Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case

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NOTE

ENVIRONMENTAL DISPUTES IN THE GATT/WTO: BEFORE AND AFTER US—SHRIMP CASE

Dukgeun Ahn*

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INTRODUCTION

International disputes related to environmental issues are particularly conspicuous in the context of international trade, which was governed mainly by the General Agreement on Tariffs and Trade ("GATT") and now is governed by the World Trade Organization ("WTO"). The GATT, however, did not squarely address environmental issues as they were not a serious concern at the time of its establishment. Environmental issues also were not, as such, a subject of negotiations during the Uruguay Round. Nevertheless, several WTO instruments have reflected some environmental considerations including two ministerial decisions.¹

The interrelationship between trade and environmental concerns has been empathetically recognized in the preambular language of the Agreement Establishing the World Trade Organization ("WTO Agreement") as follows:

[The WTO Members’] relations in the field of trade and economic endeavor should be conducted with a view to ... 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.²

This recognition of broad environmental objectives in the preamble of the WTO Agreement reflects substantial development towards incorporating environmental aspects into the newly institutionalized international economic organization, which could not have been envisaged even in the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.³

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³ This Draft Final Act, often termed as the “Dunkel Draft” after the then Director-General of the GATT, Mr. Arthur Dunkel, was released on December 20, 1991. The Dunkel Draft merely mentioned “the optimal use of the resources of the world at sustainable levels”
On the other hand, several international environmental agreements contain mandatory trade provisions to prohibit trade of specific species or products. A 1994 study by the GATT Secretariat identified eighteen out of a total of 180 international environmental agreements as containing explicit trade provisions. These trade provisions in international environmental agreements raised some concern regarding their legitimacy with the GATT obligations.

In 1991, when a GATT panel ruled that the U.S. embargo on tuna import for the purpose of preventing ancillary dolphin killing violated the GATT obligation, the concerns about real conflict between trade and environment interests acutely materialized. For instance, the Working Group on Environmental Measures and International Trade, established in 1971 by the GATT Council, remained inactivated until 1991 when European Free Trade Association members suggested convening it. It has convened frequently thereafter. Since then, numerous studies have delved into issues concerning potential conflicts and explored mechanisms to assure harmonious operation of the two competing regimes.


8. See supra note 7.
These studies primarily were founded on different “cultures” as well as legal and policy perspectives. Explanations for such prominent growth of environmental issues point to recent dynamic factors including the ever more solid scientific basis for international environmental concerns, the increased demands on the environment induced by dramatic growth in the world’s population and its real per capita income, the accelerating economic integration of national economies regionally and globally that tends to magnify the effect of a cost-raising social standard as a determinant of international competitiveness, and the relatively successful experience of environmental interests in penetrating regional integration agreements.

In October 1998, the Appellate Body of the WTO issued a landmark decision to address the interface of trade and environment, United States—Import Prohibition of Certain Shrimp and Shrimp Products (“US—Shrimp”). This decision made significant developments in both procedural and substantive aspects of WTO jurisdiction for trade disputes with environment implications, resolving some critical and long debated issues. This paper aims to present the legal analysis of the rulings by the Panel and, with more emphasis, the Appellate Body in US—Shrimp. Section I briefly reviews general dispute settlement mechanisms provided in international environmental conventions. Section II summarizes the practices regarding Article XX of the GATT in the GATT/WTO dispute settlement systems prior to US—Shrimp. Section III presents the factual background of US—Shrimp case and the legal analysis of several procedural and substantive issues specifically addressed in the Appellate Body report. Section IV examines the remaining issues to be addressed in trade disputes with environmental implication after US—Shrimp and is followed by concluding remarks.

9. For a description of “clash of cultures” as well as “clash of policies” between trade and environmental interests, see John H. Jackson, Greening the GATT: Trade Rules and Environmental Policy, in TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE 39 (James Cameron et al. eds., 1994). See also John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict, 49 WASH. & LEE L. REV. 1227, 1240 (1992) [hereinafter Jackson, World Trade Rules].


11. The titles of panel reports and Appellate Body reports issued under the GATT/WTO dispute settlement procedures typically have been abbreviated in the subsequent reports and literature. There is, however, no uniform format for such abbreviations that has been formally adopted by the GATT/WTO or by authoritative academic literature. The typical abbreviation is available at Overview of the State-of-Play of WTO Disputes (visited Oct. 5, 1999) <http://www.wto.org/wto/dispute/bulletin.htm>. In fact, although this case seems more widely referred to as Shrimp-Turtle case, the more conventional WTO practices are followed in this note.
I. DISPUTE SETTLEMENT IN ENVIRONMENTAL CONVENTIONS

Although most major multilateral environmental agreements or conventions contain some form of dispute settlement provisions,\textsuperscript{12} they generally emphasize dispute avoidance rather than dispute settlement.\textsuperscript{13} Such dispute avoidance has been implemented mainly through transparency and monitoring, notification and reporting requirements, and institutionalized surveillance and inspection.\textsuperscript{14}

Nevertheless, when a conflict or dispute regarding environmental issues occurs in an international context, the relevant parties should follow the specified dispute settlement mechanism found in the corresponding international environmental convention or agreement. Such dispute settlement mechanisms include non-compliance procedures, consultation and negotiation, mediation, conciliation, arbitration, and judicial settlement procedures.\textsuperscript{15} When the relevant convention or agreement requires judicial settlement of disputes, the majority of these conventions or agreements provide for referral to the International Court of Justice ("ICJ").\textsuperscript{16} These instruments include, \textit{inter alia}, the Vienna Convention for the Protection of the Ozone Layer (and the Montreal Protocol on Substances that Deplete the Ozone Layer), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, United Nations Framework Convention on the Climate Change, and the Convention on Biological Diversity.\textsuperscript{17}

While the ICJ is listed as the primary judicial forum for resolving such international environmental disputes, parties rarely resort to the ICJ for dispute resolution.\textsuperscript{18} This is partly because the ICJ lacks specific enforcement powers although decisions of the ICJ should be legally binding on parties who have submitted a case to its jurisdiction.\textsuperscript{19}

\begin{itemize}
\item 12. For the list of principal environmental declarations and conventions, refer to Annex I.
\item 17. OECD, \textit{supra} note 13, at 10.
\item 18. From 1946 through January 1999, the ICJ has had 71 contentious cases and 23 advisory cases, which amounts to less than two cases per year. The list of all cases is available at \textit{International Court of Justice—List of All Decisions and Advisory Opinions Brought Before the Court Since 1946} (visited Sept. 16, 1999) <http://www.icj-cij.org/idecis.htm>.
\end{itemize}
Moreover, the judicial settlement of disputes in the ICJ, including international environmental conflicts, generally require both parties' agreeing to submit the dispute to the ICJ either by *ex ante* mandatory jurisdiction of the court or by *ad hoc* agreement, a rare event.\(^2\) Other obstacles to the ICJ adjudication include the adverse effect on relations between states, the practical difficulties of the proceedings, the technical character of environmental problems, and the unsettled character of much of international environmental law.\(^2\) In July 1993, the ICJ formed a special seven-member Chamber for Environmental Affairs to better handle environmental cases falling within their jurisdiction.\(^2\) To date, however, the Chamber for Environmental Affairs remains unutilized.

Despite explicit dispute settlement provisions in various international environmental conventions, few cases have invoked or utilized these provisions to resolve inter-governmental conflicts. In fact, no modern pollution disaster, such as Chernobyl, Sandoz, or the Amoco Cadiz, has resulted in adjudication of international environmental claims.\(^2\) Therefore, the case law in this subject area is sparse and increasingly old.\(^2\) In most areas of international law, with the exception of international trade under the auspices of GATT/WTO, states historically have shown reluctance to relinquish their own domestic decision-making power by agreeing in advance to legally binding dispute resolution procedures.\(^2\) Particularly in the area of international environmental law, this tendency leads states to rely more on methods establishing liability through national law rather than the law of state responsibility.\(^2\)

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20. See id. at art. 36.
23. See BIRNIE & BOYLE, *supra* note 21, at 137.
24. See id.
Environmental Disputes in the GATT/WTO

II. ENVIRONMENTAL DISPUTES IN THE GATT/WTO

A. Practices of Article XX in Disputes under the GATT

Unlike other international environmental conventions and agreements, the GATT is not an international agreement that specifically addresses environmental questions. Yet, the GATT dispute settlement system manages environmental disputes between states more frequently than any other international dispute settlement mechanism.27 Prior to 1995, when GATT 1994 replaced GATT 1947 under the WTO Agreement, a total of ninety-one reports had been issued under Article XXIII.28 Among them, six panel reports specifically involved environmental issues related to trade measures in the context of Article XX.29 They include United States—Prohibition of Imports of Tuna and Tuna Products from Canada (“US—Tuna from Canada”),30 Canada—Measures Affecting Exports of Unprocessed Herring and Salmon (“Canada—Herring and Salmon”),31 Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (“Thailand—Cigarettes”),32 United States—Restrictions on Imports of Tuna


28. The list and summarized details of those cases are available in Annex A of Petersmann, supra note 27, at 248 or INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 587 (Ernst-Ulrich Petersmann ed., 1997). However, it is noted that those 91 reports do not include any rulings by the Chairman of the Contracting Parties, working party reports, or any relevant domestic court decisions on GATT disputes. On the other hand, a total of 196 disputes under Article XXIII of the GATT 1947 are listed in ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE Vol. 2 771 (GATT, 1995). A WTO secretariat note identifies 115 panel reports issued under the GATT 1947 and the Tokyo Round Agreements. See High Level Symposium on Trade and Environment-Background Document 27 (WTO, 1999).

29. For a brief summary of the these cases, refer to Annex 2. See also High Level Symposium on Trade and Environment-Background Document 27–31 (WTO, 1999).

30. GATT B.I.S.D. (29th Supp.) at 91 (1982), adopted on Feb. 22, 1982. The panel found that the U.S. import prohibition on tuna from Canada failed to satisfy the condition in Article XX(g) that the measures be made effective in conjunction with restrictions on U.S. domestic production or consumption.

31. GATT B.I.S.D. (35th Supp.) at 98 (1988), adopted on Mar. 22, 1988. The panel concluded that a Canadian prohibition on the export of unprocessed herring and salmon was not primarily aimed at the conservation of salmon and herring stocks and thereby not justified by Article XX(g).

32. GATT B.I.S.D. (37th Supp.) at 200 (1990), adopted on Nov. 7, 1990. The panel found that Thailand’s requirement for a license to import cigarettes was not necessary within the meaning of Article XX(b), since other measures to achieve Thailand’s public health objectives that were consistent or less inconsistent with the GATT were reasonably available.
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United States—Restrictions on Imports of Tuna ("US—Tuna I"),33 United States—Restrictions on Imports of Tuna ("US—Tuna II"),34 and United States—Taxes Affecting Imported Automobiles ("US—Auto Taxes").35 The latter three panel reports remain unadopted by the contracting parties of the GATT. Although none of those panel reports challenged the environmental objectives pursued by the government concerned, all found that the respective trade restrictions in some respect were discriminatory or unnecessarily trade restrictive for achieving the alleged environmental objectives.36

The GATT primarily addresses concern for environmental matters in paragraphs (b) and (g) of Article XX, entitled “General Exception,” as well as its preamble, which includes important provisions that override other GATT obligations. Article XX provides, in pertinent parts, 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:

\[
\begin{align*}
\text{(b) necessary to protect human, animal or plant life or health;} \\
\text{(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.}\n\end{align*}
\]

33. GATT B.I.S.D. (39th Supp.) at 155 (1992), unadopted. In examining U.S. restrictions on imports of tuna from Mexico under the Marine Mammal Protection Act of 1972, the panel ruled that Article XX(b) and Article XX(g) were not available for measures to protect resources located outside the jurisdiction of the nation taking the measure.
34. GATT DS29/R; 33 I.L.M. 839, 897 (1994), unadopted. Even if Article XX’s exceptions could be applied to protect resources outside a country’s own territorial jurisdiction on the basis of personal jurisdiction, the panel found that U.S. embargoes were taken for the purpose of forcing other countries to change their domestic policies and thus not covered by Article XX.
35. GATT DS31/R; 33 I.L.M. 1397 (1994), unadopted. In examining certain aspects of U.S. taxes on automobiles, the panel concluded that the discrimination against foreign cars and car parts through having a separate foreign fleet accounting was not primarily aimed at the conservation of natural resources and therefore could not be justified by Article XX(g).
36. See Petersmann, supra note 27, at 94.
Panel decisions prior to *US—Shrimp* established parameters of acceptable state action in the environmental context. They did so by examining the implications of Article XX’s overarching structure, the chapeau, and the terms “necessary,” “relating to,” “in conjunction with,” and “exhaustible natural resources” as well as scrutinizing the jurisdictional reach of permissible state action.

1. General Application of Article XX

To a large degree, these provisions provide a softened measure of “national treatment,” and MFN obligations.\(^{38}\) According to the GATT panel decisions, Article XX is not a positive rule establishing obligations in itself but a list of general exceptions to obligations otherwise assumed by GATT contracting parties.\(^ {39}\) Panels examine Article XX exceptions only after finding a violation under the substantive obligations of the GATT.\(^ {40}\) Consequently, the provisions of Article XX must be narrowly construed, and, when a party invokes Article XX, the burden of proof lies with that party.\(^ {41}\)

2. “Chapeau” of Article XX

The preamble, often termed the “chapeau,” of Article XX, was inserted into the exception article in the commercial policy chapter of the draft ITO Charter during the London session of the Preparatory Committee.\(^ {42}\) The Panel in *United States—Imports of Certain Automotive Spring Assemblies* noted that “the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined.”\(^ {43}\) Although two cases, *US—Tuna from Canada* and *United States—Imports of Certain Automotive Spring Assemblies*, took a very literal approach in interpreting “disguised restriction on international trade” by emphasizing the publicity of the measure, this approach was later rejected.\(^ {44}\) Since no measure considered in the six pre-GATT 1994 cases passed the first step of Article XX analysis to determine whether the measure fell under one of the listed exceptions in

\(^{38}\) Jackson, *World Trade Rules*, supra note 9, at 1240.


\(^{41}\) *See supra* note 39, at para. 5.27.


\(^{44}\) *See GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT*, WTO, WT/CTE/W/53/Rev.1 para. 21 (Oct. 26, 1998).
the subparagraphs, these panels did not discuss the chapeau any further.\footnote{The Panel in \textit{Thailand—Cigarettes} made a benchmark ruling concerning the term “necessary” in Article XX(b), holding that “the import restrictions imposed ... could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it.”\footnote{See id. at 13.} The “necessary” test under Article XX(b) requires implementation of “the least-GATT-inconsistent” measure to achieve the intended objectives of interested governments.\footnote{GATT, \textit{ supra} note 32, at para. 75.} However, noting that the term “necessary” qualifies only subparagraphs (a), (b) and (d), this interpretation has been criticized as overly strict in both legal and policy aspects. For example, Schoenbaum argued that, \textit{inter alia}, the “least-GATT-inconsistent” requirement constitutes excessive infringement on the economic sovereignty of a Member country that wants to make decisions through the democratic process.\footnote{The “necessary” test under Article XX(b) requires implementation of “the least-GATT-inconsistent” measure to achieve the intended objectives of interested governments.\footnote{GATT, \textit{ supra} note 32, at para. 75.} However, noting that the term “necessary” qualifies only subparagraphs (a), (b) and (d), this interpretation has been criticized as overly strict in both legal and policy aspects. For example, Schoenbaum argued that, \textit{inter alia}, the “least-GATT-inconsistent” requirement constitutes excessive infringement on the economic sovereignty of a Member country that wants to make decisions through the democratic process.\footnote{See also John H. Jackson, \textit{The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results}, 36 \textit{COLUM. J. TRANSNAT’L L.} 157 (1997).} The Panel adopted this “least-GATT-inconsistent” requirement from a previous panel report, which applied it in relation to Article XX(d).\footnote{United States—\textit{Section 337 of the Tariff Act of 1930}, GATT B.I.S.D. (36th Supp.) at 345, para. 5.26 (1989). The panel held that, “in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.”} 4. Article XX(g): “relating to” and “in conjunction with”

aid conservation of their fisheries. Regarding Article XX(g), the Panel concluded that:

[W]hile a trade measure did not have to be necessary or essential to the conservation of an exhaustible resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as ‘relating to’ conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms ‘in conjunction with’ in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore ... only be considered to be made ‘in conjunction with’ production restrictions if it was primarily aimed at rendering effective these restrictions.\(^5\)

Panels and the Appellate Body subsequently applied this “primarily aimed at” test to the “relating to” and “in conjunction with” clauses in the aforementioned cases, including US—Tuna I, US—Tuna II, US—Auto Taxes and United States—Standards for Reformulated and Conventional Gasoline (“US—Gasoline”) which will be discussed below.

5. Article XX(g): “exhaustible natural resources”

Prior to the US—Shrimp case, several panels defined “exhaustible natural resources” as including migratory species of fish. The Panel in US—Tuna from Canada “noted that both parties considered tuna stocks ... to be an exhaustible natural resource in need of conservation management.”\(^5\) In Canada—Herring and Salmon, the Panel “agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources.’”\(^5\) Likewise, the Panel in US—Tuna II “accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.”\(^5\)

In fact, the practices under the GATT and the WTO indicate that the phrase “exhaustible natural resources” in Article XX(g) tends to be interpreted fairly broadly. In US—Auto Taxes\(^5\) and US—Gasoline,\(^5\) panels considered policies to conserve gasoline and to reduce the depletion of clean air as policies conserving natural resources within the

\(^5\) GATT, supra note 31, at para. 4.6.
\(^5\) GATT, supra note 30, at para. 4.9.
\(^5\) GATT, supra note 31, at para. 4.4.
\(^5\) GATT, supra note 34, at para. 5.13.
\(^5\) GATT, supra note 35, paras. 3.316–3.323.
\(^5\) WTO, supra note 40, at 8.
meaning of Article XX(g). In the US—Shrimp case, the Appellate Body held that the distinction between “living” species and “non-living” natural resources is not a relevant distinction in determining what is an “exhaustible natural resource,” continuing the trend of using a broad interpretation. 57

6. Extrajurisdictionality

Two pre-GATT 1994 panel decisions examined the jurisdictional ambit of Article XX, US—Tuna I and US—Tuna II. 58 In US—Tuna I, the Panel used the drafting history and purpose of Article XX(b) to conclude that “extrajurisdictional protection of life and health” did not extend to restricting imports whenever the life or health protection policies in the exporting country were not identical with those in the importing country. 59 The Panel opined that “concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.” 60 The Panel then found that the same “considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).” 61 The Panel’s finding rested mainly on functional concerns.

The Panel considered that if ... each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement ... , [the] General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations. 62

58. Neither of these panel reports were adopted by the GATT Council due to the objection by the United States. In Japan—Taxes on Alcoholic Beverages, the Appellate Body held that “unadopted panel reports have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members.” But, they agreed with the panel’s decision that “a panel could nevertheless find useful guidance in the reasoning of an adopted panel report that it considered to be relevant.” Therefore, although these decisions are not binding, they can be persuasive. Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (Nov. 1, 1996).
59. GATT, supra note 33, paras. 5.25–5.29.
60. Id. at para. 5.26.
61. Id. at para. 5.32.
62. Id. at para. 5.27.
The *Tuna I* panel decision interpreted the Article XX exceptions to apply only to measures relating to health or conservation “within the jurisdiction” of the country imposing the restriction.  

In *US—Tuna II*, the Panel rejected the above narrow interpretation of Article XX’s scope as lacking a textual foundation. The Panel observed that “the text of Article XX(b) does not spell out any limitation on the location of the living things to be protected.” Moreover, the Panel concluded that the negotiating history of the GATT “did not clearly support any particular contention of the parties with respect to the location of the living thing to be protected under Article XX(b).”

With respect to Article XX(b), the Panel “recalled its observation that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory.” It concluded, therefore, that the Panel “could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.” The Panel consequently determined that “the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g).”

Commentators explained this seemingly contradictory decision by pointing out the shift in focus between the two decisions: *US—Tuna I* stresses extraterritoriality whereas *US—Tuna II* focuses on extraterritoriality. Although the Panel decision in *US—Tuna II* stated that

63. Hudec, *supra* note 4, at 118.
64. GATT, *supra* note 34, at para. 5.20.
65. *Id.* at para. 5.31.
66. *Id.* at para. 5.33.
67. *Id.* at para. 5.32.
68. As the Panel noted in regards to the arguments on extraterritoriality, Article XX(b) and (g) are basically the same. Therefore, the two provisions are used interchangeably here. *See id.* at para. 5.30.
69. *Id.* at para. 5.20.
70. *Id.*
Article XX allows governments to pursue environmental concerns outside the national territory, it held that the Article XX exceptions apply only to the extent that policy measures are implemented within a government’s personal jurisdiction to effect a direct conservation or protective result. Article XX cannot be used to achieve the environmental goals of a nation by coercing other states to change their policies or adopt the desired conservation policies.

Lastly, the Panel in US—Tuna II found that various bilateral or plurilateral environment treaties cited by the parties on the jurisdictional issue “were not relevant as a primary means of interpretation of the text of the General Agreement” under Article 31 of the Vienna Convention on the Law of Treaties, which stipulates the general rule of interpretation. Furthermore, the Panel concluded that those treaties were not relevant even as a supplementary means of interpretation of the General Agreement pursuant to Article 32 of the Vienna Convention. The Panel appeared reluctant to consider other purely environmental treaties in the context of trade disputes under the GATT since they “were not concluded among the contracting parties to the General Agreement,” and “they did not apply to the interpretation of the General Agreement or the application of its provisions.” This tendency toward ignoring or setting aside those environmental agreements strongly contrasts with the approach taken by the Appellate Body in US—Shrimp.

B. Practices of Article XX in Disputes under the WTO: US—Gasoline

The WTO dispute settlement system, mainly governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), features several important developments over the dispute settlement procedures under the GATT 1947. These include, inter alia, the establishment of the Appellate Body, a single unified dispute settlement for almost all the Uruguay Round agreements, and the presumptive adoption of panel and Appellate Body reports without negative consensus. The intensive utilization of the newly developed dispute settlement procedures in the WTO by its Member countries, both developed and developing countries, has already raised and resolved many procedural issues that were not specifically addressed in

72. GATT, supra note 34, paras. 5.33, 5.39.
73. Id. at para. 5.19.
74. Id. at para. 5.20.
75. Id. at para. 5.19.
Environmental Disputes in the GATT/WTO

the DSU. Substantively, the evolution of international trade law, primarily centered on the rulings of the Appellate Body and panels of the WTO, seems to be moving towards de facto stare decisis in WTO adjudication.

Among the thirty-eight established panels during the first four years of the WTO, two cases specifically address Article XX: US—Gasoline, discussed below, and US—Shrimp, which will be discussed in detail in the subsequent section.

In the first case to reach the appellate level of the newly established appeals procedure, the Appellate Body held that the baseline establishment regulations in the US Gasoline Rule, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX since, the application of the regulations resulted in “unjustifiable discrimination” and a “disguised restriction on international trade.” In regards to the application of the chapeau of Article XX, the Appellate Body held that:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

Thus, the Panel clarified the two-tiered analysis for the application of Article XX.

The chapeau of Article XX “by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.” Accordingly, the Appellate Body further stated that it is “important to underscore that the

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79. WTO, supra note 56.
80. WTO, supra note 57.
81. WTO, supra note 40.
82. Id. at 22.
83. Id. at 21–22.
purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [Article XX].’”\textsuperscript{4}\footnote{Id. at 22.} Thus, while panels established under GATT 1947 generally focused on the requirements of the individual paragraphs set out in (b) and (g), the Appellate Body of the WTO emphasized the significance of the chapeau, “apparently drawing into it an important doctrine that had previously been associated with terms found in several of the paragraphs.”\textsuperscript{5} Through their rulings on the general application of Article XX,\textsuperscript{6} the panels identified a three-step procedure. First, Article XX is invoked when a policy measure violates any substantive GATT obligation. Then, the measure should be examined to see if it is justified under one of the listed exceptions in subparagraphs. Finally, the panel assesses the application of the measure to determine whether it amounts to “arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.”

As for the “in conjunction with” clause in Article XX(g), the Appellate Body concluded that:

\begin{quote}
the clause ‘if such measures are made effective in conjunction with restrictions on domestic production or consumption’ is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of \textit{even-handedness} in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.\textsuperscript{7}
\end{quote}

The “even-handedness” requirement was later adopted in \textit{US—Shrimp} case.\textsuperscript{8}

The chapeau of Article XX prohibits applying a measure in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or that would amount to a disguised restriction on international trade. These criteria have been adopted in several WTO agreements.\textsuperscript{9} The difference in

\footnotesize
84. Id. at 22.
86. \textit{See supra} Section III.1.A.
87. WTO, \textit{supra} note 40, at 20.
88. WTO, \textit{supra} note 57, paras. 143–145.
89. These agreements include: Preamble, Articles 2.3, 5.5 in Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, WTO/MTN/FA II-A1, A4 (1993); Preamble in Agreement on Technical Barriers to Trade, Apr. 12, 1979, WTO/MTN/NTM/W/192/Rev. 5 (1979); Articles 3.2, 4(d) in Agreement on Trade-Related
standards between arbitrary or unjustifiable discrimination and disguised restriction are, however, "not without ambiguity."90 Thus, the Appellate Body found that:

"Arbitrary discrimination," "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they import meaning to one another. It is clear to us that "disguised restriction" includes disguised discrimination in international trade. . . . The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.91

In other words, the Appellate Body in US—Gasoline interpreted those terms as a whole to establish a general rule forbidding abuse or illegitimate use of the exceptions. In the US—Shrimp case, however, the Appellate Body addressed "arbitrary" and "unjustifiable" discrimination separately.92

Concerning the standard for those requirements, the Appellate Body held that "[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."93 In other words, the requirements to avoid "arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade" do not overlap with MFN or national treatment but rather are a different, sui generis, type of non-discrimination.94 In addition, the Appellate Body confirmed that the burden of proof under the chapeau of Article XX rests on the party invoking the exception and is "a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."95
III. US—SHRIMP CASE

A. Factual Background

Presently, Appendix I of CITES, which lists "species threatened with extinction which are or may be affected by trade," includes all seven species of sea turtles currently recognized.96 Six of them are also listed as endangered or threatened species under the Endangered Species Act ("ESA") of 1973, which prohibits harming endangered sea turtles within the US jurisdiction.97 Scientific evidence showed that incidental capture and drowning of sea turtles by shrimp trawlers was the most significant risk to the species.98

In 1987, pursuant to the ESA, the United States issued regulations requiring all shrimp trawlers to use turtle excluder devices ("TEDs") or tow time restrictions in specified areas that had significant mortality of sea turtles.99 In 1989, the United States enacted Section 609 of U.S. Public Law 101-162 ("Section 609").100 First, Section 609 requires the US Secretary of State, in consultation with the US Secretary of Commerce, to initiate negotiations for the development of bilateral or multilateral agreements aimed at the protection and conservation of sea turtles.101 These negotiations in particular focused on governments of countries engaging in commercial fishing operations likely to hurt sea turtles.102 Second, Section 609 provides that, as of May 1, 1997, the importation of shrimp or shrimp products that have been harvested with commercial fishing technology likely to hurt sea turtles shall be prohibited.103 The President can certify to Congress that the exporting country has a regulatory program that prevents incidental take rate comparable

96. Article II:1 of the CITES entitled "Fundamental Principles" provides that "Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." Some species of sea turtles are also classified as "Endangered Migratory Species" in Annex I of the Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (1980).

97. These species include the green turtle, hawkbill, Kemp’s ridley, leatherback, loggerhead, and olive ridley. The flatback turtle, which is listed in Appendix I of the CITES, is not included. 16 U.S.C. §§ 1531 et seq.


101. Id. at (a).

102. See id. at (a)(2).

103. Id. at (b)(1).
to that of the United States or has a fishing environment that does not pose risks to sea turtles, which will lift the prohibition. 104 This certification must be renewed annually.105 In 1991, the United States issued guidelines to compare foreign regulatory programs with the US program, which requires, *inter alia*, a commitment that all shrimp trawlers use TEDs at all times.106 These guidelines also clarified the scope of Section 609, which was limited to the wider Caribbean/western Atlantic region.107 In 1993, the United States issued revised guidelines, limiting some options in the prior guidelines.108

The Earth Island Institute, an environmental group based in San Francisco with a particular interest in sea turtles, filed suit in Federal District Court in San Francisco, challenging the limited geographic scope of section 609.109 In 1993, the Ninth Circuit affirmed the district court’s dismissal, holding that the United States Court of International Trade (“USCIT”) had exclusive jurisdiction over the section 609(b) certification dispute.110 In December 1995, the USCIT found that the guidelines limiting the geographical scope of Section 609 were contrary to law and directed the Department of State to prohibit by no later than May 1, 1996 the import of shrimp or shrimp products from any country that harvests with commercial fishing technology that may affect adversely the conservation of sea turtles.111 The subsequent case that addressed the request by the Department of State confirmed the May 1, 1996 deadline.112

In April 1996, the Department of State promulgated revised guidelines to comply with the USCIT order of December 1995.113 These guidelines permitted, *inter alia*, importation into the United States of shrimp or shrimp products declared to have been harvested with TEDs even if the exporting country could not be certified as having a regulatory program comparable to that of the United States. In October 1996, the USCIT ruled that the embargo on shrimp and shrimp products enacted by Section 609 applied to all “shrimp or products from shrimp

104. See id. at (b)(2).
105. See id.
107. Id.
110. See Earth Island Inst., 6 F.3d at 650.
harvested in the wild by citizens or vessels of nations which have not been certified” even if the imported shrimp were harvested by boats equipped with TED technology.114 Thus, the 1996 guidelines were contrary to Section 609 when they allow imports of shrimp from non-certified countries regardless of a country’s TED use. The USCIT later clarified that shrimp harvested by manual methods with no harm to sea turtles could be imported even from countries that had not been certified under Section 609.115 The U.S. Court of Appeals for the Federal Circuit, however, vacated these rulings because the Earth Island Institute withdrew its motion to enforce the final judgment in December 1995 and thereby deprived the trial court of jurisdiction.116

In February 1997, the Dispute Settlement Body (“DSB”) established panels pursuant to the request of Malaysia, Thailand and Pakistan regarding the U.S. ban on importation of certain shrimp and shrimp products under Section 609 and the “Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations.”117 In April 1997, the DSB established a panel in accordance with the request made by India and consolidated this panel with the panel already established. Sixteen WTO Members including Australia, Columbia, Costa Rica, Ecuador, El Salvador, the European Communities, Guatemala, Hong Kong, Japan, Mexico, Nigeria, the Philippines, Senegal, Singapore, Sri Lanka and Venezuela reserved their third-party rights in this case. The members of the Panel, who were from Brazil, Germany and Hong Kong-China, were selected on April 15, 1997.118

In its report issued on May 15, 1998, the Panel ruled that, whether operated in a discriminatory manner or not, the US shrimp embargo belonged to a class or kind of measure that threatened the integrity of the multilateral trading system and therefore could not be justified under Article XX.119 The Appellate Body overruled the Panel’s reasoning but still found that the US shrimp embargo was not justified under Article XX.120 The Appellate Body Report was adopted on November 6, 1998.

119. WTO, supra note 117, para. 7.44-7.62.
120. WTO, supra note 57 para. 187.
B. Legal Analysis

With some caveats to clarify the scope of the ruling, the Appellate Body held that “although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.”

The discussion below outlines the principal elements of the decision by the Appellate Body.

1. NGO’s amicus briefs

As a procedural matter, the admissibility of amicus briefs by non-governmental organizations (“NGO”) in WTO dispute settlement proceedings had been a substantial concern. For example, in the second session of the WTO Ministerial Conference held in Geneva from May 18th to May 20th, 1998, President Clinton of the United States suggested to “modernize the WTO” by proposing that “the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file amicus briefs, to help inform the Panels in their deliberations.” His remarks at such a historic scene drew substantial public attention to this issue.

In the US—Shrimp case, NGOs submitted two amicus briefs to the Panel: the first one jointly by the Center for Marine Conservation and the Center for International Environmental Law and the second one by the World Wide Fund for Nature. These NGOs also sent copies of those documents directly to the parties to the dispute. The United States urged the Panel to consider any relevant information in the two amicus briefs since nothing in the DSU prohibits panels from considering unsolicited information, and a panel is authorized to “seek information from any relevant source” under Article 13.2 of the DSU. Joint appellees requested the Panel not to consider the contents of the

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121. Id. at para. 186.
122. WORLD TRADE ORGANIZATION, FOCUS No. 31 at 10 (June 1998). Some 131 NGOs with a total of 335 representatives attended the Geneva Ministerial Conference and represented a wide variety of interests. Id. at 3.
123. U.S. President Clinton was the first head of state to speak on May 18, 1998 in commemorating the 50 anniversary of the multilateral trading system. Id. at 1.
124. WTO, supra note 117, para. 3.129.
125. Id.
126. Id. at paras. 3.129.
amicus briefs. They reasoned that allowing the amicus briefs in the WTO dispute settlement procedures would force the Panel to accept outside information, which deprives a panel of its right to make a decision to seek technical advice; also Members are deprived of their right to be informed of panels’ activities. Further, they argued that paragraphs 4 and 6 of Working Procedures in Appendix 3 of the DSU limits the right to present panels with written submissions to parties and third parties that are WTO Members. They also pointed out administrative difficulty in dealing with a deluge of unsolicited information from around the world. In addition, they argued that the amicus briefs comprised not only technical advise but also legal and political arguments; therefore, such briefs are not within the purview of Article 13 of the DSU.

The Panel refused to accept amicus briefs as such, reasoning that:

We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.
The Appellate Body, however, reversed the Panel’s reasoning, noting that, “for all practical and pertinent purposes, the distinction between ‘requested’ and ‘non-requested’ information vanishes.” It held, in pertinent part, that:

The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. . . . A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may motu proprio have initiated the request for information does not, by itself, bind the Panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.

Therefore, the Appellate Body found that the Panel acted within the scope of its authority in allowing a party to attach NGOs’ amicus briefs to its own submissions although the Panel erred in its decision that accepting NGOs’ amicus briefs is incompatible with the provisions of the DSU. Consequently, NGOs with relevant interests may submit their viewpoints in the form of amicus briefs to a panel.

In fact, NGO participation at the WTO, particularly in WTO dispute settlement proceedings, has been one of the most contentious issues since the inception of the WTO, typically raised in the context of transparency of the Organization. More active participation of NGOs in the WTO regime has been generally proposed although there is some disparity in the degree of suggested involvement. Some argue that since

133. WTO, supra note 57, at para. 107.
134. Id. at paras. 106 and 108.
NGOs are viewed as "private parties" or "non-state actors" as opposed to public or official actors that represent Member countries, these entities already participate extensively in WTO processes.  

In an effort to address this issue, the General Council of the WTO adopted the decision entitled "Guidelines for Arrangements on Relations with Non-Governmental Organizations" on July 18, 1996. Paragraph 6 of the Guidelines stated that:

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.

Thus, although it agreed that the WTO should incorporate more NGO input, the General Council affirmed the Member countries' view that formal involvement of NGOs at the WTO is not appropriate.

On the other hand, the participation of NGOs in inter-governmental regional tribunals such as the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights often has been permitted although the International Court of Justice has not adopted such procedures for contentious cases. In fact, various international institutions including the UN and its sub-bodies such as ECOSOC, UNCED, UNCTAD, and UNEP, FAO, WIPO, World Bank, and OECD have established consultative arrangement for NGOs participation in their operation and proceedings. The Appellate Body

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137. WTO, WT/L/162 (July 23, 1996).
138. Id. at para. 6.
140. See Arrangements for Relations with Non-Governmental Organizations in the United Nations, its Related Bodies and Selected Other Inter-Governmental Organizations, WTO Doc. PC/SCTE/W/2 (Oct. 11, 1994).
decision to permit NGO *amicus briefs* in the WTO dispute settlement proceedings clearly indicates the responsiveness of the WTO to global demands. Questions surrounding NGO participation in WTO dispute settlement procedures are now more procedural than substantive.\(^\text{141}\) Although NGOs can submit their *amicus briefs* to the Panels, many procedural issues related to submission have not yet been discussed or addressed in any of the existing decisions or agreements. Given the broad “discretionary authority” of a panel in dispute settlement proceedings endorsed by the Appellate Body ruling, a meaningful participation or contribution of NGOs through their *amicus briefs* in the WTO dispute settlement system will require more rigorous and articulated procedural rules to ensure constructive inputs to panels and interested parties.

2. Interpretative Analysis of Article XX

The Appellate Body reemphasized “customary rules of interpretation of public international law” as required by Article 3.2 of the DSU, which are primarily based on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).\(^\text{142}\) Relying on these rules, the Appellate Body found flaws in the Panel’s interpretation of Article XX.

First, the Panel, in examining the consistency of the measure with the chapeau of Article XX, focused on the design of the measure itself by addressing “a particular situation where a Member has taken unilateral measures which, by their nature, could put the multilateral trading system at risk.”\(^\text{143}\) The Appellate Body, however, clarified that “[t]he general design of a measure, as distinguished from its application, is . . . to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau.”\(^\text{144}\) In other words, the Panel should have examined “how the measure at stake was being applied in such a manner as to constitute abuse or misuse of a given kind of exception,”\(^\text{145}\) rather than “whether the US measure conditioning market access on the adoption of certain conservation policies by the exporting Member could be considered as

\(^141\) For example, the WTO devotes a special section of its web site to NGO related activities. See *World Trade Organization: Relations With Nongovernmental Organizations* (last modified June 16, 1999) <http://www.wto.org/wto/ngo/ngo.htm>.

142. WTO, supra note 40, para. 114; see also, WTO, supra note 117, para. 7.27.

143. WTO, supra note 117, para. 7.60.

144. WTO, supra note 57, para. 116.

145. Id.
‘unjustifiable’ discrimination.”

Therefore, the Panel made a legal error in focusing on the measure itself rather than its application.

In response to the US argument that discrimination is not unjustifiable where the policy goal of the applicable Article XX exception provides a rationale, the Appellate Body held that:

[the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX(g).]

Thus, the Appellate Body clarified that the legitimacy of the measure at issue itself should be assessed by the requirements of Article XX(b) or (g) while the manner in which the measure is applied should be examined under the chapeau of Article XX.

Second, the Panel stated, in applying Article XX, that:

the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of Article XX. Therefore, we shall first determine whether the measure at issue satisfies the conditions contained in the chapeau. If we find this to be the case, we shall then examine whether the US measure is covered by the terms of Article XX(b) or (g).

... [A]s the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyze first the introductory provision of Article XX.

Thus, the Panel ignored the two-tiered method enunciated by the Appellate Body in US—Gasoline. However, the Appellate Body stressed, in squarely reversing this portion of the Panel’s ruling, that the sequence of steps in US—Gasoline for applying Article XX “reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.”

Relying on the negotiating history of Article XX, the Appellate Body held that “each of the exceptions in paragraphs

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146. WTO, supra note 117, at para. 7.34.
147. WTO, supra note 57, at para. 149.
148. WTO, supra note 117, at para. 7.29.
149. Id. at para. 7.28.
150. WTO, supra note 40, at 22.
151. WTO, supra note 57, at para. 119.
(a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994[][;] that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.'"\textsuperscript{152}

In sum, when Article XX is invoked to justify a trade policy measure with environmental implications, the first step is to examine the legitimacy of the measure’s policy goal under Article XX(b) or (g). If the measure can be justified by the exceptions stipulated in the subparagraphs of Article XX, then the second step is to analyze the application of the measure under the chapeau’s criteria.

3. Extraterritoriality

The Appellate Body did not squarely resolve the issue of extraterritoriality under Article XX. Instead, it merely found a “sufficient nexus” between the sea turtles and the US territory for purposes of Article XX(g). It held, in relevant part, that:

\textquote{We observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas... The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction... We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).}\textsuperscript{153}

It is unclear what factors constitute a “sufficient nexus” or what is the minimum requirement for “sufficient nexus.” Although the Appellate Body noted the migratory nature of sea turtles in this case, it did not discuss the scope and degree of species’ migration needed to meet the requirements of the “sufficient nexus” test. This rather loose interpretation of “sufficient nexus” may be viewed as expanding Article XX to encompass a broader range of environmental policies. Clearly, many Article XX jurisdictional issues can be avoided by finding a “sufficient

\textsuperscript{152} Id. at para. 157.
\textsuperscript{153} Id. at para. 133.
nexus” between the concerned states and the contested environmental resources.

Despite the explicit language declining any findings on jurisdictional issues under Article XX, the Appellate Body still made some rulings on the application of environmental measures with extraterritorial effects. In response to the Panel’s ruling that conditioning the domestic market access on the adoption of certain conservation policies prescribed by importing countries falls outside the scope ratione materiae of Article XX, the Appellate Body held that:

It appears to us, however, that conditioning access to a Member’s domestic market on whether exporting Member comply with, or adopt, a policy or policies unilaterally prescribed by the importing Members may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principle of interpretation we are bound to apply.\(^{154}\)

In relation to this issue, the ICJ held in the Nicaragua case\(^ {155}\) that “under customary international law, there is no general duty of States to refrain from using economic sanctions to influence the laws and policies of other States, although such a duty may exist based on explicit treaty obligations.”\(^ {156}\) Moreover, Principle 12 of the Rio Declaration on Environment and Development (“Rio Declaration”)\(^ {157}\) may not prohibit

\(^{154}\) Id. at para. 121.

\(^{155}\) Military and Para Military Activities (Nicaragua v. United States), I.C.J. Rep. 14, 244 (June 27, 1986).


\(^{157}\) In 1992, the Rio Declaration, which is a statement of principles with no legal binding power as such rather than a treaty, was endorsed by states that are parties of the case including the United States, India, Malaysia, Pakistan, and Thailand. Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/26 (Vol. 1), 31 I.L.M. 874 (1992).
unilateral environmental measures. The Rio Declaration only stipulates that unilateral actions to address environmental challenges “outside the jurisdiction of the importing country should be avoided,” and that “environmental measures should, as far as possible, be based on international consensus.” Thus, parties of the Rio Declaration chose to discipline, but not to prohibit, such unilateral environmental measures.

However, in a later part of the report, the Appellate Body held that:

Perhaps the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.

[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.

Thus, while the statutory provisions of Section 609(b)(2)(A) and (B) do not, in themselves, require other WTO Members to adopt essentially the same policies and enforcement practices, the actual application of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, requires them to adopt a regulatory program that is not merely comparable but essentially the same as the US program. Therefore, the application of Section 609(b) violates of the GATT obligation.

Considering both parts of the decision cited above, the Appellate Body appears to be broadening the scope of extraterritoriality beyond the limit contemplated in *US—Tuna II*. Concerning the coercive effects of the policy measures, the Panel in *US—Tuna II* held that:

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159. *Id.*
161. *Id.* at para. 164.
162. See *id.* at paras. 161 and 163.
If... Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.¹⁶³

The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered “necessary” for the protection of animal life or health in the sense of Article XX(b).¹⁶⁴

Thus, the Panel in US—Tuna II seemed to categorically oppose policy measures that “force” other contracting parties to modify their domestic policies. In contrast, the US—Shrimp Appellate Body held that the mere fact that a WTO Member requires from exporting countries compliance with, or adoption of, certain policies prescribed by the importing country does not render the measure inconsistent with the WTO obligation. Instead, the measure violates the WTO obligation when the measure, or its application, requires other WTO Members to adopt a regulatory program that is not merely comparable but essentially the same as the importing country’s laws. Therefore, the Appellate Body’s ruling implies that requiring other WTO Members to adopt a comparable regulatory program may not be inconsistent per se with the WTO obligation. The distinction between “merely comparable” and “essentially the same” policies or regulatory programs remains to be seen. This part of the Appellate Body ruling, however, represents a substantial development in the WTO that may affect the discussion of the increasing number of non-conventional agenda issues such as labor and competition.

The prohibition on coercive measures also functions as a constraint on the scope of the Article XX exceptions listed and consequently applies only when this provision is invoked.¹⁶⁵ Therefore, it follows that a trade measure consistent with a WTO obligation “does not become inconsistent with [WTO] merely because it is intended as a sanction.”¹⁶⁶

¹⁶³. GATT, supra note 34, at para. 5.26.
¹⁶⁴. Id. at para. 5.39.
¹⁶⁵. MCGOVERN, supra note 85, at 13.11–24.
¹⁶⁶. Id.
coercive trade measure becomes problematic primarily when Article XX is involved.

4. Chapeau of Article XX

Following the decision in US-Section 337, the Appellate Body held that:

the negotiating history of Article XX confirms that the paragraphs of Article XX set forth limited and conditional exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.167

Then, in interpreting the chapeau of Article XX, the Appellate Body invoked “the principle of good faith” as “a general principle of international law.”168 Regarding this point, the Appellate Body opined that:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.’ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations.

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167. WTO, supra note 80, at para. 157.
168. Id. at para. 158.
constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.  

Therefore, the Appellate Body recognized the doctrine of *pacta sunt servanda*, as codified in Article 26 of the Vienna Convention, in the context of the GATT provision. This interpretation frames the chapeau as a delicate balancing test between rights under the exceptions and substantive obligations. In contrast to *US—Gasoline*, the Appellate Body addressed the requirements articulated in the chapeau separately. The Appellate Body stated that “discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.” Thus, in order to avoid a discrimination charge in the context of Article XX, importing countries must take into account the different circumstances and conditions in exporting countries that mandate differential consideration and treatment. Using this interpretation of discrimination, the Appellate Body held that the US shrimp import ban amounted to “unjustifiable discrimination” since it prohibited all shrimp imports from non-certified countries regardless of their actual harvesting methods. Moreover, the failure of the United States to negotiate with the appellees after prior satisfactory negotiation with other countries was also viewed as “plainly discriminatory and . . . unjustifiable.” The Appellate Body also found that the rigidity and inflexibility of the certification procedures denies basic fairness and due process and constitutes “arbitrary discrimination” within the meaning of the chapeau. In so finding, the Appellate Body distinguished two kinds of requirements in the chapeau: substantive and procedural. The former are found in “unjustifiable discrimination,” and the latter are in

169. *Id.* at paras. 158–159.
170. *Id.* at para. 165.
174. *Id.* at paras. 181–84.
175. *Id.* at para. 160.
the “arbitrary discrimination” clause. This articulation of the language in the chapeau clarifies the analysis of Article XX.

5. Relationship between Articles X and XX

Article X of the GATT stipulates rules and obligations concerning trade regulation publication and administration. In considering whether the United States applied Section 609 in a manner constituting “arbitrary discrimination between countries where the same conditions prevail,” the Appellate Body made an important ruling on Article X. The Appellate Body held, in relevant part, that:

In our view, Section 609 falls within the “laws, regulations, judicial decisions and administrative rulings of general application” described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension pro hac vice of the treaty rights of other Members.

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here.

We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of “unjustifiable discrimination,” but also of “arbitrary discrimination” between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX.

Thus, panels examining procedural deficiency in administration of environment-related trade policies or regulations should use the criteria promulgated in Article X even if the country implements those policies or regulations utilizing the Article XX exceptions. Therefore, measures under Article XX should provide as much procedural fairness as other substantive GATT provisions. When measures do not satisfy a certain

176. Id.
177. Id. at para. 182.
178. Id. at para. 183.
179. Id. at para. 184.
level of due process, the policies or regulations examined under Article XX exceptions will be viewed as "arbitrary discrimination." Thus, the Appellate Body not only ruled that the chapeau contains procedural requirements; they also defined those requirements as those enumerated in Article X.

IV. REMAINING ISSUES

Despite a fairly comprehensive analysis of various environment-related issues, the US—Shrimp case did not address some important problems, notably issues involving a product difference arising from using different process or production methods and congruence of GATT obligations with other international environmental agreements. The following sections will discuss each issue.

A. Process and Production Methods

Process and Producton Methods ("PPMs"), the way in which products are manufactured or processed and natural resources are extracted or harvested, often have significant environmental impacts.\(^\text{180}\) When PPMs directly affect the characteristics of a product (product-related PPMs), and a product or substance physically incorporated into the final product cause environmental damage,\(^\text{181}\) they are generally covered by the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade in the WTO.\(^\text{182}\) Alternatively, as in the US—Shrimp case, non-product-related PPMs that affect the environment during the production stage do not fall squarely within the scope of any trade agreements under the auspices of the WTO.

In the GATT/WTO context, the problem of differentiating between physically or functionally similar products bearing no consumption externalities is closely connected to the "like products" concept.\(^\text{183}\) The national treatment and MFN requirements of the GATT/WTO prohibit differential treatment for products viewed as "like products." Despite the difficulty in \textit{ex ante} characterization or determination of "like products," products that share the same physical characteristics and yet


\(^{181}\) \textit{Id.} at 12.

\(^{182}\) See Agreement on the Application of Sanitary and Phytosanitary Measures, supra note 89; Agreement on Technical Barriers to Trade in the WTO, \textit{supra} note 89.

\(^{183}\) \textit{Id.} at 31.
undergo different production methods or processes have been and are likely to be considered “like products” within the GATT. Since different treatment for products with the same physical characteristics on the basis of PPMs amounts to discrimination between “like products,” which violates Article III of the GATT, panels in the two US—Tuna cases decided that U.S. policies prohibiting the import of tuna caught with dolphin-unfriendly methods were inconsistent with the GATT obligation.\textsuperscript{184} Thus, the Panel in US—Tuna II held that:

Article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation. The Panel found therefore that the Note ad Article III could only permit the enforcement, at the time or point of importation, of those laws, regulations and requirements that affected or were applied to the imported and domestic products considered as products.\textsuperscript{185}

The US—Shrimp case did not address this “product-process” distinction in the context of “like products” although complainants raised this issue in the Article I:1 context. Since the Panel found that the United States violated Article XI:1, it did not review the issue of treating physically identical shrimp differently solely based on harvesting methods and conservation policies.\textsuperscript{186} Moreover, this issue was not within the terms of reference before the Appellate Body.

It is well recognized that some products cause serious environmental degradation through their production methods, and more often than not, the damage requires urgent remedial measures. On the other hand, the broad interpretation of Article XX embracing process distinctions as well as product characteristics or encompassing a wide range of social and environmental goals outside the territory of importing countries raises the “slippery slope” worry of where to draw the line.\textsuperscript{187} In other words, “there simply is no principled way” to distinguish desirable “like products” from unacceptable non-product related PPMs “without opening the door to unacceptable abuses.”\textsuperscript{188} To a certain degree, the fundamental principle of comparative advantage reflects differences in social and regulatory development as much as natural endowments,

\begin{itemize}
\item \textsuperscript{184} Schoenbaum, \textit{supra} note 6, at 288.
\item \textsuperscript{185} GATT, \textit{supra} note 34, at para. 5.8.
\item \textsuperscript{186} WTO, \textit{supra} note 117, at paras. 7.18–7.23.
\item \textsuperscript{187} See Jackson, \textit{supra} note 9 (1994), at 46.
\item \textsuperscript{188} Schoenbaum, \textit{supra} note 6, at 291.
\end{itemize}
which is reflected in PPMs. Thus, Principle 11 of the Rio Declaration on Environment and Development provides:

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.\textsuperscript{189}

Competitors in importing countries have opposed such “economic advantages” for developing countries based on lax environmental regulations and policies as “unfair.”\textsuperscript{190}

In fact, potential conflicts between practices under the GATT/WTO dispute settlement and some environmental agreements regarding trade restraints based on PPMs is not merely theoretical. For example, the Montreal Protocol would contravene GATT obligation by requiring its Parties to ban or restrict the import of “products produced with controlled substances” from non-party states.\textsuperscript{191} One possible solution to avoid such conflict may be to use the method followed in \textit{US—Shrimp}, i.e. to resort to Article XX analysis with a balancing test of chapeau requirements rather than risk the “slippery slope” consequence of examining PPMs. The determination of arbitrary or unjustifiable discrimination or disguised restriction on international trade seems more feasible given the factual evidence provided to panels whereas the question whether products with different PPMs should be viewed as “like products” would require a much more conceptual decision often resulting in an arbitrary demarcation. Consistent and clear standards are easier to develop by examining the policies and their application rather than the products themselves.

The use of eco-labeling to enhance consumer recognition may stimulate the consumption of environment-friendly products.\textsuperscript{192} The Panel in \textit{US—Tuna I} accepted the “dolphin safe” labeling practice when

\begin{itemize}
  \item \textsuperscript{192} See generally ECO-LABELLING AND INTERNATIONAL TRADE (Simonetta Zarrilli, et al. eds., 1997).
\end{itemize}
it adhered to MFN and national treatment requirements.\textsuperscript{193} When an importing country intends to address environmental externality resulting from trade, a non-discriminatory eco-labeling scheme may be an effective way to maintain consistency with the WTO obligation. Such labeling programs, however, will not completely eliminate the environmental externalities due to several factors including varying consumer preference and collective-action problems in consumers' behavior.\textsuperscript{194}

**B. Congruence with International Environmental Agreements**

Currently, there are about 200 international environmental instruments and declarations in effect, and some of them do address issues related to international trade of relevant resources.\textsuperscript{195} The Uruguay Round of multilateral trade negotiations substantially altered the relationship between international environmental agreements that allow trade discrimination for the purpose of protecting environment and the GATT as the primary instrument governing international trade.\textsuperscript{196} To assist effective implementation of the Uruguay Round agreements, a new GATT 1994 was created.\textsuperscript{197} Because all countries involved in the GATT 1947 joined the new GATT 1994 by withdrawing from the old GATT, the GATT 1994 legally supersedes the old GATT although the substantive contents of the GATT 1994 has only minor modifications from the GATT 1947.\textsuperscript{198} These legal characteristics of the GATT 1994 have an important implication in public international law regarding the interaction of other international agreements whose provisions may conflict with the GATT. Article 30 of the Vienna Convention provides that the more recent or later treaty supersedes earlier treaties when the later treaty concerns the same subject matter and includes all the parties.\textsuperscript{199} Since the WTO has 134 Member states as of March 1999, most

\textsuperscript{193} GATT, supra note 33, at para. 5.42.


\textsuperscript{195} See UNITED NATIONS ENVIRONMENT PROGRAM, REGISTER OF INTERNATIONAL TREATIES AND OTHER AGREEMENTS IN THE FIELD OF THE ENVIRONMENT (Oct. 1994).


\textsuperscript{198} JACKSON, supra note 76 (1998), at 7.

international environment agreements that include trade provisions will be judged by the WTO on their merit. This in turn implies that rulings by panels and the Appellate Body are important not only in establishing the scope of the GATT/WTO obligation but also in developing general public international law.

Two international environmental agreements have been made specifically in connection with cases brought to the GATT/WTO. In June 1992, the member governments of the Inter-American Tropical Tuna Commission ("IATTC"), originally established by the United States and Costa Rica in 1949 for the conservation of tuna, signed the Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean ("La Jolla Agreement"). While the Panel recognized its existence, the Panel did not seriously consider the La Jolla Agreement in resolving the US—Tuna II disputes.

In September 1996, the efforts of the United States, Mexico, and other Latin American and Caribbean nations produced the Inter-American Convention for the Protection and Conservation of Sea Turtles ("Inter-American Convention"). In contrast to the Panel in US—Tuna II, the Appellate Body in the US—Shrimp case weighed the Inter-American Convention substantially by holding that:

The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609.... The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to

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200. See Charnovitz, supra note 196, at 91.
202. Marian Nash (Leich), Contemporary Practice of the United States Relating to International Law, 92 AM. J. INT’L L. 734, 742-45 (1998). The Inter-American Convention has been signed by Brazil, Costa Rica, Mexico, Nicaragua, the United States, and Venezuela.
achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.

Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable.203

The Appellate Body used the Inter-American Convention to make several points. First, the Appellate Body utilized the existence of the Convention to prove the availability and feasibility of solving the problem through multilateral consensual procedures.204 Unlike the Marine Mammal Protection Act of 1972205 that was contested in the US—Tuna cases, Section 609(a) specifically directs the Secretary of State to initiate negotiations for bilateral or multilateral agreements and to encourage other agreements for the protection and conservation of sea turtles.206 Thus, the Appellate Body held that the subsequent lack of serious efforts to negotiate similar agreements with the complainants was unjustifiable discrimination because the U.S. practices did not satisfy its own statutory requirements.207 This ruling may mean that a WTO Member country will find its own statutes containing some good faith provisions to promote multilateral negotiation inadvertently burdensome. Once such “good faith” provisions to initiate international agreements are included in statutes, these provisions may mandate a certain level of evidence proving “serious efforts.” Some WTO Member countries may become increasingly reluctant to incorporate such “good faith” provisions in domestic statutes or to initiate such efforts unilaterally for fear of being legally bound to higher requirements for negotiating than domestically contemplated. The feasibility of such multilateral efforts also heavily depends on the circumstances of the cases. The successful conclusion of the Inter-American Convention may be explained by the geographical proximity of the parties, a relatively long history of cooperation in similar areas, an easier situation to monitor and control the compliance of the agreements, and many other unique factors. Such factors would not exist in negotiations with India, Malaysia, Thailand, and Pakistan. The requirement of equivalent outcomes may not be a very useful criterion in applying the “seriousness

203. WTO, supra note 57, paras. 171–72.
204. Id. at para. 170.
205. 16 U.S.C. §§ 1361 et seq.
206. Supra note 100, at (a).
207. WTO, supra note 57, at para. 172.
test,” particularly in a situation that involves many disparately situated countries.

Second, the Appellate Body seems to require “serious” or “substantial” efforts to carry out such good faith provisions.\textsuperscript{208} The evidence for the case did indicate that the United States tried to initiate negotiations with complainants.\textsuperscript{209} The Appellate Body did not explain why these negotiations did not constitute “serious or substantial” efforts or how Member countries can meet this test in the future. Unless these questions are addressed in a more concrete manner, the WTO dispute settlement procedures may have to face difficult challenges revolving around the seriousness test.

Third, the Appellate Body considered recourse to existing international mechanisms as part of its decision.\textsuperscript{210} The relevant footnote of the Appellate Body Report noted that the United States, a party to CITES, “did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states.”\textsuperscript{211} While this consideration was not a determinative factor, it clearly constituted one of the elements used to examine the cumulative effects of the U.S. practices.

Therefore, this decision implies that the panels will consider the exhaustion of remedies from relevant environmental regimes when evaluating trade and environment disputes in the WTO. Regarding the international exhaustion of remedy idea, however, there are practical difficulties that must be resolved in order to render it feasible. First, few international environmental agreements provide effective mechanisms to address issues such as those discussed in \textit{US–Tuna} or \textit{US–Shrimp}. Second, even in rare cases with appropriate dispute resolution procedures, the degree or extent of action needed to establish exhaustion of remedies remains a difficult question. Since many, if not most, environmental problems cannot wait for a lengthy negotiation or multilateral processes before they are irreparable, the requirement of exhaustion of remedy in international environmental regimes may be more problematic in application than in theory. This problem is compounded by the reluctance of many countries to join such consensual forums. Furthermore, future cases may have conflicting outcomes between the pertinent environmental regime and the GATT. Questions, such as whether such results should be trumped by the GATT/WTO dispute settlement rulings

\textsuperscript{208} WTO, \textit{supra} note 57, paras. 171–72.

\textsuperscript{209} See, e.g., Howse, \textit{supra} note 156, at 97. Howse argued that, considered in context, written diplomatic demarches in this case should constitute sufficient effort.

\textsuperscript{210} WTO, \textit{supra} note 57, paras. 170–86.

\textsuperscript{211} WTO, \textit{supra} note 57, at 70 n.174.
or deferred and, if deferred, to what degree, remain to be tested with real cases.

CONCLUSION

While it is well recognized in economic literature that trade measures cannot efficiently deal with environmental problems,²¹² environmentalists still find trade policies one of the most attractive instruments as a means of inducing countries to enact environmental policies that in principle are targeted at the source of the problem.²¹³ Thus, the potential risk of electing inefficient trade restraints that generate greater economic rents for domestic import-competing industries becomes acute, especially when environmental concerns are supported for the purpose of leveling the playing-field. This economic argument is aptly presented as follows:

Domestic fisherman will not care whether there are turtles in foreign waters. For them what counts is the playing-field—domestic regulations raise costs and they should be compensated for this. The uniform application of the process standard will both have significant trade-distorting effects and is very likely to increase the level of protection.²¹⁴

The Appellate Body ruling in the US—Shrimp case and other panel decisions in GATT/WTO environment related cases have heeded such economic considerations thus far. Those decisions are bolstered by the lessons of rigorous economic analysis, which show that free trade

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²¹² From an economic theory point of view, a first-best solution for such problems is to use Pigouvian environmental policies that internalize all environmental externalities and unrestricted trade and factor movements. See Michael Rauscher, International Trade, Factor Movements, and The Environment 272–312 (1997).

²¹³ Bernard Hoekman & Michel Kostecki, The Political Economy Of The World Trading System 259 (1995). The general lesson from economics regarding the interrelationship between trade and environmental policies is summarized as follows:

Taxes and regulations aimed to deal with environmental externalities should be applied as close[ly] as possible to the sources of the problems. . . . Trade interventions are normally clumsy, second-, third-, or twelfth-best ways of dealing with environmental problems. Environmental policies have trade effects and trade policies have environmental effects, but the policies themselves are, and should be kept, distinct.


²¹⁴ Hoekman & Kostecki, supra note 212, at 262.
essentially remains robust, even with diverse environmental standards across countries. To date, no case before GATT/WTO dispute settlement panels has successfully defended the application of trade policies with environmental implication under Article XX of the GATT. Such uniformly negative outcomes have raised serious concerns in environmental communities. It should not, however, be interpreted as an indication of anti-environmentalism or insensitivity to global environmental problems on the part of the GATT/WTO. Rather, it has been repeatedly emphasized that WTO Members are free to adopt their own policies aimed at protecting the environment as long as they fulfill their obligations under the WTO Agreements and respect the rights of the WTO Members. The clear message of these caveats is that a country should cooperate in protecting the global environment and, in doing so, should minimize the trade distortion, which will enhance economic development for the global economy. Therefore, the WTO Member countries must assure that the inherently inter-generational end of environmentally sustainable development is achieved through freer trade under the auspices of the WTO.

Based on its experience since 1995, the WTO has become one of the most influential international institutions, and the WTO dispute settlement system has been extensively and fairly successfully utilized. This successful launch of the WTO system has lead many people to anticipate and to aspire to a more active role by the WTO in non-conventional trade agendas. Nevertheless, the quintessential goal of the WTO is to enhance the multilateral trade relations managed by its predecessor. Until a new international environmental institution to deal with global environmental problems is established, the WTO and its


216. See, e.g., WTO, supra note 57, at para. 186.


dispute settlement system will continue to respond to challenges concerning difficult environmental issues as well as complaints about the results. In the recent symposium initiated by the WTO to address the interface of trade and environment, entitled “High Level Symposium on Trade and the Environment,” Mr. Renato Ruggiero, Director-General of the WTO, endorsed the idea of a new international environmental organization. 220 Despite the obvious potential conflict in jurisdictional scope of two organizations, a more effective and institutionalized environmental counterpart of the WTO will help resolve the perceived problems of under-representation of environmental concerns in international trade. Neither “greening the GATT” nor “GATTing the Green” alone will suffice to meet the growing demands from both the GATT and the Green. 221 At the current stage of development in international environmental regimes, “Greening the Green” adequately may be a better solution to the increasingly convoluted interaction between trade and environment.

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220. Mr. Ruggiero stated in his opening remarks to the High Level Symposium:

With the WTO we are poised to create something truly revolutionary—a universal trading system bringing together developed, developing, and least-developed countries under one set of international rules, with a binding dispute settlement mechanism. I would suggest that we need a similar multilateral rules-based system for the environment—a World Environment Organization to also be the institutional and legal counterpart to the World Trade Organization. This should be a main message from this meeting.


221. See generally Esty, supra note 8. See also Daniel C. Esty, GATTing the Greens: Not Just Greening the GATT, 72 FOREIGN AFF. 32 (1993).
ANNEX 1

SELECTED PRINCIPAL ENVIRONMENTAL DECLARATIONS AND CONVENTIONS

A. General

B. Protection of the Marine Environment
C. Protection of the Atmospheric Environment/Space


D. Protection of Fauna and Flora


E. Protection from Hazardous Substances


I. “UNITED STATES—PROHIBITION OF IMPORTS OF TUNA AND TUNA PRODUCTS FROM CANADA,” adopted on 22 February 1982, BISD 29S/91

1. An import prohibition was introduced by the United States after Canada had seized 19 fishing vessels and arrested US fishermen fishing for albacore tuna, without authorization from the Canadian government, in waters considered by Canada to be under its jurisdiction. The United States did not recognize this jurisdiction and introduced an import prohibition as a retaliation under the Fishery Conservation and Management Act.

2. The Panel found that the import prohibition was contrary to Article XI:1, and not justified neither under Article XI:2, nor under Article XX(g) of the General Agreement.


3. Under the 1976 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The United States complained that these measures were inconsistent with GATT Article XI. Canada argued that these export restrictions were part of a system of fishery resource management destined at preserving fish stocks, and therefore were justified under Article XX(g).

4. The Panel found that the measures maintained by Canada were contrary GATT Article XI:1 and not justified neither by Article XI:2(b) nor by Article XX(g).

III. “THAILAND—RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES,” adopted on 7 November 1990, BISD 37S/200

5. Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax,
a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with GATT Article XI:1, and considered that they were not justified by Article XI:2(c), nor by Article XX(b). The United States also requested the Panel to find that the internal taxes were inconsistent with GATT Article III:2. Thailand argued, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarettes imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes.

6. The Panel found that the import restrictions was inconsistent with Article XI:1 and not justified under Article XI:2(c). It further concluded that the import restrictions were not “necessary” within the meaning of Article XX(b). The internal taxes were found to be consistent with Article III:2.

IV. “UNITED STATES—RESTRICTIONS ON IMPORTS OF TUNA,” not adopted, circulated on 3 September 1991, BISD 39S/155

7. The Marine Mammal Protection Act (“MMPA”) required a general prohibition of “taking” (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except with explicit authorization. It governed in particular the taking of marine mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean (“ETP”), an area where dolphins are known to swim above schools of tuna. Under the MMPA, the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards were prohibited. In particular, the importation of yellowfin tuna harvested with purse-seine nets in the ETP was prohibited (*primary nation embargo*), unless the competent US authorities establish that (i) the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by US vessels. The average incidental taking rate (in terms of dolphins killed each time in the purse-seine nets are set) for that country’s tuna fleet must not exceed 1.25 times the average taking rate of United States vessels in the same period. Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo are also prohibited (*intermediary nation embargo*).
8. Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with Articles XI, XIII and III of GATT. The United States requested the Panel to find that the direct embargo was consistent with Article III and, in the alternative, was covered by Articles XX(b) and XX(g). The United States also argued that the intermediary nation embargo was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g).

9. The Panel found that the import prohibition under the direct and the intermediary embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). Moreover, the intermediary embargo was not justified under Article XX(d).

V. "UNITED STATES—RESTRICTIONS ON IMPORTS OF TUNA,” not adopted, circulated on 16 June 1994, DS29/R

10. The EEC and Netherlands complained that both the primary and the intermediary nation embargoes, enforced pursuant to the MMPA (see above paragraph 7), did not fall under Article III, were inconsistent with Article XI:1 and were not covered by any of the exceptions of Article XX. The United States considered that the intermediary nation embargo was consistent with GATT since it was covered by Article XX, paragraphs (g), (b) and (d), and that the primary nation embargo did not nullify or impair any benefits accruing to the EEC or the Netherlands since it did not apply to these countries.

11. The Panel found that neither the primary nor the intermediary nation embargo was covered under Article III, that both were contrary to Article XI:1 and not covered by the exceptions in Article XX (b), (g) or (d) of the GATT.

VI. "UNITED STATES—TAXES ON AUTOMOBILES,” not adopted, circulated on 11 October 1994, DS31/R

12. Three US measures on automobiles were under examination: the luxury tax on automobiles ("luxury tax"), the gas guzzler tax on automobiles ("gas guzzler"), and the Corporate Average Fuel Economy regulation ("CAFE"). The European Community complained that these measures were inconsistent with GATT Article III and could not be justified under Article XX(g) or (d). The United States considered that these measures were consistent with the General Agreement.

13. The Panel found that both the luxury tax—which applied to cars sold for over $30,000—and the gas guzzler tax—which applied to the sale of automobiles attaining less than 22.5 miles per gallon ("mpg")—were consistent with Article III:2 of GATT.
14. The CAFE regulation required the average fuel economy for passenger cars manufactured in the United States or sold by any importer not to fall below 27.5 mpg. Companies that are both importers and domestic manufacturers must calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically. The Panel found the CAFE regulation to be inconsistent with GATT Article III:4 because the separate foreign fleet accounting discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. Similarly, the Panel found that the separate foreign fleet accounting was not justified under Article XX(g); it did not make a finding on the consistency of the fleet averaging method with Article XX(g). The Panel found that the CAFE regulation could not be justified under Article XX(d).


15. Following a 1990 amendment to the Clean Air Act, the Environmental Protection Agency ("EPA") promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States. From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

16. Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, inter alia, with GATT Article III, and was not covered by Article XX. The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in GATT Article XX, paragraphs (b), (g) and (d).
17. The Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g). On appeal of the Panel’s findings on Article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX.


18. Seven species of sea turtles are currently recognized. Most of them are distributed around the globe, in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and their nesting grounds. Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans).

19. The US Endangered Species Act of 1973 (“ESA”) lists as endangered or threatened the five species of sea turtles occurring in US waters and prohibits their take within the United States, within the US territorial sea and the high seas. Pursuant to the ESA, the United States requires that shrimp trawlers use “turtle excluder devices” (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of Public law 101–102, enacted in 1989 by the United States, provides, _inter alia_, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the harvesting nation is certified to have a regulatory program and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles. In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means must impose on their fishermen requirements comparable to those borne by US shrimpers, essentially the use of TEDs at all times, if they want to be certified and export shrimp products to the United States.

20. The Panel considered that the ban imposed by the United States was inconsistent with GATT Article XI (General elimination of quantitative restrictions) and could not be justified under GATT Article XX (General exceptions). The Appellate Body found that the measure at stake qualified for provisional justification under Article XX(g), but
failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of GATT 1994.