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Protectionism or Environmental Activism? The WTO as a Means of Reconciling the Conflict Between Global Free Trade and the Environment

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COMMENT

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I. INTRODUCTION

The conflict between free trade among the nations of the world and the impact on the environment has been acknowledged by economists, environmentalists, and international legal specialists since as early as 1970.¹ The seemingly irreconcilable dispute between trade and the environment has persisted into the new millennium. Although recognized as being of significant importance in the past, the recent display of opposition posited by environmentalists outside the World Trade Organization (WTO) gathering in Seattle reinforced the need to address this issue immediately.² In the past, environmental trade concerns have been afforded some deference by the WTO, as well as by provisions of international legislation.³

This comment will discuss the strained relations that have arisen between the United States and Mexico and other less developed countries of South and Central America as a result of the conflict between trade and the environment. Part II

1. See generally THE WORLD TRADE ORGANIZATION [WTO], *Early years: Emerging environment debate in GATT/WTO* [hereinafter *Early Years*] available at http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (last visited Sept. 7, 2000).

2. Stephen L. Kass & Jean M. McCarroll, *Having It All: Trade, Development, Environmental and Human Rights*, N.Y. LAW JOURNAL, May 5, 2000 at 2. Although environmental issues were only secondary concerns to the trade disputes being addressed at the WTO meeting in Seattle, many environmentalists rallied in the streets, donning sea turtle or dolphin insignias as symbolic reminders of the recent Panel and Appellate Body decisions. Protesters demonstrated their fear that multilateral trade regulations would sacrifice the United States' environmental standards to further the interests of free trade. Significant doubt has been raised as to whether these activists had actually read the text of the decisions which recognized the United States' right to legislate to protect endangered species and to protect its domestic air quality. The reasoning behind the decisions of the Panels and Appellate Bodies rested on the fact that § 609 of the Endangered Species Act and the Environmental Protection Agency rules as to gasoline standards failed the nondiscriminatory application requirements of GATT. It is likely that the protestors were unaware that many of the challenges to the United States regulations were made by developing countries that could not afford to be sanctioned by United States standards. Ironically, the United States has narrowed the range of domestic legislation that is aimed at protecting the public health. It did so by being the most aggressive challenger of the European Union's ban on hormone-fed beef. *Id.*

3. See generally General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 21(1994), reprinted in 33 I.L.M. 28 (1994) [hereinafter GATT 1994]. For the purposes of this comment, GATT 1947 and GATT 1994 are collectively referred to as GATT.

discusses the history of legislation aimed at alleviating this conflict. Part III examines the legal decisions reflecting the application of the relevant international law, including the failures by the United States at implementing the environmental exceptions. Part IV explores possibilities of reconciling the conflict between trade and the environment and consists of suggestions as to how future efforts can be legally sustained.

II. HISTORY OF THE DEBATE BETWEEN FREE TRADE AND THE ENVIRONMENT

Trade and the environment has been a subject of dispute since as early as 1970.⁴ In November of 1971, the GATT Council organized a Group on Environmental Measures and International Trade (EMIT), which was open to all Member nations.⁵ However, the group's effectiveness was inherently limited since the decision establishing the group stipulated that it would only convene at the request of GATT members.⁶ EMIT would gain support twenty years later when in compliance with its mandate, it examined the effects of environmental protection schemes on international trade and studied the transparency and relationships between multilateral trade agreements and multilateral environmental protection agreements.⁷

Meanwhile, the 1972 UN Stockholm Conference was held in recognition of a need for an international forum in which to hear environmental management concerns.⁸ In the talks that followed the Stockholm Conference, GATT members referred to the creation of EMIT as precedent and made suggestions as to a mechanism by which issues of trade and the environment might be addressed more effectively.⁹ During the 1986-1994 Uruguay Round of negotiations, a ministerial decision created the Committee on Trade and the Environment (CTE).¹⁰

4. See generally *Early Years*, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.* EMIT was first convened in 1991, 20 years after its creation. See *id.*

8. *Id.* During the Stockholm Conference, the Secretariat of GATT prepared its own study focusing on trade implications of environmental protection policies. The study reflected the general concern among Members that such policies could become barriers to trade and could lead to a new form of protectionism known as "green protectionism." See *id.*

9. See *id.*

10. THE WORLD TRADE ORGANIZATION, *Relevant WTO Provisions: Text of 1994*

In a report titled *Our Common Future* (the Brundtland Report), the World Commission on Environment and Development coined the term "sustainable development."¹¹ This report was in response to the dilemma posed by the social and economic ills of poverty.¹² Unfortunately, the effects of poverty often cause a vicious cycle that can be difficult for undeveloped and less developed nations to overcome. The Commission recognized that an increase in global trade would lead to greater economic growth, thereby generating technological and other advantages necessary to rise up against the "pollution of poverty."¹³

The first major disruption leading to the need for more initiative among trade and environmental policies was a dispute between Mexico and the United States.¹⁴ The 1991 case, discussed in more detail in Part III, involved a United States embargo on tuna imported from countries utilizing *purse seine* nets.¹⁵ Incident to the fishing of tuna, large numbers of dolphins were killed in these particular nets. Mexico made its case before the GATT Panel, claiming that the United States' embargo was inconsistent with its obligations under international law.¹⁶ The basis of the Panel's report in favor of Mexico was that the embargo regulated Mexico's mode of production, not its conditions of sale.¹⁷ The Panel decided that the United States, under the GATT, had to treat Mexico's product as favorably as it treated the equivalent domestic product, regardless of the procedures used to harvest the tuna.¹⁸

Decision available at http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm (last visited Sept. 7, 2000). The CTE was given the role of integrating international trade and the environment so as to further each through the support of the other. *Id.*

11. See generally *Early Years*, *supra* note 1.

12. See *id.*

13. See *id.*

14. See generally GATT Dispute Panel Report on United States: Restrictions On Imports Of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Dolphin I*].

15. *Id.* at 156.

16. *Id.* at 161.

17. *Id.* at 194. The Panel decision was not adopted by GATT members, but is significant for its triggering of subsequent challenges to utilization of the Article XX exception to the GATT. See Article XX of GATT 1994.

18. *Id.* at 195. While arriving at a decision in the Mexican tuna case, the Panel noted that the GATT 1994 was not clear as to whether the resources sought to be protected could fall outside the jurisdiction of the Member adopting the environmental controls. Upon inspecting the legislative history of Article XX of the GATT (now GATT 1994), Panel Members concluded that its drafters did not intend for it to extend to other

Again attention was drawn to the need for sustainable development at the 1992 United Nations Conference on Environment and Development (UNCED), also known as the Rio "Earth Summit."¹⁹ The Summit focused on the need to alleviate poverty in furtherance of protecting the environment.²⁰

In April of 1994, towards the end of the Uruguay Round, GATT members established the World Trade Organization (WTO) in Marrakesh, Morocco.²¹ The importance of placing environmental concerns on the Organization's agenda was apparent by the words of the preamble to the Marrakesh Agreement.²² The term "sustainable development," described previously in the Brundtland Report, reappeared, indicating the WTO's recognition of the need for a mechanism to balance trade and environmental protection.²³

Since the formation of the WTO, the preambular language has been called upon by the WTO Appellate Body in determining the outcome of the shrimp-turtle case, the latest in a series of environmentally sensitive trade disputes before the WTO.²⁴ In

countries that were not imposing the environmental controls. As a result, the decision had the potential to lead to even lower environmental standards than would have been imposed domestically. Hence, the decision has been highly criticized by environmentalists citing multilateral trade agreements as obstacles to effective environment protection. *Id.*

19. See generally Agenda 21: The United Nations Programme of Action From Rio, UN Doc. DPI/1344, UN Sales No. E.93.I.11 (1993) [hereinafter *Earth Charter*].

20. *Id.* See also *Early Years*, *supra* note 1 (discussing Agenda 21, the method of action fashioned at the conference that furthered EMIT's idea of sustainable development by recognizing the importance of international trade). See also LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, Marrakesh Agreement Establishing the World Trade Organization [hereinafter *WTO Agreement*].

21. See WTO Agreement preamble.

22. *Id.* The preamble of the WTO Agreement states that the WTO Member nations acknowledge:

[T]hat their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

23. *Id.*

24. See generally WTO Report of the Appellate Body on U.S. Import Prohibition of Certain Shrimp And Shrimp Products, WT/DS58/AB/R, (Oct. 12, 1998), available at

addition, a ministerial decision arising out of Marrakesh in 1994 declared that there should be no reason for strain between policies supporting an "open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."²⁵

Along with the trade-related environmental policy furthered by the establishment of the WTO, the preexisting environmental policy considerations embodied in the GATT were also given new emphasis.²⁶ Simultaneously, attention had to be given to certain other provisions of the GATT, which require non-discrimination by means of the concepts of Most-Favoured-Nation Treatment²⁷ and National Treatment.²⁸ These provisions are necessary within a system of multilateral trade in order to prevent protectionism by Members utilizing environmental concerns as a disguise for giving preferential treatment to their own producers.²⁹ Non-discrimination goes beyond protecting imported products from discriminatory preference of domestic products, it also ensures that a Member does not arbitrarily discriminate among various importing Members.³⁰

Requirements of non-discrimination aside, GATT provides

http://www.WTO.org/english/tratop_e/dispu_e/58abr.htm (noting the importance of the language and stating, "we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement.").

25. See generally LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, *Decision on Trade and Environment*, (1995) [hereinafter DTE] at 53.

26. See THE WORLD TRADE ORGANIZATION, *Relevant WTO Provisions: Texts*, available at http://www.wto.org/english/tratop_e/envir_e/issu4_e.htm (last visited Sept. 7, 2000) [hereinafter WTO Texts].

27. See THE WORLD TRADE ORGANIZATION, *Relevant WTO Provisions: Descriptions*, available at 27. See THE WORLD TRADE ORGANIZATION, *Relevant WTO Provisions: Descriptions*, available at http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm (last visited Sept. 7, 2000) [hereinafter Descriptions]. Article I of the GATT 1994 requires WTO members to extend the same treatment to one Member's exported products as to other Members' similar or equivalent exported products. Most-favoured-nation treatment (MFN) means that a country shall not discriminate between "like" products that are imported from other GATT trading partners. "Like" products are same or equivalent products, which should be given same or equivalent treatment as required by the non-discrimination principles of the GATT. This assures that all Members are on equal footing and that less developed countries benefit from all multilateral trade negotiations. *Id.*

28. See *id.* (explaining that Article III of GATT 1994 requires another form of non-discrimination, the concept of national treatment, which means that a Member shall not discriminate between "like" products that are produced domestically and those that are imported from abroad)

29. *Id.*

30. *Id.*

significant scope with which to address environmental trade concerns.³¹ Admittedly not an environmental protection agency, and having no desire to become one, WTO Members have limited the parameters of discussion to recognizing the advantage of trade liberalization as a solution to the growing concern about deterioration of the environment.³² The WTO has emphasized the fact that free trade has a direct impact on the economies of developing nations because it offers opportunities for a transfer of financial and technological resources.³³

The paradoxical relationship between free trade and protecting the environment is often difficult to reconcile. Non-discrimination principles encourage the free flow of trade while potentially compromising a nation's high environmental standards. However, Article XX of the GATT does provide exceptions to the non-discrimination requirements when necessary to protect "human, animal, or plant life or health."³⁴ The introductory paragraph to the specific exceptions, the "chapeau," dictates that any attempt to adopt policy measures resulting in "arbitrary or unjustifiable discrimination" or representing a "disguised restriction on international trade" will not be tolerated.³⁵

Another Article XX exception lies for instances in which efforts are being made relating to the conservation of "exhaustible natural resources."³⁶ Again, this exception is subject to the non-protectionist requirements of the chapeau.³⁷

31. See The World Trade Organization, Parameters of the Discussion in the WTO available at http://www.wto.org/english/tratop_e/envir_e/issu2_e.htm [hereinafter Parameters].

32. *Id.*

33. *Id.*

34. See Descriptions, *supra* note 27.

35. See *id.* See also GATT 1994, Article XX. Article XX lists "General Exceptions" to the GATT rules (including those requiring non-discrimination). Article XX states that: 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 consumption; ...

Id.

36. See *id.*

37. *Id.*

Among agreements made by the WTO, the Agreement on Technical Barriers to Trade, (the TBT Agreement), has provided another tool by which concerned nations may ensure certain environmental standards.³⁸ This can be accomplished by a country's adoption of environmentally sensitive technical regulations, standards, and conformity requirements, which must be satisfied by foreign producers in order for them to be given access to the market.³⁹

The TBT Agreement recognizes that uniform standards are essential within a society to ensure compatibility, the efficiency of operations, and the quality of exports.⁴⁰ This ideal of harmonization of standards among WTO nations implanted fear in the minds of environmentalists who were concerned that there would be a "race to the bottom" as to environmental standards.⁴¹ However, the Agreement also acknowledges that measures necessary for the protection of the environment are essential to the resulting quality of exports.⁴² Despite recognition of the need to protect the environment, and the provisions setting forth the right to do so, the TBT Agreement was designed to ensure that all measures taken are nondiscriminatory and not designed merely to give domestic producers an advantage.⁴³

38. See LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, AGREEMENT ON TECHNICAL BARRIERS TO TRADE, March 1995 at 135 [hereinafter TBT Agreement](stating purpose of the TBT Agreement is to ensure that no unnecessary barriers to trade are imposed by a country's utilization of specifications). See ALSO ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS, (2d ed. 1999) at 571 [hereinafter Swan & Murphy](explaining that technical regulations and standards refer to myriad specifications such as thickness and strength of metals, voltage of electrical appliances, quality of meats or agricultural products, weights and measures, and performance standards of machines).

39. See TBT Agreement, *supra* note 38 at 135. The preamble of the Agreement contains language similar to that of the chapeau of Article XX, emphasizing the proscription of arbitrary or unjustifiable discrimination or disguised restrictions on trade. See *id.*

40. Swan & Murphy, *supra* note 38, at 571.

41. See *id.* generally.

42. See TBT Agreement, *supra* note 38, at 135.

43. See *id.* at 136. Article 2.2 of the Agreement states:

Members shall ensure that technical regulations are not prepared, adopted, or applied with the view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or

Following the heightened awareness of the potential conflict between free trade and the environment raised during the Uruguay Round, the WTO issued a Decision on Trade and the Environment.⁴⁴ The objectives behind the Decision included the WTO's aim for "optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so" ⁴⁵ This objective also took into consideration the differing concerns among nations at various levels of economic development.⁴⁶

The Decision on Trade and the Environment also initiated the formation of a Committee in Trade and the Environment.⁴⁷ As within the framework of the Trade Negotiations Committee Decision of 15 December 1993, the Committee was to take into consideration the objective of sustainable development and to make suggestions as to implementing policies in an equitable and non-discriminatory fashion.⁴⁸ The latter aspect of this task included facilitating interaction between concerns about trade and the environment, while respecting the needs of less developed countries, avoiding disguised protectionism by monitoring measures being taken, and implementing the multilateral disciplines available.⁴⁹

The Decision on Trade and Environment also charged the Committee with several issues to be addressed in furtherance of making environmental and international trade policies mutually supportive.⁵⁰ Upon completion of this work by the Committee,

health, or the environment. . . .

44. DTE, *supra* note 25. This 1994 ministerial decision stated boldly that: "[T]here should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other. . . ." *Id.* at 53.

45. *Id.*

46. *Id.*

47. *Id.* at 54. The Committee was to be open to all interested WTO members who would later report recommendations and findings to the WTO at the first biennial meeting of the Ministerial Conference. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The matters which were to be addressed were: the relationship between existing provisions of the multilateral trading system and environmental trade measures; the relationship between effects of trade and the environmental provisions of the multilateral trading system; imposition of fees and taxes for environmental purposes; product-related standards such as labeling, packaging, recycling, and technical

and pending the next meeting of the General Council of the WTO, Sub-Committees would be established in order to carry out the objectives determined by the Committee.⁵¹ Both the Committee on Trade and Environment and the Sub-Committees established in furtherance of its findings were invited by the Decision on Trade and Environment to provide input to relevant intergovernmental and non-governmental organizations of the WTO.⁵²

With respect to these aims of the WTO, it is also important to acknowledge the fact that there are limits to the scope of the Organization's involvement in environmental policy. The WTO is by no means a global environmental protection agency.⁵³ The depth of the WTO's involvement expands only to trade-related aspects of environmental policy. The Members of the WTO, in consideration of trade-related policies bearing an effect on the environment and vice versa, do not operate on the premise that they have a solution to environmental problems.⁵⁴ In order to maintain this mutuality of interests, the WTO liberalizes trade while allowing for legislation that adequately protects the environment. The WTO also safeguards against Members illegally gaining an advantage by utilizing environmental provisions to erect barriers to trade.⁵⁵

Lack of coordination at the national level has led to failures in the past at negotiating international agreements as to trade and environmental problems.⁵⁶ The WTO has recognized that the best solution to global environmental concerns is the negotiation of multilateral environmental agreements (MEAs). Such agreements shield against a country addressing its

regulations; requirements of transparency of environmental measures having an effect on trade as provided for by the multilateral trading system; the correlation between dispute settlement mechanisms provided for by the multilateral system and those contained in multilateral environmental agreements; and the effect on developing nations' access to markets as a result of environmental measures, including the resulting benefits to the environment from removing trade restrictions and distortions. *See id.* at 54-55.

51. *Id.* at 55.

52. *Id.*

53. *See* Parameters, *supra* note 31.

54. *See id.* (stating that the WTO has repeatedly expressed the view that environmental and trade policies do complement each other and acknowledging that economic growth depends upon an abundance of natural resources and that liberalization of international trade protects these resources by leading to further economical growth).

55. *Id.*

56. *See id.*

environmental concerns unilaterally and discriminating against other producer nations.⁵⁷ This practice (known as "extraterritoriality") occurs when a nation attempts to impose its standards and laws on a country that is beyond its jurisdiction.⁵⁸ As the law currently stands, the preferred method of dealing with the ongoing dispute between international trade and the environment is by means of consensus and multilateral agreement.⁵⁹ Unfortunately, despite efforts of justifying its behavior as necessary to protect the environment, the United States has not yet been successful in overcoming what have become the obstacles posed by the chapeau of Article XX.

III. SHRIMP, TUNA AND REFORMULATED GASOLINE: PANEL AND APPELLATE BODY RESOLUTIONS OF THE UNITED STATES ENVIRONMENTAL CASES

A. *United States – Restrictions on Imports of Tuna*

The first of a series of disputes to arise out of the United States' efforts at protecting the environment occurred in February of 1991 when Mexico requested a GATT panel to determine the legality of certain United States legislation.⁶⁰ Mexico brought the action (hereinafter Tuna-Dolphin I) in response to an embargo placed on the importation of its tuna into the United States.⁶¹ The embargo was imposed pursuant to the Marine Mammal Protection Act of 1972 (MMPA).⁶²

57. *Id.* One case of an unsuccessful attempt at unilateral action was at the heart of the dispute between Mexico and the United States with the tuna and dolphin debate. *See Part III infra.*

58. *Id.*

59. *See id.* (expressing WTO's resort to multilateral environmental agreements at the Rio "Earth Summit" conference (UNCED) in 1992). *See also* Earth Charter, *supra* note 19.

60. *See generally* Dolphin I, *supra* note 14. The case was handled under the old GATT procedure, prior to formation of the WTO and its dispute settlement mechanism.

61. *Id.* at 161.

62. The MMPA "requires a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals. . ." *See id.* at 156. Tuna from Mexico and "intermediary nations" was being denied access to the United States market. *See id.* at 161. The purpose of the legislation was to reduce the number of incidental killings of dolphins occurring while tuna were being fished in the Eastern Tropical Pacific Ocean (ETP). The use of purse-seine nets to catch tuna in this particular region was very likely to lead to the killing or disturbance of dolphins, as the dolphins were often found swimming above the schools of tuna, and were

The MMPA regulated the capture of yellowfin tuna in hope of reducing dolphin mortality incident to purse-seine and driftnet fishing methods. Some United States (domestic) vessels were given licenses to fish in the ETP region upon their agreement and compliance with a rule establishing an incidental killing maximum of 20,500 dolphins per year. The MMPA also required that the United States Government forbid the importation of products that were caught using dolphin-disruptive methods resulting in incidental deaths in excess of the United States standards. In order to qualify for importation, the foreign products had to prove to the United States authorities that its regulation scheme was comparable to the regulatory system set up by the MMPA.⁶³ Furthermore, once it had been found by United States authorities that a certain country's fleet did not qualify, importation from "intermediary nations" that had not acted to ban tuna imports from the offending nation were also subject to an embargo.⁶⁴

Mexico alleged that the MMPA and the Dolphin Protection Consumer Information Act (DPCIA)⁶⁵ violated Articles I, III, XI, and XIII of the GATT.⁶⁶ Mexico not only disputed a direct embargo that was placed on its tuna exports on March 26, 1991 and an "intermediary nations" embargo of May 24, 1991, but also challenged the DPCIA labeling provisions, which took effect on

in fact indicative of the presence of fish. The fishermen would deliberately follow the dolphins on the surface, encircling them with nets in order to capture the tuna underneath them. This resulted in the death of 6 to 8 million dolphins since 1959. See Jennifer L. Croston & Carol J. Miller, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, *World Trade Organization*, 37(1) AM. BUS. L.J. 73, 74-75 (1999).

63. See Croston & Miller, *supra* note 62, at 98 (explaining that in order to be considered comparable to the United States scheme, foreigners had to certify that the incidental "taking" of dolphins by their vessels did not exceed 1.25 times that of the average rate of the United States operating during the same time period).

64. See Dolphin I, *supra* note 14, at 158-160.

65. See Croston & Miller, *supra* note 62.

The DCPIA determines the standards that must be met in order for a finished tuna product to be labeled with the term "Dolphin Safe." This system applied to both domestic and imported tuna, and gave consumers the option of whether or not to buy the product. The DCPIA stipulates that it is a violation of the Federal Trade Commission Act (FTCA) to falsely affix the "Dolphin Safe" label to any product that was harvested 1) in the ETP with the use of purse-seine nets not meeting the conditions rendering the product dolphin safe, or 2) engaging in the use of driftnet fishing (10 to 15 mile long weighted fishing nets, reeled in by the ship, resulting in fish together with other surface-level marine life being dropped onto the ship) on the high seas. *Id.* at 99-100.

66. See Dolphin I, *supra* note 14, at 161-162.

May 28, 1991.⁶⁷

Specifically, Mexico claimed with respect to the MMPA, that its terms violated the general prohibition of quantitative restrictions of Article XI.⁶⁸ According to Mexico, the MMPA also violated Article XIII in that it created discriminatory conditions for a specific geographical area.⁶⁹ Mexico further alleged that the conditions of comparison of the Mexican yellowfin tuna and the American tuna violated Article III.⁷⁰

According to Mexico, a corresponding subsection of the MMPA, the "Pelly Amendment" of the Fishermen's Protective Act of 1967, was itself a violation of Article XI.⁷¹ The Pelly Amendment provides for the President's use of discretion in the prohibition of imports on all fish products six months after the imposition of an embargo.⁷²

As to the inclusion of "intermediary nations" to the embargo on tuna, Mexico challenged the United States' ability under Article XI to do so, as well as its ability to extend the Pelly Amendment's application to these nations.⁷³ Mexico further contested the United States labeling procedure (the DPCIA) on the grounds that it violated Articles I and IX due to its imposition of discriminatory and unfavorable conditions for a specific geographical region.⁷⁴

In response, the United States insisted that the measures were indeed consistent with the GATT, and would, in the alternative, be justified under the exceptions of Article XX(b) XX(d) and XX(g).⁷⁵ The United States asserted that the yellowfin tuna measures were "internal regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of tuna and tuna products consistent with Article III:4," and that in the absence of conformity with GATT, the regulations would nonetheless be valid under Article XX (b) and XX (g).⁷⁶ The

67. *Id.* at 161.

68. *Id.* at 162.

69. *Id.* at 161.

70. *See id.* at 161, para. 3.1(c).

71. Foreign Relations and Intercourse, Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries, 22 U.S.C. § 1978(a).

72. *See generally* Dolphin I, *supra* note 14.

73. *Id.*

74. *Id.*

75. *Id.* at 162.

76. *Id.* at 161-62.

United States also claimed that the same conditions and exceptions would apply to "intermediary nations."⁷⁷

With regard to Mexico's attack on the DCPIA, the United States countered that its terms were not subject to Article IX, but rather Articles I and III, and that the DCPIA was consistent with them since the discrimination was levied as to the waters in which the fish was caught, not the country of origin.⁷⁸

The GATT Panel considered the issues raised by Mexico in light of the Article XX exceptions raised by the United States and submitted its findings on August 16, 1991.⁷⁹ The prohibition of imports of tuna and tuna products pursuant to the MMPA was found to be inconsistent with Article XI:1 of the GATT and was not justifiable under either of the Article XX exceptions.⁸⁰ The United States' claim that Article III would apply failed because the regulations controlling the harvesting of the tuna could not affect tuna as a final product. The United States was therefore obligated to accord the same treatment to the imported product as that given to the same domestic product, despite Mexico's incidental taking of dolphins.⁸¹ The MMPA was also found inconsistent with Article XI since it involved a quantitative restriction on imports.⁸²

77. See *id.* at 162 (stating that as to "intermediary nations," Article XX (d) was also claimed to apply).

78. *Id.*

79. *Id.* In examining the complaint, the Panel considered the practices of banning imports of certain yellowfin tuna products from Mexico and "intermediary nations", (including the provisions of the MMPA), the extension of the ban to all fish via the Pelly Amendment, and the labeling provisions of the DPCIA. *Id.* at 156.

80. *Id.* at 205. In determining Mexico's claim that the MMPA violated Article XI prohibitions on quantitative restrictions and the United States' insistence that the measures were Article III internal regulations, the Panel noted that, under Article III:4, GATT members are allowed to impose internal regulations so long as there is no discrimination between products of other countries in violation of Article I:1 MFN principles. See *supra* note 27. The United States has claimed that the direct import embargo was an enforcement of the MMPA requiring that tuna be harvested in such a way as to reduce the incidental killing of dolphins. It did not regulate the sale of tuna as a product, but rather the method by which it was produced. This raised the issue of whether the regulations were applied to domestic and imported tuna within the meaning of Article III and would be consistent with the provision. The Panel reasoned that since the text of Article III:1 refers to imported or domestic *products* and that such regulations be applied in accordance with GATT principles, the MMPA regulations "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product." Dolphin I, *supra* note 14, at 195.

81. Dolphin I, *supra* note 14, at 195.

82. See *id.* at 196 (citing Article XI:1 which reads: "No prohibitions or

A previous Panel had recognized that Article XX was available to allow imposition of trade measures to pursue "overriding public policy goals" when otherwise unavoidable.⁸³ However, there was a caveat: for the exception to apply, the trade measures had to withstand scrutiny as being "necessary" and not a means of "arbitrary and unjustifiable discrimination" or a "disguised restriction" on international trade.⁸⁴ Additionally, the method by which Mexican fishermen were to gauge the requisite standards was deemed unpredictable since it was linked to the performance of United States fishermen during the same time period. Such an unpredictable limitation on trade could hardly be considered "necessary" to protect marine mammals.⁸⁵ Invocation of the exceptions failed since the Panel determined that the United States had not exhausted reasonable alternative measures available to accomplish its purpose.⁸⁶

The secondary embargo as to "intermediary nations" and the related MMPA provisions were also found to be contrary to Article XI:1 and were not covered by the Article XX exceptions.⁸⁷ However, the Pelly Amendment and its application toward further bans on fish imports was found to be consistent with the United States obligations under GATT with respect to both types of embargoes.⁸⁸

Additionally, the tuna labeling provisions of the DPCIA were found to be consistent with the most-favoured-nation and

restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . ." and noting that the United States had offered no alternative reading of this GATT provision).

83. *Id.* at 199.

84. *Id.*

85. *See id.*

86. *See id.* at 198. Insisting on the application of Article XX (b) and XX (g) exceptions, the United States pointed out that there were no other reasonable measures that could be taken since the protected species were outside the United States' territorial jurisdiction. *Id.* The Panel noted that international cooperation was a measure that the United States could have taken rather than imposing unilateral trade policies. *Id.* at 199.

87. *Id.* at 202-202. Much of the Panel's reasoning was the same as that of its decision concerning the primary embargo against Mexico. Again, since the regulations were not aimed at tuna as a product, the prohibition against quantitative restrictions applied. *Id.*

88. *Id.* at 205. Since the Pelly Amendment merely gave authority to act inconsistently with GATT, and was not a mandate to do so, the Panel upheld its legitimacy. *Id.*

national-treatment provisions of Article I:1 of GATT.⁸⁹ Mexico had argued that the "Dolphin Safe" label discriminated against Mexico as a producer of tuna. The Panel acknowledged that the labeling requirement did not block access to the United States market as the tuna could be sold freely either with or without the label. The only possible advantage would depend on the consumer's decision to choose the "Dolphin Safe" label over other tuna.⁹⁰

In determining these findings, the Panel emphasized the fact that its decision rested merely on relevant GATT provisions and was not demonstrative of any position as to Mexico or the United States environmental policies.⁹¹ The Panel also acknowledged that Contracting Parties were free to regulate products, but could not do so merely because its environmental policies were inconsistent with those of other trading Members.⁹² The Panel also insisted that it did not limit the reach of the Article XX exceptions, but rather applied GATT principles to counter possible abuse.⁹³ The concluding remarks also made the suggestion that if Contracting Parties so desired, they could and should amend or supplement the existing GATT provisions to permit environmental trade measures that would otherwise be inconsistent with it as written at the time.⁹⁴ Again, the importance of multilateral cooperation in order to address international environmental problems was stressed.⁹⁵

Despite its triumph before the GATT Panel, Mexico decided

89. *Id.* Despite a challenge under Article IX:1, which reads, "Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favorable than the treatment accorded to like products of any third country." the labeling provisions were deemed satisfactory since there was no national treatment requirement embodied in Article XI. Rather, there was only a requirement of MFN treatment. This was interpreted to mean that the marking provision only applied to imported products and not the general marking of both domestic and imported products. *Id.*

90. *See id.* at 203. (finding that because access to the right to use the "Dolphin-Safe" label depended only upon documentary evidence proving that the tuna was not harvested using purse-seine nets to intentionally encircle and trap dolphins, the United States was not discriminating against any particular nation, nor was it distinguishing between fish originating in Mexico or any other country).

91. *See id.* at 204.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

that it would not pursue sanctions against the United States.⁹⁶ Instead, the two countries worked through the problem by initiating bilateral agreements outside of the GATT sphere.⁹⁷ Since the dispute was handled under the old GATT system, which required a consensus to accept the decision before it would be adopted, the decision was not adopted.⁹⁸

In April of 1992, the European Economic Community and the Netherlands brought their own case disputing the legitimacy of the embargoes on tuna and tuna products.⁹⁹ A second panel decision, upholding some of the prior panel's findings while modifying others, was issued in 1994, and was also governed by the old GATT procedures.¹⁰⁰

As an inherent theme of the report, the Panel recognized the need to promote sustainable development and thus declined to pass judgment on the validity of the dolphin conservation efforts of the United States.¹⁰¹ The issue was whether the United States had the right to secure changes in another country's domestic policies by imposing trade embargoes. Answering the question in the negative, the Panel noted that Article XX of the GATT lent no support to this theory.

Both the United States' "primary nation embargo" and the "intermediary nation embargo" were found contrary to Article XI:1 of the GATT.¹⁰² Since the embargoes prohibited the import of tuna or tuna products from any country that failed to meet certain policy requirements, the embargoes were "prohibitions of restrictions" that were inconsistent with Article XI:1.¹⁰³ The Panel also said that since none of the policies, practices and methods had any impact on tuna as a product, the Note ad of

96. THE WORLD TRADE ORGANIZATION, *Beyond the Agreements: The Tuna-Dolphin Dispute*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited Sept. 7, 2000) [hereinafter *Tuna-Dolphin Dispute*].

97. *Id.*

98. *Id.*

99. See GATT Dispute Settlement Panel Report on U.S. Restrictions On Imports On Tuna, DS29/R, Jun. 16, 1994, 1994 WL 907620, at 2 [hereinafter *Dolphin II*].

100. *Id.*

101. *Id.* at 40.

102. *Id.* at 35. GATT Article XI:1 states that "No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party." See *id.* at 34.

103. *Id.* at 35.

Article III would not apply.¹⁰⁴

The Panel developed a procedure for determining whether the exception of Article XX(g) would apply in this case.¹⁰⁵ The United States prevailed in the sense that the Panel deemed the restriction to conserve dolphins in the eastern tropical Pacific Ocean to be a valid policy to conserve an exhaustible natural resource.¹⁰⁶ In reaching this conclusion, the Panel also noted that there was no reason to limit the provisions of Article XX(g) to resources located within the territory of the country imposing the restrictions.¹⁰⁷ However the United States' efforts collapsed when the Panel went on to determine whether the restrictions were "related to" and made "in conjunction" with domestic consumption and production. The Panel found that forcing other countries to change their policies was not "primarily aimed" at the conservation of exhaustible resources. It acknowledged the grim fact that these types of policies would not be effective at conserving exhaustible resources unless such changes actually occurred.¹⁰⁸ In reaching this conclusion, this Panel agreed with the reasoning of the previous one in its interpretation of the language of Article XX. Consistent with the analysis in Tuna-Dolphin I, the Panel read "relating to" to mean "primarily aimed" at conservation and "in conjunction with" to mean "primarily aimed" at rendering the restrictions on the country's domestic production and consumption efforts effective.¹⁰⁹ Standing alone,

104. *Id.* at 34. The Note to Article III extends the national treatment requirement of Article III to domestic measures that are instituted at the time or point of importation. It states in part, "any law, regulation or requirement . . . which applies to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as . . . subject to the provisions of Article III." *See id.*

105. Dolphin II, *supra* note 98, at 35. The Panel had to determine: 1) whether the policy being questioned fell within the range of policies aimed at conserving exhaustible natural resources; 2) whether the measure being taken was "related to" conservation and was made effective "in conjunction" with restrictions on the country's domestic consumption and production of the resource; and 3) whether the measure complied with the requirements of the chapeau which required that the measure not be applied in an arbitrary or unjustifiable manner and not as a disguised restriction on trade. *Id.*

106. *Id.*

107. *Id.* at 36. The Panel referred to the Vienna Convention on the Law of Treaties as a means of interpretation of other treaties and their relevance to interpretation of the GATT. *Id.* The Panel also concluded that any subsequent agreements made bilaterally or plurilaterally were not applicable to interpretation of the GATT since not all Members, only the parties to the dispute, were involved in the process. *Id.*

108. Dolphin II, *supra* note 98, at 38.

109. *Id.* at 37.

both the "primary nation" embargo and the "intermediary nation" embargo failed to satisfy this Article XX requirement because neither would ensure actual changes in the policies of the exporting nations.¹¹⁰

A similar analytical framework was applied in denying the applicability of the Article XX(b) exception for the protection of "human, animal, or plant life or health."¹¹¹ Again, the imposition of the measures was considered ineffective since changes would only occur if the other countries changed their policies. Since the restriction would most likely be ineffective, it could not satisfy the essential condition that it be "necessary."¹¹²

Once again the United States had failed to establish the necessity and primary aim of its environmental policy. Other environmental cases which follow in Part B and C of this section involve the same and additional weaknesses in the United States' efforts to invoke the protection of Article XX.¹¹³

B. United States – Standards for Reformulated and Conventional Gasoline

Following the formation of the WTO, Venezuela and Brazil requested that a panel be formed to decide whether certain United States regulations, the Clean Air Act ("CAA")¹¹⁴ and the EPA's Gasoline Rule¹¹⁵ were violative of GATT.¹¹⁶ In defense of its

110. *Id.*

111. *Id.* at 38.

112. *Id.* at 40.

113. *See generally* Tuna-Dolphin Dispute, *supra* note 95. This decision was never adopted since there was no consensus by all Members to do so. Since the United States had not resolved its studies on the panel report, it did not vote to adopt the decision. *See id.*

114. Report of the Panel, United States – Standards For Reformulated And Conventional Gasoline, WT/DS2/R, (Jan. 29, 1996) at 1 [hereinafter Reformulated Gasoline I]. The purpose of the Clean Air Act was to prevent and control air pollution in the United States. Gasoline refiners, blenders, and importers were subject to this regulation. *Id.*

115. *See id.* at 2. The gasoline market is divided into two parts; "ozone nonattainment areas," heavily polluted regions of the United States where only reformulated gasoline may be sold to consumers, and the rest of the United States, in which regular, or "conventional" gasoline can be sold, provided it is determined to be no dirtier than it was in the base year of 1990. Each domestic refiner is required to maintain a yearly average that is equivalent to or better than its "individual baseline" average produced in 1990. The methods of determining a domestic refiner's individual baseline involve: 1) showing evidence of the quality of gasoline that was produced in 1990; and 2) utilizing data to show the quality of blendstock used in 1990. If insufficient data are drawn from the previous

policies, the United States invoked the protection of Article XX(b),(d), and (g) to justify its actions as environmental trade policies.¹¹⁷ In January of 1996, the Panel issued its decision concluding that the baseline establishment methods were inconsistent with Article III:4 of GATT and that Article XX could not be used to justify the United States policies.¹¹⁸

According to Article III:4 of the GATT 1994, with respect to regulations on internal sale, Members are bound to treat the product of another territory no less favorably than the like product of national origin.¹¹⁹ After finding that the Gasoline Rule and CAA were in fact a regulation on the internal sale of an imported product, the Panel noted that chemically-equivalent imported and domestic gasoline with the same physical properties and end uses were being treated differently.¹²⁰ This resulted in less favorable sales conditions for the imported gasoline since most importers were required to meet the statutory baseline rather than the more easily-satisfied individual baseline required of most domestic refiners.¹²¹ This effectively stripped importers of the benefit of selling a competitive product as extraneous factors would affect its price and hence, its marketability. The importer would be forced to account for cost and price considerations, and would have to compensate for the gasoline that fell below the statutory guideline in order to import other gasoline to balance out its average.¹²² In response to this claim, the United States argued that the statutory baseline merely reflected the average in 1990

two methods, then post-1990 gasoline blendstock is used (Method three). Importers are only allowed to determine their individual baseline via Method one. If unable to determine their baseline using Method one, importers must comply with the "statutory baseline," which is calculated from the averages of all gasoline consumed in the United States during 1990. *Id.*

116. *Id.* at 5. Brazil and Venezuela claimed violations of Articles I (MFN), III (National Treatment on Internal Taxation and Regulation), III:1, and III:4 of GATT 1994. *Id.*

117. *Id.*

118. *See id.* at 46 (stating that the Panel's role in determining whether any environmental policy reviewed is consistent with the GATT 1994 is not to pass judgment on the legitimacy or desirability of the particular environmental objectives, such as those promulgated in the CAA and the Gasoline Rule, but rather to determine whether such objectives were consistent with GATT).

119. *See generally* GATT 1994, *supra* note 3.

120. *See* Reformulated Gasoline I, *supra* note 113.

121. *Id.* at 34.

122. *Id.*

and therefore did not afford preferential treatment to domestic refiners.¹²³

The Panel found that the United States' argument reflected the notion that less favorable treatment in one instance could be offset by more favorable treatment in another.¹²⁴ A previous panel had determined that the no less favorable requirement extended to each individual case of imported products, not to a class of products as a whole.¹²⁵ If Article III:4 were examined in any other light, great uncertainty in the conditions of competition would altogether undermine the fundamental purposes of Article III.¹²⁶

In making a determination as to whether Article XX(b), which provides an exception when necessary "to protect human, animal or plant life or health," the Panel examined the facts with the guidance of the test that was employed in the Dolphin Tuna II dispute.¹²⁷ As to the first prong of the test, the Panel agreed with the United States that a policy designed to protect the environment by restricting the consumption of gasoline did fall within the ambit of Article XX.¹²⁸ The Panel then proceeded to examine whether the policy was "necessary," meaning that there were no alternative GATT 94-consistent methods by which the restricting country could achieve its objectives.¹²⁹ On this point, the Panel disagreed with the United States on both the effectiveness of its current regulations and the ability to achieve the results by less GATT 94-inconsistent means.¹³⁰ The Gasoline Rule did not ensure that the gasoline governed by individual baselines would conform with the 1990 average levels. Since there was no maximum production limit set for domestic refiners, those refiners which had a smaller share of the market in 1990 could in theory increase their market share, taking advantage of

123. *Id.* at 35.

124. *Id.* at 35-36.

125. *See id.* at 35.

126. *See id.* at 36.

127. *See id.* at 37. In order to be given the protection of the exception, the following elements had to be established: First, the regulatory policy had to fall within the range of policies developed to protect human, animal or plant life or health. Second, the policy had to be "necessary" to fulfil the environmental objective. Third, the restriction had to satisfy the requirements of the chapeau of Article XX. *Id.*

128. *Id.* at 38.

129. *Id.*

130. *Id.* at 40.

the lower baseline requirement and produce more gasoline.¹³¹ This would skew the results of the overall 1990 average that importers were required to conform with and simultaneously defeat the purposes of the regulation.¹³² The other United States contentions that gaming and lack of ability to enforce compliance with its regulations made the regulation necessary were also rejected by the Panel.¹³³ The Panel referred to other situations in which the United States was engaged in enforcement mechanisms with other countries.¹³⁴

In concluding that the United States had failed to demonstrate the necessity of its regulations on gasoline, the Panel declined to examine whether or not the regulations would have been consistent with the chapeau of Article XX. It proceeded to consider whether Article XX(g), the exception for exhaustible natural resources, would apply.¹³⁵ Again, the Panel determined whether the restriction satisfied all the elements of the test derived from Article XX and its chapeau.¹³⁶ The United States had argued over Venezuela's contentions to the contrary, that clean air was an exhaustible natural resource.¹³⁷ Air pollution could also lead to further exhaustion by contaminating natural bodies of water, farmlands, reserves, and forests. The Panel agreed that clean air was natural and had value, and was therefore a resource.¹³⁸ Venezuela's argument that unlike coal, air was renewable failed to pass muster.¹³⁹ The Panel referred to a previous case in which it had been determined that "renewable stocks of salmon could constitute an exhaustible natural resource."¹⁴⁰ Concluding that a restriction aimed at reducing the depletion of clean air did fit within the meaning of Article XX(g), the Panel proceeded to examine the other requirements.¹⁴¹ According to Venezuela, past Panels had interpreted "related to" to mean "primarily aimed at" conservation of an exhaustible natural resource, and "in conjunction with" as rendering

131. *Id.* at 41.

132. *Id.*

133. *Id.* at 40.

134. *Id.* at 41.

135. *Id.*

136. *Id.*

137. *Id.* at 43.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

domestic restrictions effective.¹⁴² As to these requirements, the Panel could draw no direct connection between improving the air quality in the United States and imposing less favorable treatment conditions on foreign producers.¹⁴³ According to the Panel, consistency with the no less favorable requirements of Article III would in no way prevent the conservation of natural resources in the United States.¹⁴⁴ The Panel reached the conclusion that “the less favorable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources.”¹⁴⁵ As it determined during its analysis of Article XX(b), the Panel found it unnecessary to consider whether the regulation would have satisfied the requirements of the chapeau of Article XX.¹⁴⁶

Following the Panel’s decision, the United States appealed to the WTO claiming that the Panel erred both in its holding that the Article XX(g) justification was inapplicable and in its general interpretation of Article XX.¹⁴⁷ The United States argued that the finding that its baseline establishment rules did not qualify as a “measure” “relating to” the conservation of clean air and in neglecting to proceed further to determine whether the regulations would have satisfied the chapeau of Article XX.¹⁴⁸

The Appellate Body determined that the Panel had erred in its consideration of whether the “less favorable treatment” being afforded importers was “primarily aimed at” the conservation of an exhaustible natural resource rather than whether the “measure” itself (the baseline establishment rules) was “primarily aimed at” the conservation.¹⁴⁹ The Panel erred in utilizing its legal determination that there had been a violation of Article III:4 as the “measure” that had to be primarily aimed at conserving clean air.¹⁵⁰ By doing so, it rendered the Article XX exceptions useless because the Panel had already established that the baseline establishment rules would not be consistent in

142. *Id.* at 44.

143. *Id.*

144. *Id.* at 45.

145. *Id.*

146. *See id. generally.*

147. Report of the Appellate Body, United States – Standards For Reformulated And Conventional Gasoline, WT/DS2/AB/R, Apr. 29, 1996 at 8.

148. *Id.* at 8-9.

149. *Id.* at 14.

150. *Id.* at 15.

the absence of an exception.¹⁵¹ The Appellate Body advised that 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 favorable treatment."¹⁵² The Panel's interpretation misinterpreted the meaning of the treaty by failing to take into account the normal meaning of the words. Article III:4 could not be given such a broad reading as to swallow Article XX and its inherent policy considerations.¹⁵³ After recognizing this mistake, the Appellate Body concluded that the baseline establishment rules were "primarily aimed at" the conservation of exhaustible natural resources and that they generally applied to both domestic and imported gasoline.¹⁵⁴ It added the qualification that if it could be observed that there were no restrictions on domestic products while there were a substantial amount on the like imported products, then the measure could not be taken to be "primarily aimed at" conservation and would be a form of naked protectionism.¹⁵⁵

After the affirmative finding that the provisions of the baseline establishment rules fell within the meaning of Article XX(g), the Appellate Body proceeded further into the inquiry of whether the regulation would satisfy the requirements of the chapeau. In order to qualify for the exception, the regulation could not amount to "arbitrary" or "unjustifiable" discrimination in international trade, nor could it be a "disguised restriction" on trade.¹⁵⁶ The Appellate Body recognized the policy considerations of the chapeau, which included the prevention of illegitimate use or abuse of the exceptions.¹⁵⁷ In defense of its gasoline regulations, the United States attested that if it were to use an alternative system, it would encounter administrative problems in effectuating enforcement jurisdiction over foreign persons.¹⁵⁸ Additionally, since gasoline is a fungible product, refiners would claim the most favorable refinery of origin, and difficulties would arise in tracking the actual origin of the product.¹⁵⁹ The Appellate

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 18.

155. *Id.* at 19.

156. *See id.* at 21-23.

157. *Id.* at 20.

158. *Id.* at 23.

159. *Id.*

Body recognized the reality of these concerns but found them insubstantial in justifying the denial of individual baselines to foreign refiners.¹⁶⁰ It agreed with the Panel that there were many other measures that were reasonably available to the United States.¹⁶¹

The Appellate Body found that the United States had failed to engage in cooperative arrangements with Venezuela and Brazil to overcome its concerns of enforcement and establishment of individualized baselines.¹⁶² Additionally, the Appellate Body scoffed at the United States for considering only its domestic refiners when imposing the regulations and for not taking into account the hardships that would fall upon the foreign refiners.¹⁶³

In concluding that Article XX could not apply, the Appellate Body stated that the initial Article III:4 violation, coupled with the failure to cooperate with or to consider the impact on foreign producers constituted "unjustifiable discrimination" and a "disguised restriction on international trade."¹⁶⁴

C. United States – Import Prohibition of Certain Shrimp and Shrimp Products

The most recent case involving the conflict between international trade and the environment arose when several countries challenged the United States' policies on the protection of sea turtles.¹⁶⁵ The challenges came in response to the 1987 regulations issued by the United States pursuant to the Endangered Species Act of 1973. The regulations, effective as of 1990, imposed upon United States vessels the requirement to use certain approved Turtle Excluder Devices ("TEDs") or to implement shrimp fishing restrictions (tow-time restrictions) in areas notoriously linked to the incidental killing of sea turtles during shrimp harvestation.¹⁶⁶ The Initial regulations were

160. *Id.* at 24.

161. *Id.*

162. *Id.* at 26.

163. *Id.*

164. *Id.*

165. See Report of the Appellate Body, United States – Import Prohibition Of Certain Shrimp And Shrimp Products, WT/DS58/AB/R, (Oct. 12, 1998) available at http://www.wto.org/english/tratop_e/dispu_e/58abr.htm [hereinafter Shrimp II].

166. *Id.* at 4.

amended to require that the TEDs be used all the time and in all areas where it was likely that sea turtles would be present. There were a few very limited exceptions to the use of the approved TEDs.¹⁶⁷ On November 21, 1989, Section 609 was enacted, requiring the United States Secretary of State to engage in bilateral or multilateral negotiations with foreign nations to agree on a way to protect and conserve sea turtles. Section 609 also imposed a ban on all imports of shrimp that were harvested by methods that harmed sea turtles. The proposed ban would not be applied to foreign nations that were "certified."¹⁶⁸ As to foreign shrimp trawlers, there were two methods by which vessels could become certified. First, certification would be given to countries where the fishing environment posed no risk to sea turtles.¹⁶⁹ The second way foreign country can gain certification by the United States is by providing documentary evidence of implementation of a system designed to regulate the incidental taking of sea turtles. In addition to providing such documentation, the nation is required to utilize programs that result in effectiveness and results comparable to those of the United States.¹⁷⁰ The regulations go further to qualify the term "comparable" as meaning that the use of TEDs is consistent to the manner in which they are used by the United States.¹⁷¹

In reviewing the claims by India, Malaysia, Pakistan and Thailand, the Panel concluded that the Section 609 ban on the import of shrimp and shrimp products was inconsistent with Article XI:1 of GATT 1994¹⁷² and was not justified by the

167. *Id.*

168. *Id.*

169. *Id.* at 4-5. The regulatory guidelines of 1996 stated that if the following conditions were met, a country would be certified without any further effort on the part of the foreign government:

(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

170. *Id.* at 5. According to the 1996 guidelines, certification shall be made as long as: "(i) the required use of TEDs that are 'comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program . . .'; and (ii) 'a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.'"

171. *Id.* at 5.

172. See GATT 1994, *supra* note 3.

exceptions of Article XX.¹⁷³

Due to the level of disagreement over the reasoning used by the Panel and that of the Appellate Body, the two will be examined together. The Appellate Body effectively reversed the reasoning of the Panel and completed the analysis in light of previous methods of treaty interpretation.¹⁷⁴

A quality that effectively distinguishes this case from the other environmental cases is its procedural background. When the United States filed its appeal, it attached to its submission three briefs that were prepared by Non-governmental Organizations ("NGOs"). The Joint Appellees were infuriated and objected to the consideration of these *amicus curiae* briefs, claiming that they were inconsistent with Article 17.6 of the DSU.¹⁷⁵ The Appellate Body disposed of this concern by requesting that the United States disclose its agreement with the briefs that were affixed to the appellate submission. The United States responded by claiming that it was limiting the scope of its agreement with the *amicus* briefs only to those issues concurring with those raised in its submission, and was merely including the NGO briefs as independent determinations by organizations having "a great interest, and specialized expertise, in sea turtle conservation and related matters."¹⁷⁶ Finding that the United States' response was adequate to render the material a component of its appeal, the Appellate Body admitted the briefs, considering them to the extent that they supported the legal arguments in the appellate submission.¹⁷⁷

Moving forward from the resolution of the procedural issue, the United States also requested that the Appellate Body determine whether the Panel erred in first considering the chapeau of Article XX, thereby finding unjustifiable discrimination between countries where the same conditions prevailed, and not determining any of the provisions of Article XX.¹⁷⁸

In its interpretation of Section 609 under Article XX of GATT

173. Shrimp II, *supra* note 164, at 6.

174. *Id.*

175. *Id.* at 20. Article 17.6 states that on appeal, interpretations should be limited to the issues and interpretations that were considered by the Panel. *Id.*

176. *Id.* at 22.

177. *Id.*

178. *Id.* at 24, 28.

1994, the Panel concluded that the measure taken by the United States completely undermined the purposes of the multilateral trading system.¹⁷⁹ Additionally, it found that the measure constituted unjustifiable discrimination between countries where the same conditions prevailed since it conditioned access to the United States markets on compliance with conservation policies comparable to those of the United States. The Panel ended its analysis there, thus deviating from the reasoning used in both the Tuna-Dolphin disputes and the Gasoline dispute.¹⁸⁰ The Appellate Body noted that the Panel failed to apply the "customary rules of interpretation of public international law" as stipulated in Article 3.2 of the DSU. Its errors included failure to read the relevant portion, Article XX, of the treaty in light of its object and purpose. Instead, it referred to the purpose of the *whole* GATT 1994, analyzing the design of the measure being utilized and not the manner in which it was applied.¹⁸¹ This analytical approach should have been used in assessing the measure in light of the immediate context of the involved provisions of Article XX, not the chapeau itself. The Appellate Body stressed the importance of adhering to the requirements of the multilateral system but recognized that the opening clause of Article XX existed as a safeguard to prevent abuse of its exceptions, not as an absolute barrier to their invocation.¹⁸² By reversing the sequence of analysis used by prior panels, the Panel effectively "render[ed] a measure *a priori* incapable of justification under Article XX."¹⁸³ By conditioning access to the market for shrimp on adoption of United States policies, the United States acted unilaterally contrary to its GATT 1994 obligations. The exceptions laid out in sections (a)-(j) of Article XX exist in order to justify such otherwise inconsistent behavior when the policies are recognized as legitimate in nature.¹⁸⁴ For the above reason, the Appellate Body reversed the Panel's findings and proceeded to analyze Section 609 pursuant to the "exhaustible natural resources" exception of Article XX(g). The

179. *Id.* at 28.

180. *Id.*

181. *Id.* at 30. The Panel emphasized its focus on the unilateral measure taken by the United States in this particular situation, which it said compromised the integrity of the multilateral trading system. *Id.*

182. *Id.*

183. *Id.* at 31.

184. *Id.*

chapeau would be considered only after determining that the United States measure would be eligible for the Article XX justification.¹⁸⁵

First, the Appellate Body considered whether Section 609 was a measure to preserve or conserve an exhaustible natural resource. Recognizing the fact that the sea turtles were listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), it was not difficult for the Appellate Body to arrive at the conclusion that sea turtles were natural resources and were exhaustible.¹⁸⁶ Therefore, the measure was deemed to be a conservation effort that satisfied the requirement of the first prong of Article XX(g).

Next, the Appellate Body concluded that the design and structure of the policy was a means to the ends of accomplishing the goal of conserving sea turtles. The Appellate Body determined this by noting that the structure of Section 609 was not overly broad and related clearly and directly to its purpose.¹⁸⁷ Determining that the measure was "related to" the conservation of an exhaustible natural resource, the Appellate Body concluded that Section 609 satisfied the second prong of Article XX(g) scrutiny.¹⁸⁸

The final determination that had to be made before proceeding to the chapeau was whether the measure was applied evenhandedly, thereby being making it effective "in conjunction with," restrictions on domestic production or consumption.¹⁸⁹ As a result of the requirements of Section 609, which were modified to force United States shrimp fisherman to use approved TEDs wherever and whenever there was a likelihood that they would encounter sea turtles, the Appellate Body concluded that the measures were made "in conjunction with" domestic policies and that the third prong of Article XX(g) was satisfied.¹⁹⁰

185. *Id.* at 32.

186. *Id.* at 34.

187. *Id.* at 35. The Appellate Body concluded that the measure exempted from its provisions shrimp that were caught where there was no likelihood of the existence of sea turtles. It also did not prohibit the import of shrimp caught in the waters of certified countries. Reviewing the two certification processes, the Appellate Body found that the requirements of use of TEDs would directly coincide with the decrease in mortality of sea turtles. *Id.* at 36.

188. *Id.* at 35.

189. *Id.* at 37.

190. *Id.*

After concluding that the Section 609 qualified for the justification afforded by Article XX(g), the Appellate Body tackled the complicated task of determining whether the measure would survive the rigid application of the chapeau.¹⁹¹ This "second tier" of the analysis required that the measure be found to be neither "arbitrary or unjustifiable discrimination" nor a "disguised restriction on international trade."¹⁹² In order to be fail the requirements of the chapeau, the United States efforts had to be deemed to go beyond mere noncompliance with Article XI:1 of GATT 1994.¹⁹³ Reflecting on recent activities of the WTO, the Appellate Body weighed the principle of "sustainable development" against the safeguarding of an open multilateral trading system. It recognized that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members."¹⁹⁴ In determining this balance, the Appellate Body acknowledged the fact that the United States applied a uniform system throughout its domestic shrimp trawling system, but noted that it had failed to take into consideration the prevalent conditions in other countries where use of TEDs may not be feasible.¹⁹⁵ An even greater omission on the part of the United States was its failure to conduct bilateral or multilateral negotiations with other countries to attempt to come to a cooperative agreement. In fact, Section 609 itself required that such negotiations be initiated and the recent Inter-American Convention was evidence that such an alternate was reasonably available to the United States.¹⁹⁶ The Appellate Body concluded that, by negotiating with some but not all Members for a solution to the sea turtle problem, the United States was guilty of unjustifiable discrimination.¹⁹⁷ Furthermore, the Appellate Body found Section 609 to constitute "arbitrary discrimination" since there was no explanation or notice given as

191. See generally Parameters, *supra* note 31.

192. Shrimp II, *supra* note 164, at 38.

193. *Id.*

194. *Id.* at 40.

195. *Id.* at 43.

196. *Id.* at 46.

197. *Id.* There were some wider Caribbean and western Atlantic countries that committed themselves to using TEDs pursuant to the guidelines of 1991 and 1993. Other countries that were subject to the later guidelines of 1996 were given only four months to comply with using TEDs. The unequal burden on these Members led to a discriminatory impact. *Id.* at 47.

to why a country was or was not granted certification. Deciding that the unjustifiable and arbitrary nature of the discrimination was enough to cause the measure to fail the requirements of the chapeau, the Appellate Body chose not to determine whether the measure was also a "disguised restriction on trade."¹⁹⁸ Once again, the United States was unsuccessful at utilizing the justification afforded by Article XX. This time, as in the Appellate decision of the Gasoline case, its efforts only failed to hurdle the chapeau.

IV. SUGGESTIONS AS TO HOW THE UNITED STATES CAN SUCCESSFULLY UTILIZE ARTICLE XX TO RECONCILE THE CONFLICT BETWEEN TRADE AND THE ENVIRONMENT.

The conflict between international trade and environmental concerns has led to frustration and anger on the part of many environmentalists in the United States. Many fear that multilateral agreements such as the GATT 1994 will lead to relaxation of American environmental policy and to a general "race to the bottom" by the Contracting Parties of the world. However, the environmentalists' pessimistic outlook is founded upon the premise that there is no available methodology that allows countries to conform with the requirements of the GATT 1994 and the interests in protecting the environment. After analyzing the Dolphin-Tuna, Gasoline, and Sea Turtle-Shrimp cases, perhaps a more accurate statement is that recourse is available under the GATT environmental protection exceptions for countries desiring to balance trade policies with environmental concerns, but that such recourse will be denied to countries like the United States when the policy at issue is predominately economically motivated policy.

Rather than relying on the GATT, the United States could accomplish its trade policy objectives by simply invoking rigid environmental policies where deemed necessary and effective, including the right to restrict the use and import of harmful or dangerously produced products where other measures are not available, thereby imposing standards and regulations on both the United States and foreign countries. Such impositions should be reasonable and imposed only if cooperation has been

198. *Id.* at 49.

rendered ineffective. In addition, countervailing considerations, such as a foreign nation's ability to comply with the United States regulations, must also be taken into account. The United States should allow flexible time for conformity and when possible offer resources to less developed countries that may otherwise not be able to conform. Perhaps exchanges in technology and resources could be offered by more developed nations as incentive to cooperate with efforts to protect the environment. We may look to the language in the three decisions for guidance in determining solid suggestions as to how to solve the most pressing conflicts between the environment and international trade.

Reflecting on the decisions of the two panels in the Dolphin-Tuna cases, the most egregious mistake made by the United States was its failure to exhaust reasonable alternative measures that were available to accomplish its policy objective. The Dolphin-Tuna II Panel also cited the fact that the attempted restrictions couldn't possibly be "primarily aimed" at the conservation of exhaustible resources since the only way that they could be effective would be if other countries did indeed change their domestic policies. By engaging in multilateral or bilateral negotiations, or by amending or supplementing the existing GATT 1994 provisions to permit environmental trade measures that would otherwise be inconsistent with the Agreement would be an effective way to address the problem without resorting to unilateral action. Again, the underlying purpose of the GATT 1994 is for Members to work multilaterally to strike a balance between trade and international environmental problems.

If efforts to negotiate reach an impasse, the United States does have more narrowly tailored methods of environmental protection at its disposal. The Panels did not reject the United States' labeling restrictions on tuna. Internal measures such as the "Dolphin-safe" logo can be used to achieve awareness on the part of the American public while maintaining the United States' obligations under the GATT 1994. However, in order to pass muster before future panels, such measures should be resorted to only after good faith attempts at agreement fail.

In the Gasoline case, The Panel found that the United States was engaging in less favorable treatment since chemically-equivalent products were being treated differently. A method by

which standards were developed based on an average clearly resulted in less favorable treatment in one instance and more favorable treatment in another. Regardless of whether the United States established its statutory baseline in good faith, a unilateral attempt at offsetting losses to one producer to the benefit of another producer was not a sufficient way to draw the line as it could potentially lead to the collapse of competition, thereby undermining the fundamental purposes of GATT 1994.

A more favorable approach would be that suggested by the Appellate Body of allowing all foreign producers to establish individual baselines where there was competent and reliable data to do so. All three Methods utilized by domestic producers should be made available to foreign producers. Additionally, reasonable measures should have been taken to ensure compliance. Foreign enforcement mechanisms should be established by cooperative arrangements as was done effectively in past situations.

As a matter of policy and as was done in the Dolphin-Tuna and Sea Turtle-Shrimp cases, consideration of hardships need be given not only to domestic producers but also foreign producers.

Another major flaw in the United States imposition of the Gasoline Rule was that it did not ensure that the gasoline governed by individual baselines would conform with the 1990 average levels. In other words, the policy being furthered would be defeated by domestic refiners and foreign refiners that were granted an individualized baseline since there was no maximum cap on production. Imposition of a system that establishes a limit on the volume of gasoline that can be produced at the individual baselines would be more effective at achieving the goal of preserving clean air.

Perhaps the most obvious omission on the part of the United States as to its duty to negotiate arose in the Sea Turtle-Shrimp case. Even the uniformly applied measures of the domestic shrimp trawling system were proven ineffective since they failed to take into consideration the prevalent conditions in other countries where use of TEDs may not be feasible. Section 609 itself serves as evidence in determining that the United States engaged in unjustifiable discrimination since it by its terms required that "serious, across-the-board negotiations" be initiated with other countries in order to conserve sea turtles. By

engaging in multilateral negotiations, the United States may have been justified in imposing an import ban had its efforts failed.

In order for future efforts not to be characterized as "arbitrary discrimination," the United States should also devise a well-structured system that sets guidelines for officials to follow when approving or disapproving a foreign country's conservation policies. There needs to be a formal procedure by which different countries' measures are evaluated, as well as, a forum in which grievances can be heard and addressed. Through multilateral agreement, the United States need not shoulder this burden alone. The concluding remarks of the Appellate Body in the Sea Turtle- Shrimp case reinforce the notion that the WTO supports cooperative efforts to protect the environment. It recommends that Members act together "bilaterally, plurilaterally or multilaterally" to protect the environment. By exhausting the possibilities of negotiation before imposing unilateral trade embargoes on other Members of GATT 1994, the United States could and should enforce its policies toward preservation of the environment.

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