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ENVIRONMENTAL SURVEY OF WTO DISPUTE PANEL RESOLUTION PANEL DECISIONS SINCE 1995: "TRADE AT ALL COSTS?"*

CRAIG A.A. DIXON[†]

Are we, as a global community, really serious about taking care of the environment? In an age where modern society has engineered some of the most remarkable breakthroughs in business, law, and technology, the environmental protection movement still struggles. The movement has been, in a sense, treated like an impudent child—better seen and not heard. Politicians and business leaders alike stress the need for environmental responsibility, but looking at the landscape, it is hard to separate lip-service from true commitment. Environmental groups have been energized in order to hold those entities that are detrimentally effecting the environment accountable for their actions. One of the global organizations that has a direct and indirect hand in affecting environmental protection, the World Trade Organization ("WTO"), has lately been a target for criticism in environmental and labor circles. Recently, more than six hundred people were arrested in connection with the WTO demonstrations that occurred when the WTO met in Seattle, Washington from November 30, 1999 to December 3, 1999.¹

The purpose of this Note is to examine all of the major environmental decisions handed down by the Dispute Resolution Panel of the WTO and evaluate the organization's commitment to the environment. In doing so, section I gives a brief overview of the WTO and the General Agreement on Tariffs and Trade ("GATT"),² discussing the early stages of environmental policy under each. Section II explores the four major environmental decisions handed down by the WTO, namely: *Standards*

* Lisa K. Seilheimer, Note, *The SPS Agreement Applied: The WTO Hormone Beef Case*, 4 ENVTL. LAW. 537, 576 (1998) (quoting Colin Hines, *Globalization: Big Stick Politics*, GUARDIAN (London), Oct. 8, 1997, at 4).

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¹ See *WTO Foes Celebrate Trial as Dismissed*, SEATTLE TIMES, January 25, 2000, at B2.

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

for *Reformulated and Conventional Gasoline*,³ *EC Measures Concerning Meat and Meat Products*,⁴ *Australia—Measures Affecting Importation of Salmon*,⁵ and *United States—Import Prohibition of Certain Shrimp and Shrimp Products*.⁶ Section III discusses common themes or trends found in the four cases in order to shed light on where the WTO is with respect to environmental policy, hopefully answering the question asked by environmentalists, businesspeople, and governments alike: where are we now? Section IV concludes this Note by putting forth a call for the WTO to better balance environmental concerns with its free trade agenda, and recommends that the United States and other environmentally aware nations should consider ignoring WTO mandates until that organization does more than merely give lip service to environmental protection.

I. EARLY DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL POLICY WITH RESPECT TO TRADE

A. Creation of the WTO

The WTO identifies itself as being “the only international body dealing with the rules of trade between nations.”⁷ The WTO grew out of the economic ruin of World War II, which according to many was the result of building tension among nations caused by trade protectionism.⁸ After World War II, certain nations reached the consensus that some type of framework should be established in order to facilitate international cooperation.⁹ One component of that framework was an organization to reduce trade barriers, and, after several intermediate steps, the Havana

³ World Trade Organization, *Panel Report: United States—Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, 35 I.L.M. 274 (1996) [hereinafter *Reformulated-Gasoline*].

⁴ World Trade Organization, *Panel Report: EC Measures Concerning Meat and Meat Products (Hormones)*, 2 Int'l Trade L. Rep., No. 4, at 746, Aug. 18, 1997 [hereinafter *Hormone Beef*].

⁵ World Trade Organization, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R, June 12, 1998, Doc. 98-243 (WTO), available in Westlaw at 1998 WL 330843 [hereinafter *Australia-Salmon*].

⁶ World Trade Organization, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 37 I.L.M. 832 (1998) [hereinafter *Shrimp-Turtle*].

⁷ World Trade Organization, *What is the World Trade Organization?* (visited Mar. 8, 1999) <<http://www.wto.org/wto/about/facts1.htm#strong>>. The WTO website gives an overview of the WTO's purpose and goals. It gives the WTO's perspective with respect to trade and news updates of current matters of interest.

⁸ See, e.g., DANIEL C. ESTY, *GREENING THE GATT* 243 (1994).

⁹ See *id.* at 244.

Charter was written in 1947, and signed by fifty-three nations on March 24, 1998.¹⁰ This Charter was supposed to provide a comprehensive system for international trade practices.¹¹ However, because the Havana Charter had to go through the lengthy process of ratification by member countries, the GATT was adopted as a provisional measure in 1947.¹² Due to its "temporary" nature, the GATT was vague and provided no "enforcement mechanisms, no codified rules," or other formal procedures for its operation.¹³ Ironically, the political climate changed in both the United States and other member nations, making the GATT the only international framework to combat protectionism in international trade until 1995.¹⁴

Although the GATT lacked formal mechanisms, several accords were developed under it to more effectively guide international trade policy.¹⁵ More importantly, the "Uruguay Round,"¹⁶ signed by over 117 countries in 1994, provided the real roots for the World Trade Organization.¹⁷ The Uruguay Round provided the "stick" to enforce the "carrot" provided by the GATT and other agreements on trade.¹⁸

The WTO has three aims.¹⁹ The first goal is to help trade flow as freely as possible.²⁰ According to the WTO, this means not only removing obstacles to trade, but also "ensuring that individuals, companies and governments know what the trade rules are around the world, and [have] confidence that there will be no sudden changes of policy."²¹ The second aim of the WTO is to serve as a forum for trade negotiations.²² This provides for open lines of communication, better enabling the international community to work together for global benefit. The last and

¹⁰ *Havana Charter for an International Trade Organization*, U.N. Doc. E/C.2/78 (1948).

¹¹ See ESTY, *supra* note 8, at 244.

¹² See *id.* at 245.

¹³ *Id.* The GATT was originally intended as a temporary measure committing members to some basic principles of international trade. The proposal for an International Trade Organization ("ITO") (precursor to the WTO), necessitated ratification by member countries in order to be legally binding. Lawmakers in the United States were reluctant to ratify it, however, because of concerns with sovereignty issues. See *id.* at 244.

¹⁴ See *id.* at 245.

¹⁵ See *id.* at 247-48.

¹⁶ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

¹⁷ See *id.*

¹⁸ See RAJ BHALA, INTERNATIONAL TRADE LAW 87 (1996).

¹⁹ See World Trade Organization, *supra* note 7.

²⁰ See *id.*

²¹ *Id.*

²² See *id.*

most important objective of the WTO is dispute settlement.²³ Due to the conflicting interests that are often at the center of trade disputes, having a neutral procedure, based on an agreed-upon legal foundation, makes peaceful resolution possible.²⁴

"Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements [also] cover trade in services, and in traded inventions, creations and designs," otherwise known as "intellectual property."²⁵ The WTO's neutral framework is also beneficial in circumstances where only some of the parties in a dispute are signatories to an agreement.²⁶ Without the WTO, such situations would be much more difficult to resolve, if not impossible.

Aside from the WTO itself, another offshoot of the Uruguay Round was the decision to formulate a more international approach to environmental problems.²⁷ The end result was the WTO Committee on Trade and Environment ("CTE").²⁸ The parameters of CTE's concern are two-fold. One is that "policy coordination" be limited to trade and those trade-related aspects of environmental policies that may result in significant trade effects for its members.²⁹ This restricted focus was designed to keep the CTE out of the way of other, better equipped bodies and agencies responsible for developing, implementing, and monitoring global standards and policies on the environment.³⁰

The second parameter is that if problems of policy coordination to protect the environment and promote sustainable development are identified through the CTE's work, steps taken to resolve them must uphold and safeguard the principles of the multilateral trading system which governments spent seven years strengthening and improving through the Uruguay Round negotiations.³¹

Many in environmental circles argue that the policies established by the second parameter of the CTE effectively nullifies any protective

²³ See *id.*

²⁴ See World Trade Organization, *supra* note 7.

²⁵ *Id.*

²⁶ See *id.*

²⁷ See World Trade Organization, *Trade and Environment in the WTO* (visited Mar. 8, 1999) <<http://www.wto.org/wto/envIRON1/marrakes.htm>>.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ *Id.*

environmental measures that might have some negative trade implications regardless of their success in protecting environmental concerns.³² However, WTO literature plainly states that the goal of the Committee is to "identify the relationships between trade and environmental measures in order to promote sustainable development, and to make recommendations on whether any modifications to the provisions of the multilateral trading system are required."³³

B. *GATT XX*

The GATT was founded on the premise that limiting discriminatory trade practices increases global welfare.³⁴ However, the GATT's environmental, or "green exception"³⁵ does recognize the ability of a country to place other concerns ahead of obligations under the GATT.³⁶ Article XX states:

Subject to the requirement that such 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or

³² See, e.g., Andrew L. Strauss, *The Case for Utilizing the WTO As a Forum for Global Environmental Regulation*, 3 WIDENER LAW SYMP. J., 309, 318 (1998). Commentators argue that Developing Nations have a stranglehold on the CTE and use the relatively small size of the committee to dominate the environmental position of the WTO as a whole, thereby precluding any "significant environmental initiatives." *Id.*

³³ World Trade Organization, *supra* note 27.

³⁴ See Mark Edward Foster, *Trade and Environment: Making Room For Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393, 421-22 (1998).

³⁵ *Id.* at 425.

³⁶ See *id.*

consumption.³⁷

"Articles XX(b) and (g) are commonly considered the 'green' exceptions of the GATT because they offer the most hope for the environmental policies of high-level states."³⁸

Despite Article XX's existence, its importance in the multilateral trading system is not clear from the language. Given the current system of trade regulation, Article XX is not worth the paper that it is written on if the WTO and its proponents fail to both embrace it, and give it strength.

At one point, many environmental interests felt that when in conflict with the liberalization of international trade, Article XX was given no effect.³⁹ This thinking was largely the result of the U.S. brief "United States—Restrictions on Importation of Tuna," more commonly known as the *Tuna-Dolphin* dispute.⁴⁰ Although *Tuna-Dolphin* predates the WTO, current treatment of Article XX finds root in this case.⁴¹

Tuna-Dolphin centered on a U.S. embargo on all tuna caught using purse-seine nets, which are known to ensnare dolphins that swim above the tuna.⁴² Mexico's challenge was twofold: first, that the U.S. ban violated the GATT prohibition on import restrictions,⁴³ and second, that the ban was an attempt by the United States to protect its domestic tuna industry.⁴⁴ The panel ruled in favor of Mexico on the grounds that the embargo was inconsistent with GATT obligations because the use of trade measures to protect the environment outside a nation's sovereign territory was not permitted under the Agreement, and because the ban was not "necessary" to save dolphins.⁴⁵ One commentator felt that the *Tuna-Dolphin I* decision "jeopardize[d] the future efficacy of international

³⁷ GATT Art. XX. See also *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, April 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33, 33 I.L.M. 1125, 1181 (1994) (listing the Schedules of Specific Commitments in Article XX).

³⁸ Foster, *supra* note 34, at 426.

³⁹ See, e.g., Janet McDonald, *Trade and the Environment: Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 438 (1992).

⁴⁰ Panel Report: *United States—Restrictions on Imports of Tuna*, Aug. 16, 1991, 30 I.L.M. 1598 (1992) [hereinafter *Tuna-Dolphin*].

⁴¹ See discussion *infra* Part II. This dispute, between the U.S. and its trading partners, had two phases. Mexico brought *Tuna-Dolphin I* and the European Union brought *Tuna-Dolphin II*.

⁴² See *Tuna-Dolphin* para. 3.53

⁴³ See *id.* para. 3.58.

⁴⁴ See *id.*

⁴⁵ See *id.* para. 5.38.

environmental treaties, especially those which depend on the use of trade measures to achieve their objectives.”⁴⁶ She went on to argue that *Tuna-Dolphin I* accorded free trade a “far higher priority than environmental protection.”⁴⁷

The panel report for *Tuna-Dolphin I* was never adopted under GATT guidelines, and in *Tuna-Dolphin II*, brought by the European Union, the panel, according to the WTO, modified its position.⁴⁸ The panel “recognize[d] for Article XX(g) purposes” that the U.S. action, with respect to the tuna regulations, was “a policy to conserve exhaustible natural resources.”⁴⁹

This mixed reading of Article XX of the GATT provided the foundation for the WTO Dispute Resolution Panel’s interpretation of the four decisions examined in this paper. The first, and arguably one of the most important, is the *Reformulated Gasoline* decision.

II. SURVEY

Reformulated Gasoline centered on a regulation enacted under the 1990 Clean Air Act Amendments.⁵⁰ The Clean Air Act created two gasoline programs.⁵¹ The first was intended to maintain pollution standards from gasoline below 1990 levels.⁵² The second was aimed specifically at reducing the pollution in designated major population centers.⁵³ “Where the latter program was concerned, only ‘reformulated’ gasoline was allowed to be sold.”⁵⁴ Pursuant to this statutory mandate, the Environmental Protection Agency (“EPA”) established specifications to

⁴⁶ McDonald, *supra* note 39, at 402.

⁴⁷ *Id.* at 438.

⁴⁸ For an excellent overview of the *Tuna-Dolphin* dispute, see generally World Trade Organization, *Beyond the agreements: The tuna-dolphin dispute* (last modified Feb. 6, 1998) <<http://www.wto.org/wto/about/beyond5.htm>>.

⁴⁹ Scott Daniel McBride, Note, *Reformulating Executive and Legislative Relationships after “Reformulated Gasoline:” What’s Best for Trade and the Environment?*, 23 WM. & MARY ENVTL. & POL’Y REV. 299, 310 (1998).

⁵⁰ Air Pollution Control (Clean Air) Act Amendments of 1990, 42 U.S.C. §§ 7401-7671(q) (1994); Environmental Protection Agency, Regulation of Fuels and Fuel Additives; Standards for Reformulated and Conventional Gasoline, Final Rule, 59 Fed. Reg. 7715, 7789 (1994).

⁵¹ See Jeffrey Waincymer, “Reformulated Gasoline” Under the Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of A Chapeau?, 18 MICH. J. INT’L L. 141, 146 (1996).

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.* at 147.

determine the minimum quality of gasoline allowed in certain cities.⁵⁵

The dispute stemmed from the fact that domestic refiners had three different standards that they could use to meet the requirements of the regulation, whereas foreign refiners had only one.⁵⁶ "Foreign" refiners are those that do not export seventy-five percent of their production to the United States.⁵⁷

Venezuela filed an early complaint over the regulations under the GATT in 1994, but dropped it in exchange for the U.S. promise to amend the regulation.⁵⁸ Tension was renewed, however, when Congress blocked any amendment efforts.⁵⁹ Venezuela, and later Brazil, filed complaints with the Dispute Settlement Body in 1995 alleging that the United States violated Article XXII:1 of the GATT of 1994, Article 14.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").⁶⁰ The United States defended each of these claims, relying specifically on the provisions of Article XX(b), (d), and (g).⁶¹

The Panel found that imported and domestic gasoline were "like products" and because imported gasoline was denied the same favorable rules as domestic gasoline, the regulations violated the United States' obligations under the GATT.⁶² Furthermore, the Panel found that although clean air was an "exhaustible natural resource,"⁶³ the U.S. regulations were neither "necessary" in the context of Article XX(b) or "related to" conservation of exhaustible natural resources under Article XX(g).⁶⁴ Following the precedent set earlier in *Tuna-Dolphin*, the panel found that the regulation must be "primarily aimed at" the conservation of exhaustible natural resources in order to be upheld under Article XX.⁶⁵ The decision of the Panel did not surprise many in environmental circles given the treatment of Article XX in *Tuna-Dolphin*.⁶⁶

The U.S. brought an appeal, which was reviewed by the Appellate

⁵⁵ See *id.* at 146-47.

⁵⁶ See *id.* at 147.

⁵⁷ See 40 C.F.R. §§ 80 - 80.174.

⁵⁸ See Waincymer, *supra* note 52, at 147-48.

⁵⁹ See *id.* at 148.

⁶⁰ See *Reformulated Gasoline*, *supra* note 3, paras. 1.1.-1.2.

⁶¹ See *id.* para. 3.58-3.66.

⁶² *Id.* para. 6.14.

⁶³ See *id.* para. 6.37.

⁶⁴ *Id.* para. 6.39.

⁶⁵ See *id.* para. 4.8.

⁶⁶ See Myung Hoon Choo, *An Institutional Perspective on Resolving Trade-Environmental Conflicts*, 12 J. ENVTL. L. & LITIG. 433, 444 (1997).

Body in April 1996. The appeal by the United States claimed that the Panel erred by:

1. ruling that the baseline establishment rules do not constitute a “measure” “relating to” the conservation of air under Article XX(g);⁶⁷
2. misapplying Article XX(g);⁶⁸ and
3. ruling that the baseline establishment rules fail to satisfy the “necessary” and “primarily aimed at” requirements of Article XX.⁶⁹

The Appellate Body agreed with the Panel’s finding that clean air was an “exhaustible natural resource.”⁷⁰ However, it can be safely stated that the Body took a slightly different interpretation of Article XX. The Panel used a previous GATT decision, *Herring—Salmon*,⁷¹ to determine that in order for a regulation to relate to the conservation of an exhaustible natural resource, it must be *primarily* aimed at the conservation of that exhaustible natural resources.⁷² Using what the Body called “opaque” reasoning, the Panel found that, because there was no “direct connection” between the less favorable baseline establishment rules and the “US objective of improving air quality,” the requirements of Article XX(g) were not met.⁷³ The Body reasoned that the Panel should have looked at whether the baseline establishment rules were “primarily aimed at” the conservation of exhaustible natural resources, not whether the “less favorable treatment” of imported gasoline was “primarily aimed at” conservation.⁷⁴ “The chapeau of Article XX makes it clear that it is the ‘measures’ which are to be examined under Article XX(g), and not the legal finding of ‘less favourable treatment.’”⁷⁵ Shifting focus from the “treatment” to the measures, the Body was able to conclude that the “measures” met the general requirements of Article XX(g).⁷⁶ Using the “good faith” standard

⁶⁷ See World Trade Organization, *Appellate Body Report: United States—Standards for Reformulated and Conventional Gasoline*, 1 Int’l Trade L. Rep., No.1, at 71 (Apr. 29, 1996) [hereinafter *Reformulated Gasoline Appellate Body*].

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at 72.

⁷¹ *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, B.I.S.D. 35S/98, Mar. 22, 1988.

⁷² See *Reformulated Gasoline*, *supra* note 3, para. 6.39.

⁷³ See *Reformulated Gasoline Appellate Body*, *supra* note 67, at 75. The Panel found that the measures fell outside the scope of Article XX(g). See *id.*

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ See *id.* at 75.

established by the general rules of treaty interpretation,⁷⁷ the Body found that the baselines were "primarily aimed at" protecting the environment and should be viewed as such for Article XX(g) purposes.⁷⁸

The last, and arguably most important, segment of the Body's Article XX(g) analysis centered on the language, "if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁷⁹ Venezuela argued about the language of XX(g): "to be properly regarded as 'primarily aimed at' the conservation of natural resources, the baseline establishment rules must not only 'reflect a conservation purpose' but also be shown to have had 'some positive conservation effect.'"⁸⁰ The Appellate Body found that this argument was inconsistent with the "basic international law rule of treaty interpretation" that gives the terms of a treaty their plain meaning.⁸¹

Despite seemingly favorable treatment of the United States' arguments, the Appellate Body did not find administrative ease sufficient to justify the differing standards.⁸² Furthermore, the Body found that there were other options available to the U.S. that would be less burdensome on international trade, i.e. forming "cooperative arrangements with the governments of Venezuela and Brazil" to meet their clean air goals.⁸³ The EPA's previous attempt to "cut a deal" with Venezuela likely also contributed to the lack of credibility of the differing standards for "like products."⁸⁴ For these reasons, the Body found that the regulations failed to meet the requirements of the chapeau of Article XX of the General agreement,⁸⁵ and constituted "arbitrary or unjustifiable discrimination" creating a 'disguised restriction' on international trade."⁸⁶

Reformulated Gasoline provided the foundation for present WTO Article XX analysis, as can be seen in its progeny.

A. *EC Measures Concerning Meat and Meat Products*

⁷⁷ See *id.* 76 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

⁷⁸ See *id.* at 77.

⁷⁹ See *Reformulated Gasoline Appellate Body*, *supra* note 67, at 78.

⁸⁰ See *id.* at 78.

⁸¹ See *id.* at 78.

⁸² See *id.* at 81.

⁸³ *Id.* at 82.

⁸⁴ See Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267, 1269 (1996).

⁸⁵ See *Reformulated Gasoline Appellate Body*, *supra* note 67, at 82.

⁸⁶ *Id.* at 80.

In 1989, the EU banned animals treated with certain hormones primarily because European consumers thought hormone-treated beef was unsafe.⁸⁷ The United States cattle industry felt that the measures were taken to protect the European cattle industry.⁸⁸ From 1986 to 1989, the U.S. exported more than \$ 250 million worth of beef to the EU members each year.⁸⁹ After the ban, U.S. exports to the EU fell to almost zero.⁹⁰

In August 1997, the United States, later joined by Canada, filed a complaint arguing that the EU ban violated its obligations under Article III or XI of the GATT; the SPS Agreement;⁹¹ Article 2 of the Agreement on Technical Barriers to Trade;⁹² and Article 4 of the Agreement on Agriculture.⁹³

The U.S. argued that the EU ban was a sanitary measure inconsistent with the SPS Agreement, which ensured that no Member could use the guise of sanitary or phytosanitary measures to maintain protectionist barriers to trade.⁹⁴ Furthermore, it was argued that the ban: (1) lacked scientific foundation, (2) exceeded the requirement that the ban apply only to the extent necessary to protect human life and health, and (3) was more trade restrictive than required to achieve the appropriate level of sanitary protection.⁹⁵ The U.S. also argued that the EU ban arbitrarily and unjustifiably discriminated between Members (of the Agreement) in

⁸⁷ See Seilheimer, *supra* note *, at 542 (1998).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, [hereinafter SPS Agreement] Annex 1A, FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994, (1994).

⁹² Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, [hereinafter TBT Agreement] Annex 1A, FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994, (1994).

⁹³ See Complaint by the United States, WT/DS26/R/USA, Aug. 18, 1997, at *3, available in LEXIS, GATTPD; Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994, (1994).

⁹⁴ See *First Submission of the United States, European Communities—Measures Concerning Meat and Meat Products*, Aug. 28, 1996, para. 88, available in 1996 WL 807619.

⁹⁵ See *id.* para. 122.

identical or similar situations.

The EU defended its ban on the grounds that the SPS Agreement gives the right to establish the level of protection that the Member feels appropriate.⁹⁶ The elevated level of protection with respect to the hormones was necessary because the use of these hormones may pose dangers to human and animal health—concerns which have a scientific basis.⁹⁷ The EU further argued that the EU and U.S. are not similarly situated because the EU places a greater value on consumer safety than on commercial interests.⁹⁸

The Panel rejected the EU argument that the ban⁹⁹ should only be examined under the SPS Agreement if it first violates Article XX(b) of the GATT.¹⁰⁰ The Panel reasoned that it would be more appropriate to first review the SPS Agreement and its objectives.¹⁰¹

On appeal, the EU claimed that the Panel failed to adopt a “deferential ‘reasonableness’ standard” when reviewing a Member’s decision to adopt a particular science policy or a Member’s determination that a particular inference from the available data is scientifically plausible.¹⁰²

The Appellate Body found that the SPS Agreement does not call for a “deferential” standard of review, and that the Panel’s “objective assessment of the facts” was appropriate.¹⁰³ The Body did reject the Panel’s risk analysis, finding that the risk “is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also . . . the actual potential for adverse effects on human health in the real world where people live and work and die.”¹⁰⁴ The Panel required a scientific “probability” of risk to human and animal life and health instead

⁹⁶ See *Hormone Beef*, *supra* note 4, para. III.6.

⁹⁷ See *First Written Submission of the European Community to the Panel, European Communities—Measures Concerning Meat and Meat Products*, Sept. 20, 1996, para. 74, available in 1996 WL 87621. This argument finds foundation in Article XX(b) of the GATT. Thus, the WTO’s treatment of this argument would be similar to Article XX analysis.

⁹⁸ See *id.* para. 134.

⁹⁹ The Panel only considered meat from cattle, because the U.S.’s original complaint only dealt with meat and meat products. The WTO decision does not apply to the EU ban on live cattle.

¹⁰⁰ See *Hormone Beef*, *supra* note 4, para. 8.41.

¹⁰¹ See *id.* para. 8.42.

¹⁰² See World Trade Organization, *Appellate Body Report: EC Measures Concerning Meat and Meat Products (Hormones)*, 2 Int’l Trade L. Rep., No. 4 (Jan. 16, 1996) para. 14 [hereinafter *Hormone Beef Appellate Body*].

¹⁰³ See *id.* para. 119.

¹⁰⁴ See *id.* para. 187.

of the "possibility" of risk that the EU argued justified the ban.¹⁰⁵

The Body agreed with the Panel that the EU ban represented a disguised restriction on international trade.¹⁰⁶ The Panel was persuaded by the U.S. argument that because the EU accepts meat treated with carbadox, which has similar side-effects as the hormones banned in beef, the beef ban's true purpose was to protect the domestic cattle market.¹⁰⁷ The Appellate Body did not disagree, finding the inconsistencies "unjustifiable."¹⁰⁸

B. *Australia—Measures Affecting Importation of Salmon*

On June 30, 1975, Australia issued the Quarantine Proclamation 86A ("QP86A"), restricting the importation of dead salmon, except such salmon as "in the opinion of the Director of Quarantine is likely to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants."¹⁰⁹

When Canada requested access to the Australian salmon market, the Director of Quarantine decided that: "having regard to Australia's international obligations, importation of uncooked, wild, adult, ocean-caught Pacific salmonid product from the Pacific rim of North America should not be permitted on quarantine grounds."¹¹⁰ In October 1995, Canada requested consultation over Australia's policies regarding its salmon.¹¹¹ This led to a meeting on November 24, 1995, but no agreement was reached.¹¹² Canada felt that Australia's cited health concerns were not grounded in scientific evidence.¹¹³ The "Final Report" of Australia's risk analysis of the quarantine noted that:

¹⁰⁵ See *id.* para. 184.

¹⁰⁶ See *Hormone Beef*, *supra* note 4, para. 8.216.

¹⁰⁷ See *id.* para. 8.243.

¹⁰⁸ See *Hormone Beef Appellate Body*, *supra* note 102, para. 235. "[T]he decision will act as a strong disincentive against the arbitrary application of SPS measures justified on health grounds that are actually based on politics or public opinion." Rufus H. Yerxa & Demetrios J. Marantis, *Assessing the New WTO Dispute System: A U.S. Perspective*, 32 INT'L LAW. 795, 800 (1998).

¹⁰⁹ World Trade Organization, *Appellate Body Report: Australia—Measures Affecting Importation of Salmon*, Oct. 20, 1998 at para. 2, available in 1998 WL 731009 [hereinafter *Australia-Salmon Appellate Body*].

¹¹⁰ AQIS, File Note by Paul Hickey, Executive Director, 13 December 1996 (the "1996 decision").

¹¹¹ See *Australia-Salmon*, *supra* note 5, para. 1.1.

¹¹² See *id.* para. 1.2.

¹¹³ See *id.* para. 1.1.

there was a possibility that up to 20 disease agents exotic to Australia might be present in Pacific salmon products and although the probability of establishment would be low, there would be major economic impacts which could seriously threaten the viability of aquacultural operations and the recreational fishing industries, in addition to adverse environmental impacts on the built environment of Australia. . . . [S]hould any of the 20 diseases become established, they would almost certainly be ineradicable.¹¹⁴

Australia also noted that the conclusions of the Report would be reviewed when scientific knowledge advanced.¹¹⁵ Canada was not satisfied with this response, and brought a claim with the Dispute Resolution Panel.¹¹⁶

Canada claimed that the Australian "measure was an illegal import prohibition under Article XI:1 of GATT 1994 that found no justification in Article XI:2 or Article XX of GATT 1994."¹¹⁷ In response, Australia claimed that Canada failed to meet the evidentiary burden necessary to raise a presumption that Australia's regulation was inconsistent with the GATT.¹¹⁸ Furthermore, Australia claimed that the regulation conformed with the requirements of the SPS Agreement, and thus should be presumed to be in accordance with provisions within GATT 1994 regarding the use of sanitary or phytosanitary measures, particularly the provisions in Article XX(b).¹¹⁹

The Panel found that Australia, by maintaining a sanitary measure which is not based on a risk assessment, acted (both insofar as the measure applies to salmon products at issue from adult, wild, ocean-caught Pacific salmon and the other categories of salmon products in dispute) inconsistently with the requirements contained in Articles 2.2 and 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the Agreement).¹²⁰

The Panel also ruled that Australia adopted arbitrary or unjustifiable distinctions in the levels of sanitary protection it considered to be appropriate in different situations (on the one hand the salmon products at issue from adult, wild, ocean-caught Pacific salmon and, on

¹¹⁴ *Id.* para. 2.30. Australia agreed to perform this risk analysis following GATT Article XXII consultations in 1994. *See id.* para. 2.27.

¹¹⁵ *See id.* para. 2.30.

¹¹⁶ *See Australia-Salmon, supra* note 5, para. 1.3.

¹¹⁷ *See id.* para. 3.1.

¹¹⁸ *See id.* para. 3.5.

¹¹⁹ *See id.* para. 3.5.

¹²⁰ *See id.* para. 8.151.

the other hand, herring in whole, frozen form for use as bait and live ornamental finfish), which result in discrimination or a disguised restriction on international trade, violating Articles 2.3 and 5.5 of the Agreement.¹²¹ Finally, Australia maintained a sanitary measure (with respect to those salmon products at issue from adult, wild, ocean-caught Pacific salmon) which is more trade-restrictive than required to achieve its appropriate level of sanitary protection, violating Article 5.6 of the Agreement.¹²² Australia appealed the Panel's decision, and the Appellate Body handed its decision down on October 20, 1998.

The Body first rejected the Panel's position that, with respect to the requirements of 5.1, the import prohibition on "fresh, chilled, or frozen" salmon and the heat treatment as "two sides of a single coin."¹²³ The Panel felt that a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled, or frozen salmon are prohibited.¹²⁴ Due to this finding, the Body found that "the SPS measure at issue in this dispute is the import prohibition on fresh, chilled or frozen salmon set forth in QP86A, as confirmed by the 1996 Decision, rather than the heat-treatment requirement"¹²⁵

Due to the Body's determination that the Panel examined the wrong measure, it was forced to do its own analysis to determine whether Australia's actions were consistent with Article 5.1.¹²⁶ The Body did agree with the Panel's determination that the risk assessment must be:

¹²¹ See *id.* para. 8.160. The requirements of Articles 2.3 and 5.5 are provided below:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Id. para. 4.89 (quoting SPS Agreement, *supra* note 91, at art. 2.3).

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade

Id. para. 4.171 (quoting SPS Agreement, *supra* note 91, at art. 5.5).

¹²² See *Australia-Salmon*, *supra* note 5, para. 8.185.

¹²³ *Australia-Salmon Appellate Body*, *supra* note 109, para. 101.

¹²⁴ See *Australia-Salmon*, *supra* note 5, para. 8.86.

¹²⁵ *Australia-Salmon Appellate Body*, *supra* note 109, para. 105.

¹²⁶ See *id.* para. 119.

"[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences. . . ." ¹²⁷

Referring to the *Hormone-Beef* decision, the Body reemphasized that a proper risk assessment evaluates the "likelihood" of entry, not the fact that there is a possibility of entry, as the Australian Final report concluded. ¹²⁸

As stated before in *Hormone-Beef*, there is no quantitative requirement of risk. ¹²⁹ Thus, the Body found "that the 1996 Final Report is not a proper risk assessment within the meaning of Article 5.1 . . ." making it impossible for Australia to meet its obligation under Article 5.1. ¹³⁰

With respect to the differing standards of protection between the salmon products at issue--adult, wild, ocean-caught Pacific salmon and herring in whole, frozen form for use as bait and live ornamental finfish, the Body upheld the Panel's findings. ¹³¹ The Body found this differentiation to be "arbitrary or unjustifiable," and a "disguised restriction on international trade." ¹³²

The Appellate Body in *Australia-Salmon* was very consistent in both its methodology and its aggressive defense of international trade. In the eyes of both Bodies, the fatal flaw of both measures was the inconsistency in levels of protection between like hormones in one case, ¹³³ and like products in the other. ¹³⁴

¹²⁷ *Id.* para. 120.

¹²⁸ *See id.* There is basically a three-pronged test:

- (1) The assessment must "identify the diseases whose entry, establishment or spread a Member [Australia] wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;"
- (2) The assessment must "evaluate the likelihood of entry, establishment or spread of these diseases as well as the associated potential biological and economic consequences;" and
- (3) The assessment must "evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied."

Id. para 121. Both the Panel and the Appellate Body found that the 1996 Final Report failed both the second and third prongs of the test. *See Australia-Salmon, supra* note 5, para. 8.99; *Australia-Salmon Appellate Body, supra* note 109, at para. 128.

¹²⁹ *See Australia-Salmon Appellate Body, supra* note 109, para. 123.

¹³⁰ *Id.* paras. 135-36.

¹³¹ *See id.* para. 177.

¹³² *Id.* paras. 157, 159.

¹³³ *See Hormone Beef, supra* note 4, at para. II.3.

¹³⁴ *See Australia-Salmon Appellate Body, supra* note 109, at para. 104.

The WTO did not depart from this vigorous protectionism in *Shrimp-Turtle*. In fact, together with *Reformulated Gasoline*, *Shrimp-Turtle* is likely the most important environmental decision handed down by the WTO.

C. *United States-Import Prohibition of Certain Shrimp and Shrimp Products*

The regulations at issue in *Shrimp-Turtle* are the result of a Congressional mandate under the Endangered Species Act ("ESA") of 1973.¹³⁵ The language of the statute expresses Congress' intent to protect endangered species and also requires the help of all federal agencies in this endeavor.

In order to carry out obligations under the ESA, several agencies issued regulations requiring shrimp fishermen to use turtle excluder devices ("TED"s).¹³⁶ These regulations only applied to parties fishing for shrimp off the coast of the United States.¹³⁷

Realizing that measures to protect sea turtles would only be effective if applied on a broader scale, in 1990 Congress passed the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act.¹³⁸ Section 609 of the Act required, in part, that the Secretaries of State and Commerce enter into "bilateral or multilateral agreements with foreign countries" to protect and conserve the endangered species of sea turtles.¹³⁹ The law also prohibited the importation of shrimp or shrimp products that had been harvested in a way adverse to the survival of species of sea turtles prior to May 1, 1991.¹⁴⁰

In 1991, the Department of State issued guidelines to bring foreign shrimp operators into line with Section 609.¹⁴¹ These guidelines were

¹³⁵ See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994 & Supp. IV 1998)

¹³⁶ The agencies were the Department of Commerce, National Oceanic and Atmospheric Administration, and National Marine Fisheries Service. See *Sea Turtle Conservation; Shrimp Trawling Requirements*, 52 Fed. Reg. 24,244 (1987).

¹³⁷ See *id.* at 24,247.

¹³⁸ Pub. L. No. 101-162, 103 Stat. 1037 (1990) (codified at 16 U.S.C. § 1537 (1994)).

¹³⁹ § 609(a)(1).

¹⁴⁰ See § 609(b)(1).

¹⁴¹ See *Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines*, 56 Fed. Reg. 1051 (1991) [hereinafter 1991 Guidelines]. In order to be certified as having a comparable regulatory program, the foreign nation would be required to document evidence of a program including the following:

1. *No Retention*—a prohibition on the retention of incidentally caught sea turtles.

limited to the wider Caribbean/Atlantic region.¹⁴² Under these regulations, vessels smaller than twenty-five feet could use restricted tow times instead of TEDs.¹⁴³ However, in 1992, the National Marine Fisheries Service ("NMFS") issued new regulations for the U.S. domestic conservation program, to be administered by itself and other agencies.¹⁴⁴ Included in the regulations was a provision eliminating the "small vessel exemption" for the use of TEDs after 1993.¹⁴⁵

In 1993, the Department of State revised its own guidelines to

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2. *Resuscitation*—a requirement that comatose incidentally caught sea turtles be resuscitated.
 3. *Reduction of incidental taking.* At the time of requesting an initial positive determination, many affected nations may not have data on the incidental taking of sea turtle in their shrimp trawl fishery. This element will therefore be satisfied if there is either:
 - (a) A commitment to require all shrimp trawl vessels to use TEDs at all times (or reduce tow times if a vessel is under 25 feet). This requirement may be phased in over a period of not more than three years. The program description should establish a timetable during which TEDs use will be phased in; or
 - (b) A commitment to engage in a statistically reliable and verifiable scientific program to determine times and areas of turtle abundance and assess the impact of the shrimp trawl fishery on sea turtles; to develop and assess technologies to reduce the impact of the shrimp trawl fishery on sea turtles; and to require the use of fishing technologies and techniques that will reduce the incidental mortality of sea turtles in the shrimp trawl fishery to insignificant levels. A program will be found comparable if it contains these elements and if the period of assessment and implementation is not more than three years. The program description should establish a timetable by which each phase of the program is to be completed.
 4. *Enforcement.* To be comparable, a program must include a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

Id. See also Terrence P. Stewart & Mara M. Burr, *Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 109, 116 (1998) (discussing the 1991 Guidelines).

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance With Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawls and Other Fisheries*, 57 Fed. Reg. 57,348 (1992).

¹⁴⁵ See *id.*

bring them in line with those of NMFS.¹⁴⁶ Under these 1993 Guidelines, certification for foreign shrimp operators would depend on their use of TEDs in all areas and at all times.¹⁴⁷ Not only must affected nations require that TEDs be used at all times,¹⁴⁸ their respective programs must also contain enforcement provisions to compel compliance.¹⁴⁹

As a result of an order from the Court of International Trade,¹⁵⁰ in 1996 the Department of State was forced to issue new guidelines that would enforce Section 609 on a worldwide basis.¹⁵¹ Beginning on May 1, 1996 all shipments of shrimp and shrimp products into the U.S. were required to have a declaration that the shrimp was harvested in a manner that did not adversely affect sea turtles.¹⁵² The most important change to the guidelines was that the area of enforcement was expanded to include

¹⁴⁶ See Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015, 9016 (1993) [hereinafter 1993 Guidelines]. "With the limited exemptions noted below, beginning January 1, 1993, all U.S. commercial shrimp trawl vessels in the waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas must use TEDs at all times in all areas." *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 9017.

¹⁴⁹ See *id.*

¹⁵⁰ See *Earth Island Inst. v. Christopher*, 913 F.Supp. 559 (Ct. Int'l. Trade 1995) (holding that Endangered Species Act provisions are without geographic boundary and that global enforcement is mandatory despite potential conflicts with GATT).

¹⁵¹ See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342-43 (1996) [hereinafter 1996 Guidelines]. These new guidelines provided:

Shrimp Harvested in a Manner Not Harmful to Sea Turtles. The Department of State has determined that import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtles:

- a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested.
- b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.
- c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. Program described above, would not require TEDs.
- d. Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur.

Id.

¹⁵² See *id.*

those countries that later filed a complaint with the WTO.¹⁵³

India, Malaysia, Pakistan and Thailand charged that the U.S. regulations were inconsistent with the United States' obligations under Articles I:1, XI:1, and XIII:1, of the 1994 GATT, and, furthermore, were not justified by the exceptions in Article XX.¹⁵⁴

The Panel convened to rule on the dispute and found the following:

- (1) The import ban on shrimp and shrimp products from non-certified countries violated Article XI:1.¹⁵⁵
- (2) A violation of Articles XIII:1 and I:1 need not be examined because of the determination under Article XI:1.¹⁵⁶

The remaining issue before the panel was, "whether Article XX(b) and (g) apply at all when a Member has taken a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s)."¹⁵⁷ In order to determine the issue, the Panel analyzed the regulation against the chapeau of Article XX. Although the Panel stated that Article XX is to be interpreted broadly,¹⁵⁸ the Panel went on to state that: Members are only allowed to deviate from the requirements of the 1994 GATT as long as their actions do not undermine the multilateral trading system.¹⁵⁹ The new test was articulated as follows:

[W]hen considering a measure under Article XX, we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.¹⁶⁰

¹⁵³ By extending the area of enforcement beyond the Caribbean/Atlantic region, Section 609 lost the illusion of domestic environmental policy and looked more like extraterritorial environmental enforcement.

¹⁵⁴ See *Shrimp-Turtle*, *supra* note 6, para. 7.22.

¹⁵⁵ See *id.* para. 7.13.

¹⁵⁶ See *id.* para. 7.22.

¹⁵⁷ *Id.* para. 7.26.

¹⁵⁸ See *id.* "We [Shrimp—Turtle Panel] note that Article XX can accommodate a broad range of measures aiming at the conservation and preservation of the environment. At the same time, by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures" *Shrimp-Turtle*, *supra* note 6, para. 7.26.

¹⁵⁹ See *id.* para. 7.44.

¹⁶⁰ *Id.*

The “threat to the multilateral trading system”¹⁶¹ standard had not been used in the previous environmental decisions. The Panel’s interpretation of the measure in light of the chapeau is different from that of the Panel in *Reformulated Gasoline*.¹⁶² Past Panels tried to fit the measure into one of the specific exceptions first, before determining if the measure was applied in a non-discriminatory manner as required by the chapeau of Article XX.¹⁶³ However, the *Shrimp Turtle* Panel found that, according to Section 609, the United States’ policy of conditioning access to its markets based on other Members’ adoption of certain conservation policies constituted “unjustifiable discrimination” between countries that export “like products,” and was therefore not protected by Article XX.¹⁶⁴

The *Shrimp-Turtle* Dispute came before the Appellate Body in October of 1996.¹⁶⁵ As a threshold matter, the Body ruled that the Panel’s legal analysis was in error, and reversed the ruling.¹⁶⁶ The Body then proceeded with its own legal analysis, stating: “As in th[e] previous cases, we believe it is our responsibility here to examine the claim by the United States for justification of Section 609 under Article XX in order to properly resolve this dispute.”¹⁶⁷ The Body invoked a two-tiered analysis as first established in *Reformulated Gasoline*:

- (1) First, determine if the measure fits one of the exceptions of Article XX (in these cases, XX(b) or (g));¹⁶⁸
- (2) Second, examine the measure against the requirements of the “chapeau” of Article XX.¹⁶⁹

Citing the standards set forth in *Reformulated Gasoline* for the first tier, the Body found that turtles were an “exhaustible natural resource” under Article XX(g), and the law was an “even-handed” measure.¹⁷⁰ The Body then applied the three standards of the chapeau.¹⁷¹ It is in this area

¹⁶¹ *Id.* para. 7.61.

¹⁶² See *Reformulated Gasoline*, *supra* note 3.

¹⁶³ See *id.* para. 4.8.

¹⁶⁴ See *Shrimp-Turtle*, *supra* note 6, para. 7.49.

¹⁶⁵ See *id.* para. 1.

¹⁶⁶ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 3 Int’l Trade L. Rep., No.5 (Jan. 16, 1996) at para. 1.23 (W.T.O.) [hereinafter *Shrimp-Turtle Appellate Body*]. The Appellate Body ruled this way because the *Shrimp-Turtle* Panel did not adhere to the standards of Article XX analysis, as established in *Reformulated Gasoline*. See *Reformulated Gasoline*, *supra* note 3, paras. 6.20, 6.30, 6.35.

¹⁶⁷ *Shrimp-Turtle Appellate Body*, *supra* note 166, para. 124.

¹⁶⁸ See *id.* para. 125.

¹⁶⁹ See *id.* para. 147.

¹⁷⁰ *Id.* para. 143.

¹⁷¹ See *infra* notes 180-182 and accompanying text (listing the three standards).

of the analysis where Section 609 faltered under the Body's scrutiny.

Due to the United States' refusal to accept shrimp caught using TEDs from countries that were not certified by the United States, the Body found the measures were applied in a manner that constituted "arbitrary" and "unjustified discrimination" under the chapeau.¹⁷² In its application, the Body found Section 609 to be, "in effect, an economic embargo which requires all other exporting members ... to adopt essentially the same policy as that applied to, and enforced on, United States domestic shrimp trawlers."¹⁷³

Although the Body ruled against the United States and ordered that it bring Section 609 in compliance with its obligations under the GATT, the Body painstakingly pointed out that they did not rule that "the protection and preservation of the environment is of no significance to Members of the WTO."¹⁷⁴ In their words, "as we emphasized in [Reformulated-Gasoline], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement."¹⁷⁵

III. WHERE ARE WE NOW?

The fact that the Appellate Body in *Shrimp-Turtle* repeatedly affirmed the language in *Reformulated Gasoline* seems to be an attempt by the WTO to establish some continuity in evaluating environmental measures. Exactly when an environmentally protective measure will be acceptable under the WTO is unclear. Some language in the Appellate Body Report of *Shrimp-Turtle* suggests that a measure would only be acceptable if it is the result of a multilateral effort that several countries agree to uphold.¹⁷⁶ What is clear is that the process first established in *Reformulated Gasoline*, and reaffirmed in *Shrimp-Turtle*, will serve as the hoop that any country must guide its environmental laws through if its justification is rooted in Article XX of the GATT. If this is not accomplished, then the measure fails outright under an Article XX defense. In order to fall under Article XX(g), and perhaps XX(b), the measure must be "primarily aimed at" a conservation purpose,¹⁷⁷ or

¹⁷² See *id.* para. 184.

¹⁷³ *Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules*, 199 DEN A-3, October 15, 1998.

¹⁷⁴ *Shrimp-Turtle Appellate Body*, *supra* note 166, para. 185.

¹⁷⁵ *Id.* para. 186.

¹⁷⁶ See *id.* para. 185.

¹⁷⁷ *Reformulated Gasoline Appellate Body*, *supra* note 67, at 77.

protecting human, animal, plant, etc., health.¹⁷⁸ The law is then tested against the introductory language of Article XX, commonly referred to as the chapeau.¹⁷⁹ There are three benchmarks that an environmental measure must clear under the chapeau:

- (a) the measure must not arbitrarily discriminate between countries where the same conditions prevail;¹⁸⁰
- (b) the measure must not unjustifiably discriminate between countries where the same conditions prevail;¹⁸¹ and
- (c) the measure must not be a disguised restriction on international trade.¹⁸²

Unless all three of these conditions are met, the law fails under the chapeau and the offending country is instructed to set the law aside.

The Panel in *Shrimp-Turtle* hypothesized that if other countries adopted measures similar to Section 609, the multilateral trading system would break down.¹⁸³ The Body in *Shrimp-Turtle* did not adopt the Panel's "threat to the multilateral trading system" standard,¹⁸⁴ but it seems to be the unspoken rule in all four cases. Critics in certain environmental circles worry it is unlikely that the WTO will be able to meaningfully balance environmental and trade concerns.¹⁸⁵

A. *Contributing Nations*

One of the biggest problems that contributing to the inherent tension between the desire to promote international trade and environmental protection is the fact that not all nations are similarly situated. The richer, or "more developed" nations are usually more concerned with environmental protection than what are considered "developing" nations.¹⁸⁶ This has been referred to as the "Us-Them" among nation states.¹⁸⁷

¹⁷⁸ See *Hormone Beef Appellate Body*, *supra* note 102, para. 102.

¹⁷⁹ See *Shrimp-Turtle Appellate Body*, *supra* note 166, para. 150.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.* para. 7.44.

¹⁸⁴ *Shrimp-Turtle*, *supra* note 6, para. 7.44.

¹⁸⁵ See Layla Hughes, *Limiting the Jurisdiction of Dispute Settlement Panels, The WTO Appellate Body Hormone Beef Decision*, 10 GEO. INT'L ENVTL. L. REV. 915, 934 (1998).

¹⁸⁶ See Joshua R. Floum, *Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic*, 10 GEO. INT'L ENVTL. L. REV. 943, 944 (1998).

¹⁸⁷ See ESTY, *supra* note 8, at 181-83.

The "Us-Them" dialectic between developing and developed countries is manifested doctrinally by the split between proponents of tariffs and proponents of treaties. The former believe that it is precisely a wealthy nation's market power that can be most effective at saving an endangered species from extinction ... The unilateral use of market coercion, however, is subject to charges of "environmental imperialism" by developing nations.¹⁸⁸

Such coercions also offend both those who feel that multilateralism is the most effective mode of governance and economists who point to the increased aggregate global wealth with the removal of trade barriers.¹⁸⁹ The arguable abandonment of meaningful environmental protection in the above decisions in favor of increased international trade is the same "parade of horrors" many environmental organizations opposed to the judicial authority vested in trade organization like the WTO foresaw.¹⁹⁰ Some environmentalists, sometimes called environmental isolationists, feel that "[t]he WTO is incompatible with environmental protection and should be disbanded."¹⁹¹

Still others argue that the WTO and the multilateral system are among the most effective tools available to implement a global approach to environmental protection.¹⁹² It has even been suggested that the decisions discussed in this paper are only "seemingly" anti-environment. "[These] decisions may actually further the environmental cause by bringing attention to the need for an enhanced multinational approach to international environmental rules."¹⁹³ The argument is that the publicity that these decisions generate provides a most powerful means to advance the law.¹⁹⁴ Countries will realize that the multilateral approach to environmental is the most desirable approach, and act accordingly.

B. *WTO as Global Green Police?*

¹⁸⁸ Floum, *supra* note 186, at 947-48.

¹⁸⁹ *See id.* at 948.

¹⁹⁰ *See id.* at 949.

¹⁹¹ Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 770 (1998).

¹⁹² *See* Ronald A. Brand, *Sustaining the Development of International Trade and Environmental Law*, 21 VT. L. REV. 823, 845 (1997).

¹⁹³ *Id.*

¹⁹⁴ *See id.*

Is it the proper place for organizations like the WTO to control how and when a nation implements environmental protection?¹⁹⁵ One author argues that the WTO, by necessity, must play an aggressive role in "global environmental protection."¹⁹⁶ Even if the multilateral approach is the "best" way, the critical "Us-Them" problem is not solved. "As trade increases, the incentives for creating competitive advantages also . . . increase, bringing with them the fear that states will adopt lower environmental standards in order to attract industry."¹⁹⁷ The two main arguments of this school of thought are: first, "[t]he emergence of global environmental problems such as ozone depletion and global warming, and the growing realization that the global environment is in a general sense ecologically interconnected, has made the need for global environmental regulation increasingly clear."¹⁹⁸ Given the interconnectedness of the environment, the efforts of a few "environmentally minded" nations toward environmental protection are futile in the face of mass apathy or opposition from the rest of the world.

Second, environmental protection is entirely the role of the WTO and consistent with its "overall trade mission."¹⁹⁹

[O]ne of the primary purposes of the WTO is to create a level playing field upon which international trade can take place. As is well known, this playing field can become uneven when some countries provide domestic producers with a competitive advantage over foreign producers by establishing relatively lax environmental standards. Assigning the [WTO] the task of eliminating this competitive advantage through oversight of global environmental standards is well within the overall trade

¹⁹⁵ Although organizations such as the WTO have obvious benefits, the necessary relinquishing of sovereignty by poor nation-states is too high a price. With the incalculable differences among the peoples and nations of the world and their respective philosophies and needs, it is impossible for all nations to agree on how to move forward in areas like the environment where all parties are not similarly situated. For the many abjectly poor nations, environmental protection may be seen as a luxury they can ill afford. The fact of the matter is that the majority of the nations are not as well off as the U.S. or the EU. Why should the U.S. and the EU have their efforts to protect the environment restrained by this fact?

¹⁹⁶ Strauss, *supra* note 32, at 309.

¹⁹⁷ Brand, *supra* note 192, at 838.

¹⁹⁸ Strauss, *supra* note 32, at 311. Although Strauss is wary of possible threats to national sovereignty that the WTO as global environmental regulator would pose, he argues the WTO should take a unique leadership role in global environmental initiatives.

¹⁹⁹ *Id.* at 312.

mandate of the WTO.²⁰⁰

The "lax environmental standards as unfair trade practice" argument provides an interesting riposte to the traditional "environmental regulation as unfair restraint on trade" argument that is the familiar rallying cry of developing nations and their friends in business.²⁰¹

Even accepting the arguments above as the foundation for the WTO's role in environmental regulation, the issue of enforcement becomes critical. Any student of international law knows that aside from a tradition of deference, there are no concrete legislative mechanisms in existence to enforce international regulation.²⁰² The WTO's current methods of enforcement are capable enough.²⁰³ An immediate incentive for joining a WTO-led move toward environmental protection is the possible loss of the obvious benefits that nations receive in participation.²⁰⁴ Membership most certainly has its privileges, and the possible loss of those privileges will be enough to persuade most nations to join the environmental protection effort. Furthermore, the Dispute Settlement Understanding (DSU) allows a winning party in a dispute to seek permission from the WTO to withdraw trade concessions previously

²⁰⁰ *Id.* at 312-13.

²⁰¹ Others say that the later argument rests on the false assumption that "a preference for degrading the local environment should be seen as a low cost factor of economic production." Strauss, *supra* note 191, at 793. The costs of such a preference will have to be borne by the local population "whose quality of life the pollution adversely affects." See *id.* Nevertheless, Strauss would venture to say that when given a choice between feeding their families or protecting the environment, there is no choice. There is probably a direct correlation between the intensity of feeling for environmental protection and the fullness of one's belly.

²⁰² See Strauss, *supra* note 32, at 320.

²⁰³ See *id.*

²⁰⁴ See *id.* at 317-18.

Most favored nation [MFN] treatment . . . assure[s] nations "C" and "D" that if nation "A," a GATT participant, granted a certain reduction of tariffs to nation "B," also a GATT participant, "C" and "D" as GATT participants would be entitled to the same treatment as "B," without having to provide any benefits in return. In addition, once B's, C's, or D's goods had been imported into "A," they had to be treated in the same manner as domestically produced goods. This is the principle of "national treatment" which introduce[s] an additional measure of equality and fairness. For not only [is] it necessary to treat the goods of other nations as favorably as those of the most favored nation, but once the goods . . . ente[r]. . . a member's territory, these goods ha[ve] to be treated as if they were the importing member nation's own goods.

Boris Kozolchyk, *NAFTA in the Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMP. L. 135, 137-38 (1996).

given to the offending party if the offending party refuses to compensate the "winner."²⁰⁵ "These can be very costly, and can be strategically targeted against specific politically powerful national industries of the recalcitrant parties."²⁰⁶

Even if the multilateral approach is the "best" way, without using the "lax environmental standards as unfair trade practice" standard to prohibit a "race to the bottom," the critical "Us-Them" problem is not solved. Present conditions show: "[a]s trade increases, the incentives for creating competitive advantages (rather than pure comparative advantages) also increase, bringing with them the fear that States will adopt lower environmental standards in order to attract industry."²⁰⁷ Even though multinational companies may bring technologies that will improve environmental practices in some of the developing countries,²⁰⁸ if profit maximization is the goal, how logical is it to bring to developing nations the very same expensive environmental standards one is attempting to escape? The WTO decisions do not seem to provide any incentives to developing countries or the industries they are attempting to attract to make environmental protection a priority.

Although commentators such as Daniel Esty suggest replacing the current Article XX analysis with something more environmentally friendly,²⁰⁹ and others propose removing environmental conflict from the WTO/GATT regime to the United Nation Environmental Programme (UNEP),²¹⁰ neither is necessary. First, if one endorses the belief that international trade and global environmental protection are opposite sides

²⁰⁵ See Strauss, *supra* note 32, at 324. "As the largest trading partner of most WTO members, the United States simply has more credibility when it threatens sanctions." Yerxa, *supra* note 108, at 809.

²⁰⁶ Strauss, *supra* note 32, at 325.

Thus, in addition to facing international pressures to comply with environmental treaty obligations, the system is designed so that targeted industries place additional internal pressures on their governments to comply. Because such sanctions are legalized, and therefore deemed legitimate, the loser is unlikely to retaliate in kind, thus averting the potential for a trade war.

Id.

²⁰⁷ Brand, *supra* note 192, at 838.

²⁰⁸ See *id.*

²⁰⁹ Esty proposes replacing the Article XX analysis with a test that weighs competing trade and environment claims based on the following three factors: (1) intent and effect of the challenged regulations; (2) the legitimacy of the underlying environmental injury; and (3) the justification for the disruption of trade. See *id.* at 114-30.

²¹⁰ See *id.*

of the same coin,²¹¹ the policies driving both should be formulated and coordinated by the same body in order to pursue the notion of balance between trade liberalization and responsible environmental stewardship. Second, keeping environmental regulation and international trade together makes sense from an efficiency standpoint. The WTO's Dispute Settlement system was designed to handle disputes as expeditiously as possible,²¹² and both the issues, and politics behind the issues, are complicated enough with the involvement of just one bureaucracy. The connection between the environment and international trade remains, therefore inserting another body into the equation would result in unnecessary delay and confusion.

The pieces are already in place to implement environmental protection on a global scale. There is no need to tinker with Article XX, because the failure is not in the language. The only failure is that the WTO refuses to give the language any effect.

C. *Language of Article XX—Clauses (b), (g), and Chapeau*

The language of Article XX provides the legal foundation for protecting a nation-state's environmental initiatives provided that the WTO chooses to embrace such action. Given the Article XX exemption, the GATT Secretariat stated in 1992 that: "GATT rules, therefore, place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products."²¹³ Article XX is an exception to general obligations under the GATT, so if the language is given the strength that the WTO's promoters promised it would, environmental interests may be advanced within the multilateral trading system.

As a preliminary matter, the case history indicates that it is not especially difficult for an environmental regulation to meet the

²¹¹ See Brand, *supra* note 192, at 838 (generally discussing the effect that trade measures and environmental regulation have on each other and the real or imagined environmental implications of trade.)

²¹² The target time frame for dispute settlement is one year and three months with an appeal. See World Trade Organization, *The WTO's 'most individual contribution'* (visited Mar. 8, 1999) <www.wto.org/wto/about/dispute1.htm#panel>. The WTO website gives an overview of the role of the WTO in dispute resolution, and provides an estimated time schedule.

²¹³ Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, 32 INT'L LAW. 901, 902 (1998) (quoting 1 INT'L TRADE 1990-91 at 23 (General Agreement on Tariffs and Trade, 1992)).

requirements of clause (g).²¹⁴ Under current WTO jurisprudence, it is a comparatively easier task to justify a measure as “necessary to protect human, plant, or animal life,” or as “necessary to protect an exhaustible natural resource,”²¹⁵ than it is to justify a measure under the chapeau.

The WTO’s interpretation of the chapeau’s language provides the greatest hurdle for environmental regulations challenged before the WTO.²¹⁶ The language of the chapeau prohibits the application of a measure in any way that constitutes “unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”²¹⁷ Since the language gives no indication what exactly constitutes “unjustifiable discrimination,” the standard is what the Appellate Body says it is.²¹⁸ Given the current application of the chapeau, “there would seem to be little basis for the conclusion that GATT rules place essentially no constraints on a country’s right to protect its own environment.”²¹⁹

While it is certainly possible to use environmental regulation as a guise for protecting domestic markets, this is certainly not the case in every instance. The Panel or Appellate Body should be quite capable of discerning the intent behind an environmental measure, and scientific evidence is already required to meet the requirements of clauses XX(b) and XX(g).²²⁰ In the final analysis, the WTO must accept that in certain circumstances, environmental protection is a legitimate barrier to some trade objectives. If the environment truly has legitimacy as a reason for excepting a nation from fulfilling certain GATT obligations, then such measures will only fail to meet the language of the chapeau if their purpose is not actually environmental protection, but something else.

²¹⁴ See *Shrimp-Turtle Appellate Body*, *supra* note 166, para. 143; *Reformulated Gasoline Appellate Body*, *supra* note 67, at 71; Charnovitz, *supra* note 213, at 912.

²¹⁵ GATT Art. XX(b), (g).

²¹⁶ Subject to the requirement that such 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement of any contracting party of measures.

Id.

²¹⁷ *Id.*

²¹⁸ According to Charnovitz, “[t]he Appellate Body has shown a willingness to invent new requirements for the [chapeau] that do not exist in the text and to apply them arbitrarily.” Charnovitz, *supra* note 213, at 912.

²¹⁹ *Id.*

²²⁰ See *Shrimp-Turtle Appellate Body*, *supra* note 166, para. 141; *Reformulated Gasoline Appellate Body*, *supra* note 67, at 71.

D. *Endorsing the WTO's Environmental Role*

At this point it would be detrimental to furthering the environmental cause if disputes were removed from the multilateral trading framework. It is only logical to keep the two together.²²¹ Pursuit of maximizing global wealth must necessarily include a cleaner environment. Making the leap between the WTO's present environmental approach and a meaningful absorption of environmental protection in trade development is not as difficult as it seems.²²² The paradox lies in that forming a real partnership between environmental and trade concerns is both easy and so hard as to seem insurmountable. The ease is the fact that, as stated before, the pieces are already in place and the WTO is the logical tool.²²³ The seemingly insurmountable difficulty is that in order to form this partnership, the WTO will have to make a fundamental change in how it views the place of environmental protection in international trade. Developing nations adverse to greater environmental initiatives have worked, and will continue to work diligently through the Committee on Trade and Environment ("CTE") to stymie any attempts to change the status quo.²²⁴ While the necessity of such change is obvious to this author, the WTO faces a complex situation. While it is important to loosen the stranglehold that less environmentally concerned nations have on the CTE and domestic environmental policy, the WTO must still work to avoid the very same tragedies that led to the forming of the WTO in the first place.²²⁵

Despite the foreseen dangers in such a change in policy, the WTO's perceived aggressiveness against domestic environmental protection in order to preserve the multilateral trading system might in the end be counterproductive. There is a danger that countries that put a priority on meaningful environmental protection may start to ignore the

²²¹ See generally Brand, *supra* note 192, at 861.

²²² See *id.* at 851.

²²³ See *id.*

²²⁴ See Strauss, *supra* note 32, at 318.

²²⁵ See ESTY, *supra* note 8, at 243. Some fear that a breakdown of international trade relations may lead the world to repeat the mistakes of the past. This concern is a bit overblown. The world is a different place, and given the interconnectedness of the world's economy, the fear of a trade war may be something of a "strawman." Moreover, the United States is in a unique position with respect to trade, given that it is an important trade partner for the rest of the world. If the U.S. takes a more aggressive stance toward domestic environmental protection when faced with a challenge from the WTO, the WTO will blink first.

WTO's rulings with respect to their efforts. The U.S. has yet to comply with *Shrimp-Turtle* and cannot say when it will.²²⁶ The WTO may kill the "golden goose" in their haste to protect it.

IV. CONCLUSION

As one surveys the latest environmental decisions and sees in the language a departure from *Tuna-Dolphin*, the growth in positive language regarding the validity of Article XX should bring optimism. The future of environmental protection under the WTO is still up in the air; but recent decisions have opened the door for increased recognition of environmental protection goals.

Although there may be set tests against which environmental laws may be measured, the present landscape shows the credibility of Article XX is largely in the minds of its drafters. Despite what environmental circles might consider progress in the ability to meet the bar provided by clauses (b) and (g), the WTO doggedly maintains an interpretation of the chapeau that renders any progress with clauses (b) and (g) practically useless. The WTO's record shows more lipservice than commitment when it comes to balancing environmental protection with international trade.

The time seems ripe for bringing things to a head concerning the ability to implement environmental regulations that may affect international trade. In order to force a more environmentally friendly interpretation of Article XX, one of the member countries, particularly the United States or the European Union, may have to start ignoring the WTO's decisions. The WTO could not continue to exist without the full support of its most important Members, especially the United States, given the reliance of the rest of the world on the U.S. economy. Such an action would force the WTO to deal squarely with the future of global environmental protection.

²²⁶ See Daniel Pruzin, *Trade: U.S. Says it will Comply with Ruling in Shrimp-Turtle, but Fails to Say When*, 230 DAILY ENV'T REP., Dec. 1, 1998, at A-2.