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# *‘Unilateralism’, Values, and International Law*

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## **Abstract**

*States take unilateral measures every day. Their ‘unilateral acts’ only become contentious where one state seeks to impose its values on another state, and where that other state has not consented to the imposed values. Recently international tribunals have sought to determine when values may be imposed in environmental/natural resource disputes. In the Shrimp/Turtle case the WTO Appellate Body identified three international conditions which need to be satisfied: the concerned resource must be shared (community value), protective measures are required because the conservation of the species is recognized as a desirable objective (conservation value), and a consensual approach is desirable (consensus/cooperation value). This approach raises two questions: how are international values to be identified? What is the proper function of international courts and tribunals in seeking to give weight and effect to values once they have been identified? The debate about ‘unilateral’ acts reflects a broader debate about tension between different values (economic, social, political, environmental) and the hierarchical relationships between different values as reflected in international legal norms. The debate is further informed by the changing character of the international legal order, including the growth in the number of international instruments across subject matters, cross-fertilization between different subject-matter areas, and the increase in the number of international courts before which these tensions may be aired.*

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Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing state should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.<sup>1</sup>

## 1 Background

In the field of international law the subject of ‘unilateralism’ attracts considerable interest from governments and international bodies, as well as from scholars. The International Law Commission has been working on the topic ‘Unilateral Acts of States’ since 1997.<sup>2</sup> In a sense the level of interest seems strange; by definition governments act ‘unilaterally’ on a daily basis when they implement policies, take decisions and adopt administrative and other acts.<sup>3</sup> These and other measures — taken without recourse to international or multilateral authority — have daily and significant effects on persons within their territories or otherwise subject to their jurisdiction or control. It is not usually the ‘unilateral’ act per se which raises issues: what produces a sharp reaction is the ‘unilateral’ act which intrudes upon the interests of third persons to an inappropriate extent, perhaps because it requires them to alter their behaviour in some way. This may be because the person affected — including a state or an international organization — considers itself to be sovereign (or subject to some other sovereign body) in relation to the matter addressed by the act, or where it has not participated in the decision-making process leading to the adoption of the act, or where it has so participated but the formal conditions for the adoption of the act have not been met.<sup>4</sup>

<sup>1</sup> Principle 15, Rio Declaration on Environment and Development, June 1992, 31 *ILM* (1992) 874. For an account of the negotiating history of the Rio Declaration and an excellent interpretative guide see Porras, ‘The Rio Declaration: A New Basis for International Co-operation’, 1 *Rev. Eur. C. & Int. Env. Law* (1992) 245.

<sup>2</sup> See Report of the International Law Commission on the work of its 51st session, 3 May–23 July 1999, GAOR, 54th Sess., Supple. No. 10 (A/54/10 and Corr. 1&2) 1999, at paras 485–597; also at <<http://www.un.org/law/ilc/reports/1999/english/99repfra.htm>>. The ILC Working Group is focusing on a restricted category of unilateral acts, namely statements, and has agreed that the following concept will be taken as the basic focus for the Commission’s study on the topic: ‘A unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or Organization concerned.’ *Ibid.*, para. 589.

<sup>3</sup> As the Special Rapporteur of the ILC Working Group on Unilateral Acts of States has put it: ‘In international relations, States usually acted, in both the political and legal field, through the formulation of unilateral acts. Some were unequivocally political; others were easily identifiable as belonging in the legal field. Still others were ambiguous and would require careful study to determine in which category they belonged. In the case of legal acts, some were designed solely to produce internal legal effects and could be ignored. Concerning those seeking to produce international legal effects, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent.’ *Ibid.*, para. 498.

<sup>4</sup> On the failure to comply with procedural requirements see Michael Reisman, in the previous issue of this journal, at 3–18.

'Unilateral' acts become especially contentious where they are associated with the *imposition* by one community of its values on another community, and where that other community has not consented to or acquiesced in the imposition of such values. Unilateralism in the international context is intrinsically linked to sovereignty, territory and jurisdiction. At the national level, however, where sovereign authority and the limits of territorial jurisdiction are often less contentious, the 'unilateral' act is more or less a non-subject. We do not in domestic discourse think of the Parliament of the United Kingdom or the Congress of the United States of America as having acted unilaterally. Concerns about decisions taken by these bodies will be framed in terms of compliance with procedural requirements or constitutional limits: is the act consistent with European Community law, or the European Convention on Human Rights, or the US Constitution? Unilateralism is a term of art at the international level because we do not construct the issues in terms of international constitutional authority, because the territorial limits to the exercise of sovereign autonomy remain in a state of flux, and because the standards set by international law remain incomplete in many areas and ambiguous and open-textured in many others. Against this background differences in systems of values — whether of a political, economic, religious, cultural, social or other character — coupled with permeable national boundaries inevitably give rise to circumstances in which one community acts in such a way as to bring it into potential conflict with another. Such conflict may arise in just about all areas of international intercourse, from the use of force (one thinks of the recent conflict in Kosovo), to the prosecution of human rights violations before national courts (see Pinochet), to the application of economic and commercial standards (for example in relation to competition/anti-trust rules and intellectual property rights (see Wood Pulp), to the application of trade measures.

## 2 Unilateral Acts Relating to the Environment

For the subject matter addressed by Principle 15 of the Rio Declaration — the environment — states have long acted unilaterally in ways that lead to international differences. As early as 1893 an international arbitral tribunal ruled that the United States was not entitled to prevent British vessels from fishing Pacific fur seals on the high seas beyond its three mile territorial waters, even if such fisheries activities would lead to the extinction of the species.<sup>5</sup> Implicit in the decision is a recognition that measures of this kind required the consent of all states concerned. A more recent example was Hungary's unilateral decision, in 1989, to suspend work on a project commenced in 1977 for the joint construction with Czechoslovakia of two barrages on the River Danube. Hungary's act was followed by Czechoslovakia's 1991 decision to proceed to a 'provisional' solution by the unilateral diversion of the Danube on to its own territory, and this was in turn followed in 1992 by Hungary's unilateral

<sup>5</sup> *Behring Sea Fur Seals Fisheries Arbitration (Great Britain v. United States)*, *Moore's International Arbitrations* (1893) 755.

termination of the 1977 Treaty which provided the basis for the joint project.<sup>6</sup> Each of these three unilateral acts was found by the International Court of Justice to be unlawful. Another example, even more recent, was Japan's decision in 1998 (and repeated in 1999) to establish a unilateral experimental scientific fishing programme after Australia and New Zealand had declined to consent to an increase in Japan's catch quota for southern bluefin tuna. The lawfulness of this act, which was challenged by Australia and New Zealand by reference to Articles 64 and 116–119 of the 1982 UN Convention on the Law of the Sea, remains pending before an international arbitral tribunal. By way of provisional measures, however, the International Tribunal for the Law of the Sea ordered Japan to 'refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna' except with the agreement of Australia and New Zealand or unless the experimental catch is counted against its annual national allocation under the 1993 Convention for the Conservation of Southern Bluefin Tuna.<sup>7</sup> It was the 'unilateral' character of Japan's act, as much as its implications for the conservation of the tuna, that seems to have motivated the Tribunal. Beyond these cases, and there are many others, it is in the relationship between environmental standards and the application of trade measures that the subject of unilateral acts motivated by considerations of environmental protection have been most contentious. This topic attracted considerable attention throughout the 1990s.

From 1990 to 1992 intergovernmental negotiations were conducted leading to the United Nations Conference on Environment and Development (UNCED), which was held at Rio de Janeiro in June 1992. Amongst the most contentious issues were the circumstances, if any, in which one state could prohibit or regulate the entry of goods coming from an exporting state on the grounds that the process leading to the production of the good did not conform to the environmental standards of the importing state. In other words, to what extent could a state apply its own environmental standards as a basis for assessing the impact upon the environment of goods produced outside its territory? The question arises in two different circumstances: first, where that national standard is based upon a multilateral environmental agreement, and secondly, where it is not. In the first situation a trade measure taken pursuant to a multilateral environmental agreement<sup>8</sup> might be considered not to be 'unilateral' in character. It is the second situation that is envisaged by Principle 15.

The negotiation of what became Principle 15 coincided with international litigation before a GATT panel arising from the prohibition by the United States of tuna imports from Mexico. The US prohibition had been adopted on the grounds that the

<sup>6</sup> See *Case Concerning the Gabčíkovo/Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997) 76.

<sup>7</sup> See International Tribunal for the Law of the Sea, *Southern Blue-Fin Tuna Cases (New Zealand v. Japan, Australia v. Japan)*, Order on Provisional Measures, 27 August 1999, at para. 90(c) and (d).

<sup>8</sup> For example, pursuant to the 1973 CITES (which prohibits trade in species listed on Annex 1) or the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (which prohibits trade in certain substances or with non-parties); see P. Sands, *Principles of International Environmental Law* (1995) 685–687.

tuna had been caught in a manner which did not conform to regulations for the conservation of dolphins adopted by the United States under its 1972 Marine Mammal Protection Act. At issue was the entitlement of the United States to impose its dolphin protection standards to activities taking place in areas beyond its territory and jurisdiction, namely Mexican waters and its exclusive economic zone and the high seas. Mexican irritation was further compounded by the fact that the dolphins in question were not listed on any international instruments as being endangered or entitled to conservation measures. From a US perspective reasonable measures were being taken to protect a species much-loved by many Americans. From a Mexican perspective this amounted to nothing less than the imposition of US standards on the conduct of fishing activities by Mexicans. In the absence of any international standard governing the conservation of dolphins — whether by convention or 'soft law' — there was no evidence that the US values being promoted benefited from international approval, or that Mexico had in some way committed to the values which were now being applied to it. In September 1991 a GATT Panel ruled that the US measures were incompatible with the GATT.<sup>9</sup> In particular the Panel rejected the US measures on the grounds that they would mean that:

each contracting party could *unilaterally* determine the life or health protection policies [and the conservation policies] from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.<sup>10</sup> (emphasis added)

The unarticulated concern here is the transboundary imposition of one set of values on a community which holds another set of values. The *Mexican Tuna* case was concerned with a particular form of 'unilateral' act in the specific context of the GATT. One should therefore be careful not to come to conclusions of a more general application from the argument or the results of this case. Nevertheless, it highlighted the essential core that characterizes an act as 'unilateral' and therefore problematic in the international legal order: *it was concerned with the imposition by one state (community) of its values (dolphin conservation) on another state (community) without that other state having had an opportunity to contribute to the elaboration of those values or their elevation to international acceptability.* Unilateral acts of the *Mexican Tuna*-case type raise concerns precisely because the persons affected by the decision have not been able to participate — directly or indirectly — in the decision-making process.

Nine months after the GATT Panel handed down its report some 175 states, including Mexico and the United States, adopted the Rio Declaration. The text of what became Principle 15, which is also mirrored in Agenda 21,<sup>11</sup> was hugely controversial, precisely because it sought to develop, for the first time in an international environmental instrument, the test for determining the circumstances in which — if any — one state could apply its values to activities taking place outside its jurisdiction. The language of Principle 15, which is quoted at the introduction to this article, is notable for a number of reasons. First, it does not endorse or imply a blanket

<sup>9</sup> US Measures on Yellowfin Tuna Imports, 30 *ILM* 1594 (1991).

<sup>10</sup> *Ibid.*, paras 5.26 and 5.32.

<sup>11</sup> Agenda 21, para. 39.3(d); UNCED Report, A/CONF.151/2/Rev.1, Vol. 1 (1993).

prohibition on ‘unilateral actions’ which address environmental challenges outside the jurisdiction of the state taking the trade measures: the requirement that such actions ‘should be avoided’ is different from the ‘shall be prohibited’ standard which a considerable number of states, including Mexico, had wanted. Second, the language of Principle 15 indicates — admittedly in the most general terms — the conditions under which such ‘unilateral actions’ may be taken: the environmental measures which such actions are intended to promote ‘should, as far as possible, be based on an international consensus’. Here it is important to note that the existence of an international consensus is not a prerequisite but is desirable. Principle 15 thus points to the permissibility of unilateral measures that address environmental challenges outside the jurisdiction of the state taking the measures — including but not limited to trade measures — where a consensus amongst interested states has been sought but not necessarily achieved.

### 3 *Shrimp/Turtle Case*

The approach implied by Principle 15 appears to have informed the decision of the Appellate Body of the World Trade Organization in the *Shrimp/Turtle* case. The Appellate Body was called upon to assess the legality (under WTO law) of the import prohibition imposed by the United States on certain shrimp and shrimp products from India, Malaysia, Pakistan and Thailand. The prohibition had been adopted on the grounds that the shrimp were being harvested in a manner which caused harm to endangered sea turtles.<sup>12</sup> US federal guidelines adopted in 1996 (pursuant to s. 609 Public Law 101–162) required that all shrimp imported into the United States had to be accompanied by a shrimp exporter’s declaration attesting that the shrimp was harvested either in the waters of the nation certified under section 609, or under conditions that did not adversely affect sea turtles, including through the use of turtle excluder devices (TEDs). From a WTO perspective — particularly in the light of the GATT Panel’s finding in *Tuna/Dolphin I* — the difficulty was that the United States

<sup>12</sup> AB-1998-4, 12 October 1998; 38 *ILM* 33 (1999) at 118 *et seq.* In 1987 the United States had issued regulations (pursuant to its 1973 Endangered Species Act) requiring all US-registered shrimp trawl vessels to use approved turtle excluder devices (TEDs) in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. TEDs allowed for shrimp to be harvested without harming other species, including sea turtles. The US regulations became fully effective in 1990, and were subsequently modified to require the general use of approved TEDs at all times and in all areas where there was a likelihood that shrimp trawling would interact with sea turtles. In 1989 the United States enacted s. 609 of Public Law 101-162, which addressed the importation of Certain Shrimp and Shrimp Products. Section 609 required the US Secretary of State to negotiate bilateral or multilateral agreements with other nations for the protection and conservation of sea turtles. Section 609(b)(1) imposed (not later than 1 May 1991) an import ban on shrimp harvested with the commercial fishing technology, which may adversely affect sea turtles. Further regulatory guidelines were adopted in 1991, 1992 and 1996, governing *inter alia* annual certifications to be provided by harvesting nations. In broad terms, certification was to be granted only to those harvesting nations that provided documentary evidence of the adoption of a regulatory programme to protect sea turtles in the course of shrimp trawling. Such a regulatory programme had to be comparable to the programme of the US, with an average rate of incidental taking of sea turtles by their vessels, which should be comparable to that of the US vessels.

was, in effect, applying its standards of conservation to activities carried out in areas within the territory or jurisdictional limits of these four other states. When its legislation was challenged by India, Malaysia, Pakistan and Thailand, the United States sought to justify its actions on the grounds that the sea turtles it was seeking to protect were recognized in international law as being endangered. At first instance a WTO Panel concluded that the import ban applied on the basis of section 609 was not consistent with Article XI(1) GATT 1994 and could not be justified under Article XX GATT 1994.<sup>13</sup> The United States appealed to the WTO Appellate Body, invoking in particular Article 20(g) to justify the legality of its measures. Article 20(g), it will be recalled, provides an exception to free trade rules, permitting measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

Overruling the Panel decision, the Appellate Body found that section 609 was 'provisionally justified' under Article 20(g), because sea turtles 'constituted "exhaustible natural resources" for the purpose of Article XX(g) of the GATT 1994' and section 609 was a measure *concerned with* the conservation of 'exhaustible natural resources'.<sup>14</sup> In reaching this conclusion the Appellate Body was required to pass on the question of whether the United States had an interest in the sea turtles and whether the turtles were internationally entitled to a measure of protection. This was addressed by way of construction: the Appellate Body noted that Article XX(g) of GATT 1994 must be read by a treaty interpreter 'in the light of contemporary concerns over the community of nations about the protection and conservation of the environment,'<sup>15</sup> and it refers to the preamble to the 1994 WTO Agreement (which 'explicitly acknowledges "the objective of *sustainable development*"') and modern international conventions and declarations, including the UN Convention on the Law of the Sea.<sup>16</sup> The sea turtles at issue were an 'exhaustible natural resource' and they were highly migratory animals, passing in and out of the waters subject to the rights of jurisdiction of various coastal states on the high seas.<sup>17</sup> The Appellate Body concludes with the observation that

it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat — the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, *there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purpose of Article XX(g)*.<sup>18</sup> (emphasis added)

In many respects the case turns on this finding of fact, since it provides the basis for

<sup>13</sup> WT-DS58/R, 15 May 1998.

<sup>14</sup> *Ibid.*, paras 131 and 134.

<sup>15</sup> *Ibid.*, para. 129.

<sup>16</sup> *Ibid.*, para. 130, citing Art. 56 para.1(a) of the 1982 UNCLOS.

<sup>17</sup> *Ibid.*, paras 132 and 133.

<sup>18</sup> *Ibid.*, para. 133 (emphasis added).

concluding that the United States has an interest in the resources and — unstated but implicit — an interest in the treatment by the four Asian states of the migratory turtle resources. Although the case does not proceed on this basis, the ‘unilateral’ acts in question might just as easily be those of the four states rather than that of the United States. Having found the US measures to be ‘provisionally justified’, the Appellate Body then assesses whether section 609 is consistent with the requirements of the chapeau to Article 20, which requires that exceptional trade measures ‘are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’. Here the Appellate Body finds against the United States, in particular that section 609 established a rigid and unbending standard by which US officials determined whether or not countries would be certified: it was not acceptable, in international trade relations,

for one WTO member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.<sup>19</sup>

Shrimp caught using identical methods to those employed in the United States had been excluded from the US market solely because they had been caught in waters of countries that had not been certified by the United States, and the resulting situation was ‘difficult to reconcile with the declared [and provisionally justified] policy objective of protecting and conserving sea turtles’.<sup>20</sup> This suggested that the United States was more concerned with effectively influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers.

Moreover, the United States had not engaged the four Asian countries ‘in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition’.<sup>21</sup> The failure to have *a priori* consistent recourse to diplomacy as an instrument of environmental protection policy produced ‘discriminatory impacts on countries exporting shrimp to the United States with which no international agreements [were] reached or even seriously attempted’.<sup>22</sup> The fact that the United States negotiated seriously with some but not other members that exported shrimp to the United States had an effect that was ‘plainly discriminatory and unjustifiable’. In addition, the protection and conservation of highly migratory species of sea turtles demanded ‘concerted and cooperative efforts on the part of the many countries whose waters [were] traversed in the course of recurrent turtle migrations’.<sup>23</sup> Such ‘concerted and cooperative efforts’ were required by *inter alia* the Rio Declaration

<sup>19</sup> *Ibid.*, para. 164.

<sup>20</sup> *Ibid.*, para. 165.

<sup>21</sup> *Ibid.*, para. 166.

<sup>22</sup> *Ibid.*, para. 167.

<sup>23</sup> *Ibid.*, para. 168.

(Principle 12), Agenda 21 (para. 2.22(i)), the 1992 Convention on Biological Diversity (Article 5) and the 1979 Convention on the Conservation of Migratory Species of Wild Animals. Further, the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles provided a 'convincing demonstration' that alternative action was reasonably open to the United States, other than the *unilateral* and non-consensual procedures established by section 609.<sup>24</sup> Whilst the United States was a party to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), it had not attempted to raise the issue of sea turtle mortality in relevant CITES Committees, and had not signed the Convention on the Conservation of Migratory Species of Wild Animals or the 1982 UNCLOS or ratified the 1992 Convention on Biological Diversity.<sup>25</sup>

The *Shrimp/Turtle* decision departs from the approach of the Panel in the 1991 *Tuna/Dolphin* decision, and hints at the permissibility of national conservation measures being applied to assess activities being carried out beyond national jurisdiction. The decision is of course distinguishable from the *Tuna/Dolphin* case in at least one material respect: unlike dolphins, turtles are internationally recognized as being endangered and in need of protection. The difficulty inherent in the US position was that the international protection afforded to turtles was only in respect of trade in the turtles themselves, which has been prohibited by the 1973 CITES to which all five states were party. There was — and still is — no international instrument that entitles one state to take measures to protect turtles located in another jurisdiction. The Appellate Body nevertheless concluded that the United States had a legitimate interest in the conservation of turtles located outside its jurisdiction and was not, in principle, prohibited by WTO law (or, apparently, by any other general rule of international law) from seeking to give effect to its environmental standards by way of trade import restrictions. The progressive nature of this finding may be seen by contrasting the Appellate Body's decision with that of the Arbitral Tribunal in the *Pacific Fur Seal* arbitration which, as mentioned above, came down firmly against unilateral conservation measures in relation to activities undertaken beyond the territory of the implementing state.

The *Shrimp/Turtle* decision was widely criticized by sections of the environmental community for undermining the ability of states to set for themselves their own environmental standards. In fact, the decision may be seen as a radical expression by a leading international judicial authority of the potential capacity of states to act unilaterally in seeking to apply their environmental standards to activities taking place outside their jurisdiction. The parameters of that right are circumscribed, however, and certain conditions must be satisfied:

<sup>24</sup> *Ibid.*, para. 170. The 1996 Convention establishes obligations to reduce harm to sea turtles and encourages the appropriate use of TEDs (Art. IV para.2(h)). It also provides expressly that in implementing the convention the parties shall act in accordance with the WTO Agreement, including in particular the Agreement on Technical Barriers to Trade and Art. XI of GATT 1994 (Art. 15).

<sup>25</sup> *Ibid.*, para. 171 and note 174 (and accompanying text).

- first, the state taking the measure must have a legitimate interest in the resource which it is seeking to protect (i.e. it might be a migratory, shared resource);
- second, the resource concerned must be the subject of international measures aiming to protect them from further endangerment; and
- third, the state taking the measures must have exhausted prior diplomatic efforts to enter into an agreement with the state which is the subject of the measures regarding the standards to be applied for the conservation of the resource.

#### 4 International Values and the International Judicial Function

At the core of the three conditions identified by the Appellate Body rests the need to identify values which have been recognized by the international community: that a resource is shared (community value), that protective measures are required because the conservation of the species is recognized as a desirable objective (conservation value), and that a consensual approach is desirable (consensus/cooperation value). In the *Shrimp/Turtle* case the Appellate Body concluded that two of the three international values were in place but that the third — consensus/cooperation — was not present. This aspect of the case raises two questions: first, how are international values to be identified? And second, what is the proper function of international courts and tribunals in seeking to give weight and effect to values once they have been identified?

For the purposes of giving effect to the Appellate Body's approach it is necessary to identify international values, such as community, conservation and consensus. Clearly this is a different task from identifying the rules of international law or the sources of international obligation, which direct one towards treaty and custom and the other formal materials referred to in Article 38(1) of the Statute of the International Court. The Appellate Body has, in effect, drawn upon a collection of international instruments, some of which are intended to have legal effects, others of which are not. This approach gives considerable weight to what has been called 'soft law', and its use in this way requires a reconsideration of the traditional sources of international law. The approach is sensitive because it necessarily interjects a subjective element, both in terms of the process of determining which instruments or acts may be relevant and then determining what weight, if any, to give to them. These are issues that clearly require further consideration, beyond what is possible in this introductory presentation.

The second question is related to this first point, and raises equally sensitive issues about the proper relationship between the international legislature (such as it exists) and the international judiciary (such as it exists). The three Members of the Appellate Body invoke a host of international instruments to support their conclusions. For example, five instruments are referred to in support of the view that 'concerted and cooperative efforts' are needed to exhaust diplomatic efforts before a state may act unilaterally. Of these, two are not — and do not purport to be — legally binding (the

Rio Declaration and Agenda 21), one is a convention which the United States has signed but has declined to ratify (the Convention on Biological Diversity), another is a convention which none of the five states involved had even signed — the Convention on the Conservation of Migratory Species of Wild Animals — and another is a convention with which none of the four Asian states have any association (the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles). As mentioned, reliance on these instruments reflects a move away from the traditional formalities associated with establishing customary norms or applicable (as opposed to relevant) treaties. These instruments of international law — soft and hard, binding and not — go to the identification not of a rule of international law but of an international value, which is then used to justify (or not) in legal terms the ‘unilateral act’ of a particular state. I make these points not by way of criticism, but rather to illustrate the extent to which the judicial function (at least within the WTO context) has departed from formal positivism. The Tribunal has not limited its function as being to identify mechanically a norm and then apply it, but rather to divine the existence of one or more international values that may then be invoked to assess the permissibility of particular behaviour. In this process the identity of the individual members of the adjudicating body becomes especially significant: departing from the apparently mechanical process of identifying and then applying the law (how much state practice? Which states? Over what period of time?<sup>26</sup>) the body moves to the even more subjective task of identifying core international values. The subjectivity of the approach does not necessarily delegitimize the function, so long as one is clear about what is actually happening. In this regard the background and representativity of the members of the adjudicating body becomes a key element in determining the legitimacy of the approach. Inevitably the path taken by the Appellate Body will lead to greater scrutiny of the process of appointment of its members, including the background and approach of future candidates. This would not be a negative development, in relation to the Appellate Body or indeed to other international adjudicatory bodies. But it points to an enhanced role for a self-confident judiciary, filling in the gaps which states in their legislative capacity have been unwilling — or unable — to fill.

## 5 Looking Forward

In the environmental field the subject of ‘unilateral’ acts has largely — but by no means exclusively — focused on the circumstances in which a state which

<sup>26</sup> For a classical example see the International Court of Justice’s consideration of whether the equidistance principle for maritime delimitation was a rule of customary international law: *North Sea Continental Shelf Cases*, ICJ Reports (1969) at paras 60–82. By way of contrast, more recently the International Court seems to have dispensed altogether with the traditional formalities of establishing the existence of a rule of customary international law by reference to state practice and *opinio juris*: see for example its conclusion that ‘the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation’: *Gabcikovo/Nagymaros* case, *supra* note 6, at para. 51.

participates in regional or global trading regimes will be entitled to impose unilateral trade restrictions on the importation of goods which might be harmful to the importing state's environment or which have been produced in a manner which is inconsistent with its environmental objectives. The significance of the issue goes beyond environmental matters, and implications for other non-economic objectives, including human rights and labour standards, should be plain. I have sought to explain my understanding that the debate about 'unilateral' acts reflects a broader debate about:

- tension between states and other communities between different values (economic, social, political, environmental);
- the question of hierarchical relationships between different values as reflected in international legal norms; and
- the relationship between trade rules and norms of international law which seek to give effect to other values (do regional/global trade rules exist within hermetically sealed regimes).

This debate is further influenced by the changing character of the international legal order, including in particular the rapid growth in the number of international instruments across the range of subject matters, an increasing propensity to cross-fertilization between these different subject-matter areas and the rules, and the multiplication in the number of international adjudicatory fora dealing with international disputes. The growing challenge to the dominance of international trading rules was seen most dramatically in the collapse of the WTO Ministerial meeting at Seattle, in November 1999, and seems set to develop further in the context of the differences in values which have given rise to disputes over genetically modified organisms and the place of human rights and labour standards in the world trade order. The absence of a comprehensive code setting out the norms of international law which are to apply in these areas provides fertile conditions for the adoption of 'unilateral' acts. Even where regional norms are well developed, for example in the EU, some place still remains for 'unilateral' acts seeking to promote particular values. Principle 15 and the *Shrimp/Turtle* decision have indicated a way forward, but also suggest the initiation of a broader debate about the nature of the international legal order and the proper function of the international judiciary.