohibit sealing in international waters to address the danger that fur seal populations would be

[120] Thus, before triggering unilateral action, is a requirement under Article XX to conduct negotiation to conserve transboundary or global resources according to subject matter.
[121] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO DocWT/DS58/AB/RW (2001) (Report of the Appellate Body).
[122] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[123] Successful negotiation occurred in the Americas and around the Indian Ocean except for Malaysia.
[124] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[125] *Gabacikovo-Nagymaros Project (Hungary-Slovakia)*, [1997] ICJ Rep 7, 40-41, paras 51-52.

eliminated by unrestricted hunting.[126] In the *Fisheries Jurisdiction*[127] case, Canada invoked necessity to protect straddling fish stocks of the Grand Banks that were threatened with extinction. The *Coastal Fisheries Protection Act of 1994*[128] enabled Canada to take urgent action and, pursuant to the Act, Canadian officials seized a Spanish fishing ship in international waters. In March 1967, the British government decided to bomb the Liberian oil tanker, Torrey Canyon which had run aground on submerged rocks outside British territorial waters, after all other attempts to prevent oil spill damage to the British coastline had failed.[129] None of these cases were resolved judicially.[130] Nevertheless, they suggest that the United States interest in migratory sea turtles would qualify as an "essential interest". The concept of "essential interest" is relevant to determining the jurisdictional nexus that is required under Article XX (g).

It would cover situations where the environmental problem is transnational or global and has an environmental impact in the territory of the country. However, a geographic connection is not necessarily the only means of establishing the country's interest in the matter. Where there is an MEA, parties to the MEA have a legal interest in the issue. For example, *CITES* establishes a legal nexus between its parties and the endangered species – whether or not the species occurs in the territory of the country.[131] In the absence of a geographic or legal connection, it would be difficult to establish that the country has an essential interest or jurisdictional nexus with the environmental problem unless one accepts the argument that all states have an interest in preserving global biodiversity.[132]

[126] *Russian Fur Seals, British and Foreign State Papers* 1840-1841 (London, Ridgway, 1857) vol. 29, 1129 cited in Report of the International Law Commission, above n 112, 81.
[127] *Fisheries Jurisdiction (Spain v Canada)*, [1998] ICJ Rep 431.
[128] *Coastal Fisheries Protection Act, R. S. C 1985c. C - 33, amended by Coastal Fisheries Protection Act of 1994.*
[129] *The 'Torrey Canyon'*, Cmnd 3246 (London, Her Majesty's Stationery Office, 1967).
[130] In the *'Russian Fur Seals'* case the measure was temporary and Russia offered to negotiate a long term solution with the British. In the *'Torrey Canyon'* case, no international protest occurred and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 970 UNTS 211, was concluded to cover future cases. In the *Fisheries Jurisdiction* case, the ICJ held that it had no jurisdiction, and two subsequent agreements were negotiated: *Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks*, Brussels, 20 April 1995, 34 ILM 1260 (1995) and *Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 8 September 1995, A/CONF 164/37.
[131] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 6 March 1973, 993 UNTS 243 (entered into force 1 July 1975).
[132] United States President Bill Clinton appeared to be advocating this view when he said that 'international trade rules must permit sovereign nations to exercise their right to set protective standards for…the environment and biodiversity'. See Bill Clinton, speech at the celebration of the 50th anniversary of GATT, 17 June 1998, <www.wto.org>, cited in Massimiliano Montini, 'The Necessity Principle as an Instrument of Balance' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001), 135, 136.

IX GRAVE AND IMMINENT PERIL

The peril has to be objectively established and has to be imminent in the sense that it is proximate.[133] This does not exclude that 'a "peril" appearing in the long term might be held to be "imminent" as soon as it is established', since 'the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable'.[134] A measure of uncertainty about the future (in environmental cases, there is often scientific uncertainty) is permissible if the peril is clearly established by reasonably available evidence.[135] The case of the sea turtles threatened with extinction appears to qualify under this condition, since their status was objectively determined under *CITES*. Moreover, the Appellate Body in *Turtle-Shrimps*[136] accepted that the situation was urgent.

X THE ONLY WAY

According to the International Law Commission commentary to Article 25, this term 'is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organisations'.[137] Thus, both unilateral trade measures and MEA trade measures taken against non-parties (or parties that do not implement their MEA obligations) could meet this condition in principle. Whether the means proposed to address the problem are the only ones available in the circumstances of a particular case is a separate issue.

In environmental cases, there may be scientific uncertainty and diverging expert opinions regarding the best means of tackling a problem.[138] The effectiveness of the chosen measure in resolving the problem is thus relevant to the determination of necessity. It is argued that in the *Turtle-Shrimps* case, a unilateral trade measure is seemed ineffective to prevent the extinction of sea turtles since it would still allow the shrimp exports to be diverted into different markets.[139] Nevertheless, the fact that *CITES* categorised the sea turtles as threatened with extinction and consensus had been reached in two regional conservation agreements regarding appropriate conservation methods suggests that other ways of preventing their extinction had not been effective. Had this issue been addressed

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[133] International Law Commission, above n 112, 202.
[134] *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 42, para 54.
[135] Report of the International Law Commission, above n 112, 80.
[136] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[137] Ibid.
[138] Uncertainty regarding how and whether to address global warming is a good example.
[139] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

directly in the *Turtle-Shrimps II*[140] case, the United States measure may have met this condition of the necessity test. Whether or not a negotiated solution is an available alternative to unilateral action (or multilateral action against a third party) will depend on the facts of the case. In this regard, in the *Turtle-Shrimps I*[141] case, unilateral trade action was clearly not the only way to address the problem. Negotiations had succeeded in the Americas and subsequent negotiations achieved agreement among the countries around the Indian Ocean except for Malaysia. With respect to the negotiation alternative in *Turtle-Shrimps II*,[142] however, the unsuccessful effort to include Malaysia in a negotiated solution provided evidence that this route was not available in the given circumstances. The 'only way' condition of the necessity doctrine suggests that there is a duty to negotiate prior to employing unilateral trade measures in circumstances where time permits this course of action. In cases of sudden, unexpected environmental disasters, such as oil spills, this option will not be available until after the fact.

However, in most cases involving the conservation of exhaustible natural resources, the exhaustion of the resource should be sufficiently foreseeable to permit time for negotiation. Thus, in the context of GATT Article XX, the necessity doctrine implies a duty to negotiate before taking unilateral action to conserve transboundary or global resources, due to the subject matter. Thus, it is submitted that this opinion is consistent with the duty to negotiate in international environmental law and the holding of the *Turtle-Shrimps II*[143] case. In the *Russian Fur Seals*[144] and the *Fisheries Jurisdiction*[145] cases, unilateral actions preceded negotiations to resolve the issues. However, in the *Fisheries Jurisdiction*[146] case, Canada had made an effort to resolve the problem in multilateral negotiations in the North Atlantic Fisheries Organization before taking unilateral action. In the *Russian Fur Seals*[147] case, this did not occur. However, this case occurred in the nineteenth century, when the necessary scientific data took longer to gather and receive. The unilateral action was taken on a temporary basis just prior to the beginning of hunting season. These factors suggest that there may have been inadequate

[140] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[141] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).
[142] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[143] *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[144] *Russian Fur Seals, British and Foreign State Papers* 1840-1841 (London, Ridgway, 1857) vol. 29, 1129 cited in Report of the International Law Commission, above n 112, 81.
[145] *Fisheries Jurisdiction (Spain v Canada)*, [1998] ICJ Rep 431.
[146] *Fisheries Jurisdiction (Spain v Canada)*, [1998] ICJ Rep 431.
[147] *Russian Fur Seals, British and Foreign State Papers* 1840-1841 (London, Ridgway, 1857) vol. 29, 1129 cited in Report of the International Law Commission, above n 112, 81.

time to resolve the question through negotiation prior to the start of the hunting season and distinguish the case from the *Turtle-Shrimps II*[148] situation.

XI SERIOUS IMPAIRMENT OF AN ESSENTIAL INTEREST OF THE TARGETED STATE

This condition requires that 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective'.[149] Does the prevention of the extinction of sea turtles outweigh the interest of Malaysia in the United States export market? Does it outweigh the collective interest in the global trading system? It did in the opinion of the Panel and Appellate Body. While the United States measure raises serious issues regarding the proper construction of Article XX and the relationship between developed and developing countries in the WTO, restricting trade in one product between two countries constitutes a relatively insignificant disruption of global merchandise trade. Does it outweigh Malaysia's interest in maintaining its sovereign equality? Given the current state of international law, this measure was not inconsistent with the principles of sovereign equality or non-intervention. On balance, it is reasonable to assume that the United States measure would not be found to seriously impair an essential interest in these circumstances that would outweigh saving sea turtles from extinction. However, there is insufficient evidence to make a definitive determination on this point because the necessity doctrine was not argued explicitly in the *Turtle-Shrimps*[150] case. For example, it is not possible to determine the ecological and economic impact that the extinction of sea turtles would have on marine ecosystems and fish stocks, nor is there information available on the economic impact of the trade embargo on the incomes of shrimp fishermen in Malaysia.

XII CONTRIBUTION TO THE STATE OF NECESSITY

For a plea of necessity to be precluded under this condition, 'the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral'.[151] If one views the absence of a multilateral agreement as contributing to the state of necessity in the *Turtle-Shrimps I*[152] case, the lack of effort on the part of the

[148] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[149] Report of the International Law Commission, above n 112, 82, citing *Gabcíkovo – Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7, 46, para 58.

[150] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[151] Report of the International Law Commission, above n 112, 84.

[152] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

United States to conclude an agreement with the affected countries could constitute a bar to the plea. Thus, a duty to negotiate may also be relevant to determining the outcome under this condition. However, the duty would have been met in *Turtle-Shrimps II*.[153] With respect to the United States' contribution to the reduction in sea turtle populations, killing turtles inadvertently due to a lack of scientific knowledge rather than a lack of effort, would not bar a plea of necessity. Based on the available information, the circumstances in *Turtle-Shrimps II*[154] appear to meet the conditions for invoking the necessity doctrine. However, because the necessity doctrine was not explicitly addressed, it is difficult to say with certainty whether all of the conditions would be met. Nevertheless, the *Turtle-Shrimps*[155] case represents a contribution on the part of the WTO judiciary to the development of this doctrine in international law, not just WTO law. Generally, the necessity doctrine is consistent with the least trade-restrictive test that has been applied in WTO jurisprudence. However, the application of both the necessity doctrine and Article XX to international environmental concerns would benefit from further development.

It would be useful for the WTO judiciary to make explicit reference to the necessity doctrine, as codified in the *Draft Articles*, when interpreting Article XX. Indeed, it would also be useful for the WTO judiciary to systematically address the relevant rules of international law when interpreting WTO obligations and exceptions in order to ensure coherence, and to do so explicitly. This would facilitate the coherent evolution of the WTO law and other branches of international law, as well as the internal coherence of the WTO law.

XIII THE ROLE OF THE WTO JUDICIARY IN ACHIEVING COHERENCE IN INTERNATIONAL LAW

This section suggests how the WTO can use the above analysis to play an active role in achieving greater coherence between WTO law, international environmental law and general international law.[156] The jurisdiction of the WTO judiciary is restricted to the interpretation of covered agreements. This bars the WTO judiciary from determining the

[153] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[154] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[155] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[156] On the dangers raised by unilateralism for contemporary international law, see the different contributions to the conference held at the University of Michigan Law School, Unilateralism in International Law: A United States -European Symposium (2000) 11 *European Journal of International Law* 1.

content of obligations in treaty or customary international law. However, the WTO judiciary is required to take these other obligations into account when interpreting the covered agreements. Thus, while the ability of the WTO judiciary to influence other branches of international law is restricted, a significant contribution can be made in achieving coherence in international law. In this context, the WTO has been called upon to rule on matters involving public international law. In the *EC-Hormones*[157] case, the Appellate Body stated:

> The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallised into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[158]

This decision is consistent with the jurisdictional limits of the WTO judiciary regarding the definition of the content of customary international law. Moreover, it demonstrates an appropriate level of deference to national governments by not imposing an obligation when it is not clear that they have accepted it. In this case, Canada and the United States were clearly of the view that the precautionary principle is not, yet, crystallised as a principle of customary international law. However, all parties to the dispute, as WTO members, had accepted the more concrete formulation of aspects of the principle found in the *Agreement on the Application of Sanitary and Phytosanitary Measures,*[159] providing a more solid basis for the Appellate Body to make its ruling. The situation regarding the content of sovereign equality is analogous. While the WTO judiciary does not have the jurisdiction to define the content of this principle in general international law, they do have the jurisdiction to ensure that their interpretations of the covered agreements are consistent with the more concrete manifestations of this principle in WTO agreements.

It is also appropriate that the Appellate Body defer to the jurisdiction of the ICJ to determine whether a principle of customary international law has or has not emerged.[160]

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[157] *European Communities — Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).
[158] Ibid para 123.
[159] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments — Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994).
[160] The *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments— Results of the Uruguay Round, 33 ILM 1125 (1994) does not clearly set out what the relationship is between the WTO Dispute Settlement Body and the ICJ. However, the draft International Trade Organisation Charter contemplated appeals to the World Court in some circumstances, providing a basis for the development of a body of international law that applies to trade relationships. See Jackson, *Jurisprudence*, above n 6, 170. Also see *Havana Charter for an International Trade Organization*, Articles

This is a wise course to follow as the ICJ is better placed to perform this task. Moreover, since the WTO agreements came into force, international trade law has been more fully integrated into the system of international law than the GATT was.[161] The Panel and the Appellate Body both follow the customary rules of treaty interpretation, and make reference to other principles of international law, when interpreting the WTO agreements. If the WTO begins to rule on the status of principles in international law, it increases the risk of diverging opinions arising in different international courts – a development that is best avoided. For this reason alone, it is 'imprudent' for the Dispute Settlement Body (DSB) to take on this task. Jurisdictional boundaries thus contribute to coherence in various fields, including international trade law and international environmental law.

However, WTO tribunals need to ensure that their application of *accepted* principles of customary international law is consistent with the general body of international law, in order to avoid the 'fragmentation of international law'.[162] The necessity doctrine is a case in point. Unlike the precautionary principle, the necessity doctrine *has* been accepted as forming part of customary international law. The *Turtle-Shrimps*[163] rulings contribute to the development of this doctrine even though they do not do so explicitly. In future cases of this kind, the WTO judiciary needs to incorporate a consideration of the doctrine of necessity and ensure that its decisions are consistent with its content. It is within their jurisdiction to do so. In *Turtle-Shrimps II*,[164] the Panel formulated a standard of review to

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92-97 in UN Conference on Trade and Employment – Final Act and Related Documents, UN Doc. E/Conf. 2/78 (1948) and Clair Wilcox, *A Charter for World Trade* (1949), 159 at 305-308.

[161] See John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (2000), 181, where the author states, '…the Appellate Body has made it reasonably clear that general international law is relevant and applies in the case of the WTO and its treaty annexes, including the GATT. In the past there has been some question about this, with certain parties arguing that the GATT was a 'separate regime' in some way insulated from the general body of international law. The Appellate Body has made it quite clear that this is not the case…'.

[162] See Ian Brownlie, 'Some Questions Concerning the Applicable Law in International Tribunals' in 21st Century, in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996) 763-764. He states, at 763-764, 'It is beyond question that public international law constitutes an applicable law, and may be indicated as such…by the determination of a tribunal….The question is…to what extent specialised areas of international law…may constitute discrete forms of applicable law, forming bodies of law independent of the parent body…'International Environmental Law' has tended to develop as a wholly academic personality, developed in ignorance of the practice of States and organisations…It is the principles of State responsibility which are applicable and which need developing. To encourage the fragmentation of international law will have retrograde effects'. Also see, Louis B. Sohn, 'Enhancing the Role of the General Assembly of the United Nations in Crystallizing International Law', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996) 549 and Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 *Michigan Journal of International Law* 903.

[163] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[164] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); Also see WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

apply in determining whether a WTO member was entitled to use unilateral trade measures with respect to international environmental issues as follows:

> [T]he Panel feels it is important to take the reality of international relations into account and considers that the standard of review of the efforts of the United States on the international plane should be expressed as follows: whether the United States made serious good faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries.[165]

However, the Panel also recognised that 'no single standard may be appropriate'. The Appellate Body rejected the Panel's view that the United States should be held to a higher standard given its scientific, diplomatic and financial means. In this regard, the Appellate Body noted that the principle of good faith applies to all WTO members equally, but otherwise did not object to the standard of review formulated by the panel.[166] This aspect of the *Turtle-Shrimps*[167] case is relevant in determining whether the United States measure met the requirements of the doctrine of necessity. In failing to consider the doctrine of necessity, both the Panel and the Appellate Body missed an important opportunity to contribute to the development of a greater coherence between WTO law and customary international law.

It should be noted that when applying a theoretical framework of necessity into practice, the conceptual difference between the different genres of necessity circumstances[168] set out in the WTO regime is not to be conflated with the use of the "necessity" condition in order to trigger the different types of exceptions, in particular, set out in Article XX of GATT. This "necessity" condition is a description of the circumstances in which the exceptions may be triggered. However, it does not necessarily conform to the exception of the character of a circumstance of necessity. Be that as it may, there is merit in obtaining insights into how the "necessity" for the application of a measure resulting in a departure from WTO obligations has been interpreted in Article XX of GATT – in particular, for a comparative exercise in general international law of the application of necessity as a defence.

The recent development of the WTO ruling in *Brazil-Measures Affecting Imports of Retreaded Tyres (Brazil-Tyres)*[169] clarified the necessity condition in accordance with

[165] *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia,* WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 5.73.
[166] Ibid para 5.77.
[167] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).
[168] More particularly, the WTO engages in situations of necessity mainly in three ways, such as 'long term crisis prevention, 'the empowerment of Member States to deal with different types of emergencies', and 'necessity as a defence'. Therefore, in the WTO the customary international law defence of necessity appears to have been displaced through the express articulation of different necessity circumstances.
[169] *Brazil – Measures Affecting Imports of Retreaded Tyres ('Brazil-Tyres')* WT/DS332/AB/R.

Article XX of GATT regarding the context in this point.[170] The Appellate Body in this case set out a holistic approach to the determination of the necessity condition asserting that what constitutes as necessary involves a 'weighing and balancing process'.[171] The Appellate Body, in particular, placed an importance in this exercise of the value of the objective of the measure departing from the WTO norms, the contribution of the measure to the objective sought, and the restrictive impact of the measure to international trade. With regard to the assessment of the contribution, the Appellate Body clarified that this can be both quantitative and/or qualitative, as long as there is a genuine and material relationship of ends and means, including that the measure is apt to produce such a relationship. Under the circumstances, by no means is the condition of necessity in the application of a measure involving a departure from the WTO norms under Article XX of GATT a strict one. Moreover, a shift to the new jurisprudence development in respect to the different positions laid down by the WTO judiciary is an interesting one to observe. As such, one may even observe a certain shifting of position in comparison to the previous description of the requirement by the Appellate Body in the *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef ('Korea-Beef')*[172] case, which ruled as follows:

> […] the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term 'necessary' refers in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'" at the other, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.

Furthermore, the liberal holistic approach is consistent with the conceptual difference identified herein, namely between necessity as a defence and the circumstances of societal value which the WTO empowers a member to deal with. In brief, the condition of 'necessary' for the invocation of exceptions in the WTO itself differs according to the

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[170] The difficulties encountered by the adjudicating bodies in *Brazil-Tyres* when examining the level of contribution or nexus required between the ends pursued and means adopted, show that there remains a large and important role for the DBS to play in the future interpretation and application of necessity under the proposed text-based interpretation. This case concerned Brazil's measures relating to the prohibition on the importation of retreaded and used tyres which Brazil claimed was necessary under article XX (b) for reducing 'exposure to the risks to human, animal and plant health arising from the accumulation of waste tyres'.208 Further, Brazil claimed that an exception to the prohibition which it afforded to Mercosur countries was necessary under article XX (d).

[171] Ibid, para 139-143.

[172] See *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef ('Korea-Beef')* WT/DS161.169/AB/ R, 11 December 2000. In this case Korea unsuccessfully claimed that its dual retail system segregating imported and domestic produced beef was justified under article XX (d), alleging that such differential treatment was necessary to protect consumers against fraudulent practices prohibited under its Unfair Competition Act. After accepting that Korea's measures were covered by the policy objectives envisaged in article XX (d), the Appellate Body began its application of the necessity test. The Appellate Body noted that 'necessary' does not always mean 'indispensable' or 'inevitable' but refers instead to 'a range of degrees of necessity'. In this respect, the Appellate Body appeared to be paying closer attention to the textual provisions of the treaty and giving full effect to the distinctions of each sub-clause.

type of exception involved. Therefore, the WTO's concept of "necessary" for the application of a measure under an exception is similar in outline, but not identical to, "necessary" – in necessity as self defence, as reflected in Article 25 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Furthermore, the actual necessity circumstances which allow for departures from the WTO norms themselves differ and are not necessarily identical to the circumstances of necessity described under Article 25 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* which is 'grave and imminent peril'.[173]

XIV THE STATUS OF THE PRECAUTIONARY PRINCIPLE IN THE WTO JURISPRUDENCE

Having analysed and discussed the core principles of customary international law such as sovereignty and necessity and shown how its role influenced the development of WTO jurisprudence, the paper now turns to the precautionary principle under international environmental law. Equally, the international environmental law has its own role in developing the landscape of the WTO jurisprudence through the precautionary principle. However, the pertinent question to ask is whether the customary international law recognises the status of the precautionary principle as part and parcel within the ambit of its core principles. Therefore, it is the aim of this section to analyse the status of precautionary principle within the sphere of the WTO jurisprudence. It should be noted that the precautionary principle has been described as 'the most important' new policy approach in international environmental cooperation'.[174] After making its debut in a number of "soft law" declarations in the 1980s,[175] it has since found its way into at least 12 "hard" multilateral agreements.[176] Yet its application is not free from controversy: it

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[173] See Article 25 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* Report of the International Law Commission, above nn 105, 112.

[174] See D. Freestone 'The Precautionary Principle,' in R. Churchill and D. Freestone (eds) *International Law and Global Climate Change* (1991) 21, 36; see also J. Cameron and J Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment', (1991) 14 *Boston College International and Comparative Law Review* 1; E Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (1992) 4 *Georgetown International Law Review* 303; H Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle* (1994); D. Freestone and E Hey, *The Precautionary Principle and International Law: The Challenge of Implementation* (1995); O. McIntyre and T. Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221.

[175] See, for example, the *1982 World Charter of Nature*, UN General Assembly Resolution 37/7, Principle 11; the ministerial declarations of the *International Conferences on the Protection of the North Sea* (Bremen 1982, London 1987); and Decision 15/27 (1989) of the Governing Council of the UNEP.

[176] See, for example, the *1991 Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, Article 4 (3) (f); the *1992 UN Framework Convention on Climate Change*, Article 3 (3); the *1992 Convention on Biological Diversity*, preamble; the *1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, Article 2 (5) (a), and its *1999 London Protocol on Water and Health*, Article 5 (a); the *1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic*, Article 3 (2); the *1994 Oslo Protocol* (on sulphur emission reductions) and the *1998 Aarhus Protocols* (on heavy metals, and on persistent organic pollutants) *to the Convention on Long-Range Transboundary Air Pollution*, preambles; the *1995 Straddling Fish Stocks Agreement implementing the UN Convention on the Law of the Sea*, Article 6(2); the *1996 Syracuse Amendment Protocol for the Protection*

collapsed the negotiations for a biosafety protocol at the Cartagena meeting in February 1999, where disagreement on 'precautionary' draft provisions was a contributing factor.[177] Nevertheless, the precautionary principle found its way through a treaty codification under Principle 15 of the *Rio Declaration on Environment and Development (Rio Declaration)*,[178] where the precautionary principle is defined as follows:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[179]

Based on the above principle, the invocation of this is given life through treaty codification in accordance with international environmental law, although this is not free from the surrounding debate.[180] Indeed, the precautionary principle is therefore legally-formally recognised through Principle 15 of the *Rio Declaration*[181] above and therefore has been invoked in a number of the WTO cases that will be discussed here. It should be noted here that precautionary principle was the first time invoked before the ICJ in *the Nuclear Test*[182] case brought by New Zealand against France. Nevertheless, the French government responded that the legal status of the principle was 'uncertain'. With respect to the principle invocation in the WTO jurisprudence, there are several cases pertaining to the interpretation of the SPS Agreement were placed before the DSB of the WTO. The gist and relevant ruling will be touched upon below, while limiting the discussion to the extent it contributes to the overall assessment of whether the precautionary principle[183] has acquired a status of customary international law.[184]

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of the Mediterranean Sea against Pollution from Land-Based Sources, preamble; and *the 1996 London Amendment Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, Article 1 (3).

[177] See Meeting Summary in Earth Negotiations Bulletin 9 No. 117 (26 February 1999), 3, 11 available at <http://www.iisd.ca/linkages/biodiv/bswg6>.

[178] See Report of the UN Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), UN Doc. A/CONF, 151/26/Rev. 1 (1993) 3, 6. On the drafting of the declaration (by working group III of the UNCED Preparatory Committee, mainly during the 3rd and 4th PrepCom sessions in August 1991 and March 1992), see H. Mann, 'The Rio Declaration', *Proceedings of the 86th Meeting of the American Society of International Law* (1992), 405; and T.T. Koh, 'UNCED Leadership 'A Personal Perspective', *in Negotiating International Regime: Lessons Learned from the United Nations Conference on Environment and Development (UNCED)* B. I. Spector, G. Sjotedt and I. M Zartman (eds)., (1994) 165, 168. It has been pointed out that negotiations for the Rio Declaration 'were – except perhaps those on the financial resources chapter of the UNCED action plan, Agenda 21 – the most overtly political in the UNCED process'; I. M Porras, 'The Rio Declaration: A New Basis for International Cooperation,' *in Greening International Law*, P. Sands (eds) (1994) 20, 22. See also P. H. Sand, 'UNCED and the Development of International Environmental Law', *Yearbook of International Environmental Law* 3 (1992) 3, 8.

[179] See Principle 15 of the *Rio Declaration on Environment and Development, United Nations Conference on Environment and Development* 31 ILM 876 (1992).

[180] See the critical comments by L. Gundling, 'The Status in International Law of the Principle of Precautionary Action' (1990) 5 *International Journal of Estuarine and Coastal Law* 23, 26 and D. Bodansky, 'Scientific Uncertainty and the Precautionary Principle' (1991) 33:7 *Environment* 4.

[181] The *Rio Declaration on Environment and Development, United Nations Conference on Environment and Development* 31 ILM 876 (1992).

[182] See the Nuclear test *Nuclear Tests Cases* (*New Zealand v. France*), 1974 ICJ 457.

[183] The first MEAs which explicitly referred (in their preambles) to the need of the adoption of precautionary measures are the *1985 Convention for the Protection of the Ozone Layer (Vienna Convention)* and its *1987 Protocol on Substances that Deplete the Ozone Layer*. Since then, the

A EC – Measures Concerning Meat and Meat Products ('EC – Hormones')[185]

In the *EC-Hormones*[186] case, the United States and Canada challenged the ban imposed by the EC on the imposed of hormone-treated beef as discussed above.

Faced with a direct plea on the status of the precautionary principle in the *EC-Hormones*[187] case, the Appellate Body could have, and as some authors feel, should have interpreted whether the precautionary principle is a rule of customary international law.[188]

B Japan – Measures Affecting Agricultural Products ('Japan – Agricultural Products')[189]

In this case, the United States challenged Japan's phytosanitary measures, i.e. varietal testing requirements, pertaining to several fruit varieties and walnuts. While Japan explicitly relied on the precautionary principle, the Appellate Body reiterated its position express in the *EC-Hormones*[190] case that the principle 'has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement'.[191] The Appellate Body ruled that Japan violated the SPS agreement by not seeking additional information and failing to review the SPS measures within a reasonable period of time.[192]

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precautionary principle has been integrated in the substantive provisions of MEAs as well, such as in the *Convention on Persistent Organic Pollutants (2001)*, *the Cartagena Protocol (2000)* to the *Convention on Biological Diversity* and *the UN Framework Convention on Climate Change (1992)*.

[184] It may be noted that the World Wildlife Fund for Nature (WWF) argued for the application of the precautionary principle in its *amicus curiae* submitted in *Shrimp-Turtle* case, however, the Member States did not argue this point. In the *US-Shrimp* case, Appellate Body Report, WT/DS58, and 6 November 1998. Para 128-132 where the Appellate Body interprets the WTO term 'exhaustible natural recourses' of GATT Art XX (g) with reference to various MEAs, such as the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species (*CITES*).

[185] *European Communities — Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[186] *European Communities — Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[187] *European Communities — Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[188] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other rules of International Law* (2003), 482. The author said 'in my view, the Appellate Body was obliged to make a ruling on whether this principle is, indeed, part of customary law binding on the disputing parties. Or at least assume that it was customary law and on that basis to examine further, whether it could possibly overrule SPS Rules'. The author states that the Appellate Body was correct in concluding that the precautionary principle does not override the provisions of the SPS agreement.

[189] *Japan – Measures Affecting Agricultural Products ('Japan-Agricultural Products')*, AB-1998-8, WT/DS76/AB/R, 22 February 1999.

[190] *European Communities — Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[191] *Japan – Measures Affecting Agricultural Products ('Japan-Agricultural Products')*, AB-1998-8, WT/DS76/AB/R, 22 February 1999, para 81.

[192] Ibid paras 90-92 and part VII.

However, the Appellate Body did not address the larger question of the status of the precautionary principle in public international law, and its consequences for the interpretation of the WTO Agreements.

C *Japan – Measures Affecting the Importation of Apples ('Japan – Apples')*[193]

A similar case arose between the United States and Japan based on Japan's quarantine and inspection requirements of apples, allegedly to eliminate the threat of contamination from particular bacteria. The Japanese measures included a complete ban on the import of apples from orchards showing any sign of bacteria. The Appellate Body endorsed the Panel Report in full by finding the Japanese measures to infringe the SPS Agreement. The text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient', not to 'scientific certainty'. The two concepts are not interchangeable. Therefore, the Appellate Body is unable to endorse Japan's approach of interpreting Article 5.7 through the prism of 'scientific uncertainty'. The Appellate Body, thus, distinguishes the connotation of scientific uncertainty, so characteristic of the precautionary principle, from the text of Article 2.7. However, this has not been further clarified.

D *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ('EC – Biotech')*[194]

Three main exporters of agriculture and food products containing genetically modified organisms (GMOs), i.e., the United States, Canada, Argentina, filed complaints against the EC's alleged general de facto moratorium on the approval of GMOs between 1998 and 2003, as well as some of the EC member states national bans on GMOs. The EC argued that the precautionary principle 'has by now become a fully-fledged and general principle of international law'.[195] It further referred to the fact that the principle found reflection in the *Rio Declaration*, the *Climate Change Convention* and the *Convention on Biological Diversity,* and further that 'in the specific field of GMOs, the *Biosafety Protocol* has confirmed the key function of the precautionary principle in the decision to restrict or prohibit imports of GMOs in the face of scientific uncertainty'.[196] The U.S. submitted that the precautionary principle had not acquired the status of a rule of customary international law, since it did neither constitute a general, consistent, extensive, virtually uniform practice of States, nor was it followed by them in a sense of legal obligation.[197] The Panel held that while interpreting the relevant WTO Agreement it was not required to take into account other rules of international law that were not applicable to one of the parties to this dispute. It noted that the United States were neither party to the Convention on Biological Diversity (CBD)[198] or the *Cartagena Protocol*.[199]

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[193] *Japan – Measures Affecting the Importation of Apples ('Japan-Apples')* WT/DS245/R, 15 July 2003 (Report of the Panel) and WT/DS245/AB/R, 26 November 2003 (Report of the Appellate Body).
[194] *European Communities-Measures Affecting the Approval and Marketing of Biotech Products ('EC-Biotech'),* WT/DS291, WT/DS292, WT/DS293, 29 September 2006.
[195] Ibid paras 4.523, 7.78.
[196] Ibid paras 4.524, 7.78.
[197] Ibid paras 4.542-7.82.
[198] Ibid para 7.74.

It quite correctly noted that the EC had not explained what it meant by the term 'general principle of international law', which could be understood as encompassing either rules of customary law or the recognised general principles of law, or both.[200] While referring to the crucial part of the *EC-Hormones*[201] case, quoted above,[202] it observed that the 'legal debate over whether the precautionary principle constitutes a recognised a principle of general or customary international law is still ongoing, and that there has, to date, been no authoritative decision by an international court or tribunal which recognises the precautionary principle as a principle of general or customary international law'.[203] It also noted that there remain questions regarding the precise definition and content of the precautionary principle, and that the doctrine remains divided on the issue.[204] It concluded that 'since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so', and would, therefore, 'refrain from expressing a view on this issue'.[205] Though there is no legal reason why the Panel or the Appellate Body should not take up the issue of whether the precautionary principle is customary international law, there is an apparent reluctance to do so.[206] The main reasoning put forward by the WTO dispute settlement bodies is that it can resolve disputes without it being necessary to cut the Gordian knot.[207]

XV CONCLUSION

Based on the above analysis, it can be concluded that the relationship among international trade, customary international law and international environmental law is complex and problematic. Sovereignty today it is merely a functional power possessed by a ruler or a government to rule a population for its own good.[208] The pattern of influence and decision-making that rules the world has an increasingly marginal

[199] Ibid para 7.75.
[200] Ibid para 7.86.
[201] *European Communities—Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).
[202] Ibid para 7.87.
[203] Ibid para 7.78.
[204] Ibid para 7.88.
[205] Ibid para 7.89.
[206] Joost Pauwelyn, above n 188, 269 pointed out that the WTO panels can and should refer *suo moto* to non-WTO rules in the interpretation of WTO provisions. In contrast, to refer to non-WTO rules as facts (such as reference to MEA), it must be pleaded by one of the parties to the dispute), and at p. 463-464 the author further explains the importance of MEAs as facts (or evidence) which can be relied upon even in a dispute involving a WTO Member which is not a party to the MEA – for instance, when proving that a measure is 'necessary' under GATT Art. XX (b), though it may not be conclusive in the dispute and could be rebutted; whereas MEAs can only be applicable law between disputing WTO members which are also a party to the MEAs.
[207] Els Reynaers Kini, 'The Status of the Precautionary Principle' in Julien Chaisse and Tiziano Balmelli (ed), *Essays on the Future of the World Trade Organization, Volume I, Policies and Legal Issues* (2008) 333, 380.
[208] Martti Koskenniemi, 'What Use of Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61, 63.

connection with sovereignty. In the *Island of Palmas*[209] case from 1928, Max Huber had already linked sovereignty with the exercise of effective power because this enabled the protection of the rights of the inhabitants and the interests of the other states.[210] This is due to the fact that international law does not contain ready-made answers to problems about how sovereignty should be governed.[211] But it could be used as a vocabulary for articulating alternative preferences and for carrying out (strategic) manoeuvres in order to limit powers of the globally economic significant states from encroaching the sovereignty of the economic insignificant states. However, with today's rapid globalisation, the external and internal encroachment of one's sovereignty is much more complex than traditional state to state conflict. As it could happen in many forms, that would thus put the sovereignty concept of absolute state power under siege.

Invoking necessity, however, is challenging in the sense that the states who wish to invoke it shall establish the requirements that justify the action. It has been shown by the cases that the elements of sovereignty such as essential interest, grave and imminent peril, only way, serious impairment of an essential interest of the targeted state have strict conditions to pass. Thus, it suggests to us that invoking the necessity must come with well-thought through ideas, and it must be exercised with due care. Any deliberate attempt to manipulate necessity under the disguise of state interests would be regarded as abuse of a process which is hardly justifiable. Moreover, international reputation is at stake, in order to preserve the goodwill of one state in the eyes of a global international community. Therefore, invoking necessity is ultimately the last resort after considering its rigorous condition to be met, followed by the justification of state's unilateral action to act reasonably as the "only way" to safeguard the "essential interest" from a 'grave and imminent peril' threat.[212]

It is interesting to note that that unilateralism is the antithesis of multilateralism. Thus, in a multilateral institution such as the WTO, unilateralism should only be exercised as a last resort in accordance with the necessity doctrine. Furthermore, the effect of market power access to effective unilateral measures and the concern that the right to take such measures could be abused justifies serious constraints on their use. The circumstances in which the necessity doctrine can be exercised are strictly constrained. Applying this doctrine to the analysis of unilateral environmental measures under Article XX thus serves not only to promulgate greater harmonisation between difference streams of international law, but also ensures that such measures will be allowed in exceptional circumstances. Necessity may be invoked to highlight urgent environmental issues where the acting state has a jurisdictional nexus to the environmental problem. The requirement of an "essential interest" makes such a jurisdictional nexus mandatory. This means that unilateral measures can only be justified for transnational or global environmental concerns where the acting state has a territorial connection, since there is no MEA that would provide a legal interest in the problem. Where this jurisdictional nexus is absent,

[209] *Island of Palmas Case* (*Netherland v United States*), [1928] 2 R.I.A.A. 829.
[210] Ibid 869-70.
[211] Koskenniemi, above n 208, 68.
[212] See Article 25 of the *Draft Articles on Responsibility of States for International Wrongful Act,* Report of the International Law Commission, above nn 105, 112.

unilateral measures will not meet this requirement of the necessity doctrine and will be incapable of justification under Article XX.

Therefore, clarity of analysis is not incompatible with a flexible, evolutionary interpretation of international law. In addition, the obscured language of Article XX serves a useful purpose. The broad language of Article XX leaves interpretative room available to achieve the harmonisation that is necessary for both WTO law and customary international law to stand the test of time. The obscured language leaves room for the WTO to consider the evolution of the necessity doctrine in both WTO law and customary international law pursuant to Article 32 of the *Vienna Convention.*[213] Moreover, it also leaves room for the WTO to take into consideration a shift in the allocation of decision-making authority as international environmental laws and institutions above. In addition, broad language lessens the need to employ legislative mechanisms to resolve conflicts among WTO members and gives the WTO judiciary greater latitude to resolve conflicts on a case-by-case basis.

It is submitted that, the Appellate Body report in *Turtle-Shrimps II*[214] seems to imply that the non-WTO rules such as MEAs could also be functioning as a legal defence apart from merely a factual reference. Heavy reliance by the Appellate Body on the non-WTO treaty such as the Inter-American Convention as a 'factual reference' or a point of comparison has implied that the United States' policy was no longer discriminatory in the sense of the *chapeau* of Article XX.[215] In doing so, it implied that the conclusion of the MEAs can absolve a WTO inconsistency. As a result, once such MEAs is concluded, it would be difficult for the Appellate Body to exclude it from the applicable law in case a WTO complaint were brought, for example, against the very trade restrictions imposed or explicitly permitted in the MEAs.[216] The failure of the Panel and Appellate Body to deal explicitly with the necessity doctrine in *Turtle-Shrimps*[217] case is a missed of important opportunity to further develop the harmonisation between WTO law and customary international law, moreover, this is still within jurisdiction to do so.

[213] See Article 32 of the *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 32 (Supplementary means of interpretation) provides as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

[214] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); Also see WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

[215] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel), para 130.

[216] Pauwelyn, above n 188, 485.

[217] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body). See also *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Turtle-Shrimps II)*, Recourse to Article 21.5 by Malaysia, WTO Doc WT/DS58/RW (2001) (Report of the Panel); WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

Furthermore, the consistency of the ruling in the *Turtle-Shrimps*[218] case with the necessity doctrine suggests that the relevant text of Article XX of GATT can be interpreted in a manner that is consistent with the necessity doctrine. It is submitted that for the future case, the WTO judiciary should consider to incorporate the necessity doctrine to ensure a more consistent approach towards application of customary international law in the interpretation of Article XX of GATT. This can be done by explicitly referring to the necessity doctrine enshrined in the *Draft Articles* when the task of interpretation of Article XX arises. Failure to explicitly refer to relevant international rules would deliver uncertain circumstance as to whether necessity conditions are satisfied.

The reluctance of the Appellate Body in *EC-Hormones*[219] case to take a position regarding the status of 'precautionary principle' as to whether it is part of customary international law are inconsistent with its conclusion. Although the Appellate Body rightly concluded that the principle of precautionary approach does not override the provisions of Article 5.1 and 5.2 of the SPS Agreement,[220] it fails to answer the crucial question regarding the status of precautionary principal before coming to that conclusion. Had the Appellate Body answer this question, it would not only clear the ambiguous status of precautionary principle but also significantly contributing coherence between WTO Agreement and customary international law. The Panel's approach to apply narrow reading of applicable sources of treaty law in *EC-Biotech*[221] is a hindrance to response positively to the ongoing evolution of international law. Hence, the Panel has missed the opportunity to develop coherence between international environmental law and WTO Agreements when decided to take conservative approach to refer such sources merely for confirming the meaning of treaty terms rather than appreciate it as legal rules. This is so particularly when the Panel's unwillingness to cross-fertilise WTO law with relevant treaty-based source of public international law.[222] Moreover, the Panel also refused to take international environmental law treaties into account because they were not informative.[223] It is argued that the Panel was unduly dismissive of relevant sources of international environmental law that had direct relevance to the issue at hand. This is particularly so given the Appellate Body's prior willingness to examine non-binding sources of international environmental law as a means of determining appropriate state

[218] *United States – Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS58 (1998) (Report of the Panel), WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

[219] *European Communities—Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[220] Article 5.1 and 5.2 of the SPS Agreement provides as follows:

> 5.1 Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
>
> 5.2 In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

[221] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ('EC-Biotech')*, WT/DS291, WT/DS292, WT/DS293, 29 September 2006.

[222] Ibid paras 7.71-7.72.

[223] Ibid paras 7.74-7.75.

practice in the area at dispute. The failure to consider the external force of international environmental law, even to a mild degree, is likely to send wrong message to external stakeholders as it does not mirror a responsiveness to 'contemporary concerns of the community of nations about the protection and conservation of the environment,[224] particularly given the rapid advancement if biotechnology and the escalating public concerns since the WTO agreement came into force.

It is submitted that harmonisation of customary international law, international environmental law and WTO Agreements could only be better achieved through liberal approach by the WTO judiciary to recognise the non-WTO sources of law if they are dealt with explicitly in future cases. Although it is not a miracle to solve the problematic relationship between the international trade law and international environmental law, exercising relevant principles of international environmental law to clarify rights and obligations under the SPS Agreement would have aided the Panel to strike appropriate balance between internal and external legitimacy. Moreover, it is argued that WTO judiciary missed the opportunity as they do not sufficiently exercise their judicial activism in order to rule the status of precautionary principle independently from the ICJ rulings. The fact that there is no binding precedent or *stare decisis* to restraint the WTO judiciary from doing so would not influence them to differ from ICJ rulings. Although the WTO judiciary is theoretically free to depart from every ICJ ruling, they are reluctance to exercise judicial activisms. This is due to the fact that ICJ is perceived the most authoritative among international bodies even with the least judicial activisms. This is perhaps, as explained above, to avoid the risk of diverge opinions arising in different international courts. In addition, this put the WTO judiciary in limbo between the conflict of exercising judicial activism and to maintain the status quo of the law derived from more authoritative international bodies. On top of that, by opting to maintain the status quo of the law rather than attempting to resolve precautionary principle issue wound render judicial activism to be rhetoric. As there is no inherent hierarchy of treaty norms (apart from *jus cogens*), the Panel and Appellate Body must take into account customary international law, WTO law and applicable external sources of international treaty law together, according to the rules on the interplay and conflict of norms.[225] This includes both relevant sources of international law and that were in existence before the Marrakesh agreement was concluded (including certain international environmental and human rights rules) and non-WTO rules created subsequent to the Marrakesh Agreement.[226]

With regard to the precautionary principle, as the law currently stands it has yet to obtain the rule status under customary international law. This position is greatly contributed by the lack of judicial activism by the WTO judiciary to resolve this issue even when they have opportunity to renounce a more clear status of precautionary principle. As shown in

[224] *United States – -Import Prohibition of Certain Shrimp and Shrimp Products ('Turtle-Shrimps I')*, WTO Doc WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).
[225] Pauwelyn, above n 188, 538. However, the author notes that in reality a 'two-class society' exists between those 'rules of international law than can be enforced judicially…and those that cannot', 553.
[226] Ibid 540-541.

EC-Hormones,[227] *Japan-Agricultural Products*,[228] *Japan-Apples*[229] and *EC-Biotech*[230] cases discussed above, the Appellate Body did not attempt to resolve this complex issue and as a result leave the status of precautionary principle in the dark. An apparent reluctance of the WTO judiciary resolve this issue is not a progressive step forward in determining as to whether the precautionary principle has reached the status of customary international law. The core reasoning given by WTO judiciary that they are capable of resolving disputes being it being necessary to cut this Guardian Knot should not be surprised. This is due to the principle of 'judicial economy' according to which only those claims must be addressed which is necessary to resolve the matter at issue, plays a 'prominent role' in the WTO jurisprudence.[231] It is highly likely that the trends continue in future cases too, as there are very few instances where the WTO dispute would irresolvable unless this conundrum is highlighted. Moreover, the present decision making process in the WTO judiciary still faces 'a hard political constraint',[232] and it would not be oblivious to the possible political fall-out it may have on the ongoing trade and environment negotiations. Furthermore, one ought to recall that the WTO as a legal regime remains by and large 'member driven', which often inhibits judicial activism.[233]

As international environment and health disputes will become prevalent before various international adjudicating bodies,[234] there will be an ever increasing number of opportunities where an explicit ruling on the status of precautionary principle can be expected. It is submitted that a judgment by the ICJ in this respect would radiate most authority. In fact, the WTO Appellate Body did refer to the fact that the ICJ had failed to identify the principle as the rule of Customary International law in *Gabcikovo-Nagymaros* case,[235] therefore confirming the view of many commentators that that ICJ still perceived as the most authoritative of international bodies.[236] However, it is also a body with the least sense of judicial activism.[237]Although this paper concluded that the precautionary is yet to acquire the status of rule in Customary International Law, it must be emphasised that it is crucial vehicle which 'caution that regulatory policy should be

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[227] *European Communities – Measures Affecting Meat and Meat Products ('EC-Hormones')*, WTO Doc WT/DS26-DS48/AB/R, (1998) (Report of the Appellate Body).

[228] *Japan – Measures Affecting Agricultural Products ('Japan-Agricultural Products')*, AB-1998-8, WT/DS76/AB/R, 22 February 1999.

[229] *Japan – Measures Affecting the Importation of Apples ('Japan-Apples')* WT/DS245/R, 15 July 2003 (Report of the Panel) and WT/DS245/AB/R, 26 November 2003 (Report of the Appellate Body).

[230] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ('EC-Biotech'),* WT/DS291, WT/DS292, WT/DS293, 29 September 2006.

[231] Pauwelyn, above n 188, 449 (referring to the *US-Shirts and Blouses* case which the principle of judicial economy was explicitly referred to).

[232] R. H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraint' (2004) 98 *American Journal of International Law* 247, 275.

[233] Pauwelyn, above n 191, 152.

[234] D. Bodansky, 'Customary (And Not So Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105, 119.

[235] *Gabacikovo-Nagymaros Project (Hungary-Slovakia)*, [1997] ICJ Rep 7.

[236] P. Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights and Development Law Journal* 85, 93. Also see Pauwelyn, above n 188, 121.

[237] Pauwelyn, above n 188, 152. The author states that 'court activism may be more readily expected, for example, from the European Court of Justice than from the ICJ. The WTO judiciary could posit itself somewhere in between'. See, for example, 420-421.

pro-active in ferreting out potentially serious threats to human health and the environment'.[238]

In spite of the finding of this legal analysis, it should not be forgotten that it has asserted the ground for prospective future research. Globalisation and international law, for example, is potentially to spark research particularly the effects of globalisation to the sovereignty of the nation-state. Even the judiciary is no longer within the exclusive domain of the sovereign nation-sate. National courts show an increasing tendency to consider the decisions of international and foreign courts when faced with complex legal issues. Courts within the member states of the European Convention on Human Rights ('ECHR') now take into account the jurisprudence of the ECHR when reaching their decisions. Furthermore, the International Criminal Court at The Hague has complimentary jurisdiction over crimes committed in more than 115 nations.[239] There are many examples of dependency between national and transnational bodies. However, the crucial question is to what extent today's impact of globalisation affect the traditional conceptual of nation-state sovereignty which is allocation of power. Does it pose thereat to international lawmaking, for example from the non-state actor participation?

Apart from analysing the necessity doctrine from the legal perspective, it is crucially important to analyse necessity from the theoretically perspective too. A circumstance of 'necessity' confronted by a state in its international economic relations can be a consequence of or response to non-economic causes, for instance, not only to environment but also humanitarian, ecological, or related to national security. It is, therefore, important for the future research not to ignore the theoretical perspective of necessity as it involves wider subjects than merely from environmental standpoints. This paper leaves the room for future research to undertake the study of 'necessity theory' in order to expand the general international law scholarships.

While analysing the status of precautionary principle in customary international law and reviewing the its literatures, one is surprised by the absence of new customary international law theory, particularly by the commentators who build up their arguments in favour of recognising the customary international law status to precautionary principle. Therefore, there is a need for future research to fill this gap in proposing a new customary international law theory. This is not only to craft the clarity of granting customary international law status to precautionary principle but also to further develop the existing literatures of general international law.

In the end, it is hoped that the finding from this paper would generate interest for further research beyond trade and environment debate. The adoption of sustainable policy by international governments, for example, is the way to trade liberalisation and environmental protection. However, even with the agreement on many steps to attain that goal, they have often unable or unwilling to provide the institutional, financial and

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[238] R. V. Percival, 'Who's Afraid of the Precautionary Principle?' (2005-2006) 23 *Pace Environmental Law Reporter* 21, 22.
[239] See International Criminal Court, <http://www.icc-cpi.int/home.html&1=en> (listing members of ICC).

technical support necessary to carry out those steps.[240] Therefore, trade and environment conflict should be extended into broader debate about how to achieve sustainable development. This could be a potential area of future research to think about 'more specific ways' that the WTO could help to turn benefits from trade liberalisation into sustainable developments because it increases wealth which eventually leads to higher levels of environmental protection[241] taking into account the limitations within the WTO framework.

[240] Nations adopted detailed action plans at the 1992 Rio Conference on Environment and Development at the 2002 Johannesburg Conference on Sustainable Development, but they are far from successful implementing those plans. See A. Dan Tarlock, 'Ideas Without Institution: The Paradox of Sustainable Development' (2001) 9 *Indiana Journal of Global Legal Studies* 35, 39.

[241] See Gene H. Grossman and Alan B Krueger, 'Economic Growth and the Environment' (1995) 110 *Quarterly Journal of Economics* 353. These two authors made the best known arguments for the environmental Kuznets curve, which suggest that economic growth initially increases and then, past a certain level of per capita income, decreases levels of pollution.