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Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization

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FREE TRADE OR SUSTAINABLE DEVELOPMENT? AN ANALYSIS OF THE WTO APPELLATE BODY'S SHIFT TO A MORE BALANCED APPROACH TO TRADE LIBERALIZATION

PADIDEH ALA'I*

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INTRODUCTION

This essay examines the evolution of the Article XX General Exceptions provision of the General Agreement on Tariffs and Trade ("GATT 1994")¹ from its drafting history in 1946, to increasingly

1. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. Article XX of the GATT 1994 states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement [GATT 1994], shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importation of exportation of silver or gold;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this agreement . . . ;
- (e) relating to products of prison labor;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement . . . ;
- (i) involving restrictions on exports of domestic material necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan . . . ;
- (j) essential to the acquisition or distribution of products in general or in local short supply

GATT, *supra*, art. XX.

Accompanying the creation of the WTO were a series of renegotiated trade agreements, including an updated version of the GATT known as GATT 1994. GATT 1994 incorporated in its entirety GATT 1947 with subsequent modifica-

narrow interpretations by the GATT panels, and ultimately to the more expansive interpretations by the World Trade Organization Appellate Body ("Appellate Body") in *United States-Standards for Reformulated and Conventional Gasoline*² ("Reformulated Gasoline") and *United States-Import Prohibition of Certain Shrimp and Shrimp Products*³ ("Shrimp-Turtle") in 1996 and 1998.⁴ Interpretation of Article XX by the Appellate Body indicates that the World Trade Organization ("WTO") has taken the policies and interests that are outside the realm of trade liberalization, such as the environment, much more seriously than its GATT predecessor. In its decisions, the Appellate Body has recognized that it is no longer possible for the WTO to uphold the free trade goals of the GATT 1994, such as promoting market access, above all other goals and concerns—e.g., health, the environment, and the objectives of sustainable development.⁵

tions and understandings. Specifically, Article XX of GATT 1947 was not amended or modified as a result of the Uruguay Round agreements. Therefore, Article XX of GATT 1994 or GATT 1947 are identical texts. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 21, 33 I.L.M. 1125, 1154.

2. Report of the Appellate Body on *United States-Standards for Reformulated and Conventional Gasoline*, Apr. 26, 1996, WTO Doc. No. WT/DS2/AB/R [hereinafter *Reformulated Gasoline Appellate Report*].

3. Report of the Appellate Body on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Oct. 12, 1998, WTO Doc. No. WT/DS58/AB/R [hereinafter *Shrimp-Turtle Appellate Report*].

4. Contrary to the Appellate Body, the Dispute Settlement Body ("DSB") Panels have interpreted Article XX narrowly. See WTO Dispute Panel Report on *Import Prohibition of Certain Shrimp and Shrimp Products*, May 15, 1998, WTO Doc. WT/DS58/R, paras. 7.24-7.61 [hereinafter *Shrimp-Turtle Panel Report*]; WTO Dispute Panel Report on *United States-Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, WTO Doc. WT/DS2/R, paras. 6.20-6.43 [hereinafter *Reformulated Gasoline Panel Report*]; see also *infra* note 17 and accompanying text (noting that the language of Article XX has remained unchanged since 1947).

5. This essay concentrates on Appellate Body decisions. The DSB panels appear to be unaware of this change in attitude towards Article XX interests from the GATT to the WTO. They continue to put free trade above all other concerns. The relationship of the panel system to the Appellate Body is beyond the scope of this article but has been addressed in other articles. See *Symposium on the First Three Years of the WTO Dispute Settlement System*, 32 INT'L LAWYER 609, 609-11

This essay maintains that although the Appellate Body held in *Reformulated Gasoline* and *Shrimp-Turtle* that the environmental measures at issue were not justified under Article XX, the final holding of the Appellate Body should not overshadow the positive and important implications of its analysis for the future of Article XX. After narrow interpretation by GATT panels, the Appellate Body has expanded the scope of Article XX through the application of the Vienna Convention on the Law of Treaties.⁶ As a result, it is now within the realm of possibility that a governmental measure, otherwise inconsistent with a substantive provision of the GATT 1994, can be justified as an Article XX exception.

This essay is divided into three parts. Part I reviews the drafting history of Article XX of the GATT 1994 and the important role the United States played in that process. Part II traces the evolution of Article XX by looking at selected GATT panel and Appellate Body decisions that interpret Article XX exceptions both under the GATT 1947 panel procedure and the current WTO Dispute Settlement Understanding ("DSU").⁷ The analysis is limited to the discussions of Article XX in each decision. Part III concludes by briefly addressing the growing importance of Article XX exceptions within the framework of the WTO Agreement and the unique and increasingly important role of the Appellate Body.

I. HISTORY OF ARTICLE XX EXCEPTIONS

The general exceptions listed in Article XX of the GATT 1994 can be traced back to the 1927 International Agreement for the Suppression of Import and Export Prohibitions and Restrictions.⁸ Subse-

(1998) (reviewing the first three years of the new WTO dispute settlement system).

6. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

7. For an overview of the GATT 1947 and 1994 systems and their differences, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENTS* 66-92, 177-98 (1997).

8. *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, League of Nations Doc. C.559 M.201 1927.II[B] (1927). Article 4 provides an exception for, among other things, rules and regulations that are "issued on grounds of public health" or "imposed for moral or humanitarian

quently, the drafters incorporated the same general exceptions⁹ during negotiations for the creation of the International Trade Organization ("ITO").¹⁰ As the drafting history of the ITO Charter indicates, the drafting of the General Exceptions provision—which ultimately became Article XX of the GATT 1947¹¹—was controversial due to

reasons. . . ." *Id.* art. 4.

9. For the full drafting history of the ITO Charter general exceptions, see *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. ESCOR, 1st Sess., at 33, U.N. Doc. E/PC/T/33 (1946) [hereinafter London Draft Charter] (illustrating that general exceptions were considered, but were not drafted); *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. ESCOR, 1st Sess., Annexure II, at 52, 60, U.N. Doc. E/PC/T/33 (1946) [hereinafter United States Draft Charter] (illustrating draft exceptions); *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. ESCOR, 2d Sess., at 31, 77, U.N. Doc. E/PC/T/34/Rev.1 (1947) [hereinafter New York Draft Charter]; *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. ESCOR, 2d Sess., at 7-65, U.N. Doc. E/PC/T/186 [hereinafter Geneva Draft Charter]; *Final Act and Related Documents of the United Nations Conference on Trade and Development*, U.S. ESCOR, at 33, U.N. Doc. E/Conf.2/78 (1948) [hereinafter Havana Charter].

10. At the Bretton Woods Conference in 1944, there was agreement among the participants that protectionism and restrictive trade policies had led to the worldwide recession, which had in turn caused World War II. As a result, partly to forestall history from repeating itself and partly to rebuild the economies of many parts of the world—specifically Europe and Japan—after the devastation of World War II, the Conference drafted outlines for three "Bretton Woods" institutions. Two of these institutions, the International Monetary Fund ("IMF") and the International Bank for Reconstruction and Development ("IBRD" or "World Bank"), began operating in Washington, D.C. in 1946. The third institution was the International Trade Organization ("ITO"). Negotiations for the creation of the ITO began in 1946 but the organization itself never came into existence, largely due to the fact that the United States Congress refused to ratify it. As a result, the General Agreement for Tariffs and Trade ("GATT"), which was originally envisioned to be a subsidiary agreement and part of the ITO, was concluded as an executive agreement and was left to fill the void that the failed ITO had left. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35 (2d ed. 1997).

11. The GATT was never contemplated to be an organization and its was implemented on a "provisional basis" for almost fifty years. Because the GATT was not an institution, signatory countries were referred to as Contracting Parties and not Members. Under the WTO, all signatory countries that have successfully joined and acceded to the organization are called Members. See generally *WTO Membership* (visited Feb. 14, 1999) <<http://www.wto.org>> (listing the 134 Members of the WTO).

the scope of the exceptions proposed under the Article and the “divergence of national practices” with regard to the issues it addressed. This difference in views was explained in a report by the Preparatory Committee of the United Nations Conference on Trade and Employment in 1947:

A substantial degree of agreement among the members of the Preparatory Committee was reached on questions of the principle underlying these [General Exception] provisions. However, as was to be expected, there were numerous differences of opinion, and a number of reservations were made on account of national variations in the practice of detailed administration.¹²

Ultimately, the drafters of the ITO Charter used the General Exceptions provision proposed by the United States in its draft of the ITO Charter, which had been included as “Annexure II” in the London Draft Charter.¹³ The United States draft proposed the following introductory language: “Nothing in Chapter IV [on commercial policy] of this [ITO] Charter shall be construed to prevent the adoption of enforcement by any Member of measures.”¹⁴

12. London Draft Charter, *supra* note 9, at 11.

13. See *id.*; see also *infra* note 15 and accompanying text (discussing opposition by certain countries to the adoption of the Article XX exceptions).

14. United States Draft Charter, *supra* note 9, at 60. The full text of the General Exceptions provisions from the United States Draft Charter provided:

Nothing in Chapter IV, article 32 [on commercial policy] of this [ITO] Charter shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal, or plant life or health;
- (c) relating to fusionable materials;
- (d) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;
- (f) relating to the importation or exportation of gold and silver;
- (g) necessary to induce compliance with laws or regulations which are not inconsistent with the provisions of Chapter IV, such as those relating to customs enforcement, deceptive practices, and the protection of patents, trade marks and copyrights;
- (h) relating to prison-made goods;

The proposed unqualified introductory language immediately raised concerns that the provision would be subject to abuse. For example, delegations from the Netherlands and the Belgo-Luxembourg Economic Union feared that "the stipulations 'to protect animal or plant life or health' would be misused for indirect protectionism."¹⁵ Therefore, in order to combat abuse of exceptions and, in particular, to prohibit the use of the exceptions for protectionist ends, the introductory clause was amended as follows:

*Subject to the requirement that such measures not be 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 Chapter V [General Commercial Policy] shall be construed to prevent the adoption or enforcement of any Member of measures. . . .*¹⁶

This amended introductory language became the introductory language for Article XX of the GATT and remains today, unchanged, the introductory provision—or chapeau—of Article XX of the GATT 1994.¹⁷

(i) imposed for the protection of national treasures of artistic, historic or archeological value;

(j) relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption;

(k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security; or

(l) imposed in accordance with a determination or recommendation of the Organization [ITO] formulated under paragraphs 2, 6, or 7 of Article 55 [Powers and Duties of the Conference].

Id.

15. GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 563 (1995) (citing U.N. Doc. E/PC/T/C.II/32 (1946) (note of the Netherlands and the Belgo-Luxembourg Economic Union)) [hereinafter GATT ANALYTICAL INDEX]. "Indirect protectionism is an undesirable and dangerous phenomenon. Many times stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection. . . ." *Id.*

16. New York Draft Charter, *supra* note 9, at 31 (emphasis added).

17. Article XX was not amended as a result of the Uruguay Round agreements or the creation of the WTO. Therefore, the introductory language of Article XX

As far as the specific subparagraphs under Article XX are concerned, almost all, with the exception of subparagraphs (i)¹⁸ and (j),¹⁹ can be traced back to the United States Draft ITO Charter.²⁰ Furthermore, subparagraph (g)²¹ was included at the insistence of the United States so that it could continue to institute export controls in connection with domestic conservation measures.²² In sum, the drafting history of Article XX indicates that, first, participants in the multilateral trading system have always recognized that there are equally legitimate interests and policies other than "free trade" that governments often must pursue. Second, Article XX has been controversial from the very beginning because of the divergence of national practices in areas listed under Article XX.²³ Third, all of the Article XX exceptions invoked to date—namely, subparagraphs (b), (d), and (g)—were United States proposals,²⁴ and it was the United States that specifically insisted on the inclusion of subparagraph (g).²⁵ Fourth, countries expressed concern that Article XX would be used for protectionist ends, and, therefore, amended the introductory provision of Article XX in order to prevent such abuse.

1994 remains as it was originally drafted in 1947.

18. See GATT, *supra* note 1, art. XX(i) ("[I]nvolving restrictions on exports of domestic materials necessary to ensure essential quantities so such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan").

19. See *id.* art. XX(j) ("[E]ssential to the acquisition or distribution of products in general or short local supply").

20. See *id.* art. XX; see also United States Draft Charter, *supra* note 9, at 52.

21. See GATT, *supra* note 1, art. XX(g).

22. See CLAIR WILCOX, A CHARTER FOR WORLD TRADE 182 (Ronald Steel ed., 1972) (explaining the drafting history of Article XX(g)).

23. Compare United States Draft Charter, *supra* note 9, at 60, with London Draft Charter, *supra* note 9, at 33-34.

24. See *supra* note 15 and accompanying text (discussing fears of other countries concerning Article XX); see also United States Draft Charter, *supra* note 9, at 60.

25. See WILCOX, *supra* note 22, at 182.

II. THE EVOLUTION OF ARTICLE XX EXCEPTIONS FROM THE GATT 1947 PANEL DECISIONS TO THE WTO APPELLATE BODY

A. INTERPRETATION OF ARTICLE XX UNDER THE GATT 1947

The burden of proof has always been on the party invoking an Article XX exception to justify a GATT-inconsistent measure. As the following cases demonstrate,²⁶ however, the traditional analysis of the provisions of Article XX by the GATT panels made this a difficult, if not impossible, burden to meet. The GATT panels held that Article XX must be interpreted narrowly and that none of the Article XX exceptions in themselves create an obligation.²⁷ Therefore, it was not the duty of the panels to examine Article XX exceptions unless they were invoked by the parties to the dispute.²⁸ The panels did hold, however, that invocation of one or more of the Article XX exceptions does not constitute *ipso facto* an admission that the measures in question would otherwise be inconsistent with the GATT.²⁹

26. See, e.g., Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. L/6268-35 S/98 [hereinafter GATT Herring and Salmon Report]; Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. DS10/R-37S/200 [hereinafter GATT Thailand-Cigarettes Report]; United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. 39S/155 [hereinafter GATT Tuna I Report]; United States-Restrictions on Imports of Tuna, June 1994, 33 I.L.M. 839 (1994) [hereinafter GATT Tuna II Report].

27. See GATT ANALYTICAL INDEX, *supra* note 15, at 563; see also GATT Secretariat, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT*, WT/CTE/W/53/Rev.1, para. 5 (Oct. 26, 1998).

28. See GATT Tuna I Report, *supra* note 26, para. 5.22 (summarizing the history of Article XX).

[A]rticle XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.

Id.

29. See *id.* (stating, "[a] party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement."); see also GATT ANALYTICAL INDEX, *supra* note 15, at 563.

The panels provided that the parties can argue Article XX exceptions "in the alternative" and that indeed arguments in the alternative were necessary for the "efficient operation of the dispute settlement process."³⁰

1. Canada-Measures Affecting Exports of Unprocessed Herring and Salmon ("Herring and Salmon")

In *Herring and Salmon*, the United States brought a complaint against Canada, stating that Canadian laws and regulations restricting exports from Canada of unprocessed sockeye salmon, pink salmon, and herring³¹ were inconsistent with the obligations of Canada pursuant to Article XI of the GATT,³² and that Article XX exceptions did not justify any of those regulations.³³ The United States

30. GATT Tuna I Report, *supra* note 26, para 5.22.

31. There are three relevant laws and regulations. First, the Canadian Fisheries Act of 1970, sub-section 34(j), which provides that "the Governor in council may make regulations for carrying out the purposes and provisions of this Act in particular, but without restricting the generality of the foregoing, may make regulations . . . (j) respecting the export of fish or any part thereof from Canada. . . ." *Id.* para. 2.1 (citing The Fisheries Act, R.S.C., ch. F-14, section 34(j) (1970) (Can.) (as amended)). Second, the Regulations Respecting Commercial Fishing for Salmon in the Waters of British Columbia and Canadian Fisheries Waters in the Pacific Ocean, paragraph 6, which prohibit the exportation from Canada of any sockeye or pink salmon unless it is "canned, salted, smoked, dried, pickled or frozen and has been inspected in accordance with the Fish Inspection Act." *Id.* para. 2.2 (citing Regulation of Nov. 7, 1978, Ch. 823, 1978 C.R.C. 3900 (Can.)). Third, the Regulations Respecting Fishing for Herring in Canadian Fisheries Waters on the Pacific Coast, paragraph 24(1), which prohibit the exportation or attempt to export any "food herring, roe herring, herring roe or herring spawn on kelp unless: (a) it is canned, salted, dried, smoked, pickled or frozen; and (b) it has been inspected by an inspector designated pursuant to section 17 of the Fish Inspection Act." *Id.* para. 2.3 (citing Regulation of May 2, 1984, Pt. II, 1984 C. Gaz. 1693 (Can.)).

32. See GATT, *supra* note 1, art. XI. Article XI refers to the general elimination of quantitative restrictions and provides in pertinent part:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Id.

33. The United States also argued that the measure at issue was not justified under Article XI:2(b) of the GATT 1947, which provides an exception to Article

argued that "the purpose and effect of Canada's export restrictions was not to conserve resources or ensure product quality, [but] rather the purpose was to protect Canadian processors and help maintain employment in British Columbia."³⁴ Canada, on the other hand, maintained that the measure in question had been in effect since the early decades of the century and that the measures at issue here were "an integral part of a complex and longstanding system of fishery resources management [and, more specifically,] an integral part of the conservation and management programme for herring and pink and sockeye salmon."³⁵ Canada further asserted that the export measures at issue were justified under Article XX(g), which provides an exception to GATT obligations for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption."³⁶

In analyzing Article XX(g), the panel started with the actual language of subparagraph (g), which together with the introductory provision provides:

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:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.³⁷

XI. A discussion of Article XI:2(b) is outside the scope of this article.

34. GATT Herring and Salmon Report, *supra* note 26, para. 3.11. To prove this point the United States quoted language from a 1980 Canadian Department of Fisheries and Ocean Report which stated that "export restrictions were in place for the purpose of 'promoting jobs for Canadians (by increasing the amount of processing done in Canada).'" *Id.* Canada responded that the quotation was "taken out of context" and that the measures at issue were "multipurpose." *See id.* para. 3.12.

35. *Supra* note 26, para. 3.5.

36. GATT, *supra* note 1, art. XX(g).

37. *Id.*

The panel agreed with the parties that salmon and herring stocks are "exhaustible natural resources,"³⁸ but held that the Canadian law was not "related to" the conservation of salmon and herring nor was it "in conjunction with" restrictions on domestic production or consumption.³⁹ The panel analyzed the phrases "relating to" and "in conjunction with" as they are used in subparagraph (g). It concluded that "relating to" means that a measure must be "primarily aimed at the conservation of an exhaustible natural resource" and "in conjunction with" means that the measure in question must be "primarily aimed at rendering effective the domestic production restrictions."⁴⁰ The panel held that Canada had failed to prove that the export restrictions were primarily aimed at conserving salmon and herring or that the measure was primarily aimed at rendering effective a domestic restriction. Having failed the "primarily aimed at" test, the panel found that the Canadian law violated Article XI:1 of the GATT and was not justified under Article XX(g).⁴¹ Having interpreted the words "relating to" and "in conjunction with" to mean "primarily aimed at," the panel concluded that it was not necessary to analyze the Canadian law at issue either under the requirements of the Article XX chapeau or in relation to the overall purpose and aim of Article XX.

38. GATT Herring and Salmon Report, *supra* note 26, para. 4.4.

39. *See id.* para. 4.4.

40. *See id.* para. 4.6. The panel held 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." The Panel further stated that although subparagraph (g),

does not cover only measures that are necessary or essential for the conservation of an exhaustible natural resources but a wider range of measures. However, the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement is not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at conservation of exhaustible natural resources.

Id. para. 4.6

41. *See id.* para. 5.1.

2. Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes ("Thailand-Cigarettes")

In *Thailand-Cigarettes*, the United States brought a complaint against Thailand⁴² claiming that Thailand's Tobacco Act of 1966 ("Tobacco Act") was inconsistent with Thailand's obligation under Article XI:1 of the GATT.⁴³ The Tobacco Act of 1966 stated that "the importation . . . of tobacco is prohibited except by license of the Director-General."⁴⁴ The Director-General of Thailand had not granted any import licenses for cigarettes in the past ten years.⁴⁵ The United States argued that none of the Article XX exceptions covered Thailand's prohibition, including Article XX(b), which states that: "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human . . . life or health."⁴⁶

The United States argued that Article XX does not cover the measure because no safeguards comparable to an import prohibition existed with respect to domestic cigarettes. Referring to the Article XX chapeau, the United States asserted that the intention of the drafters of the GATT was to ensure that "measures which a Contracting Party seeks to justify under the provisions of Article XX(b) . . . reflect similar domestic safeguards,"⁴⁷ and that the drafting history of the chapeau supports this position. Furthermore, the chapeau was amended to state that under Article XX a "measure must not be disguised restrictions on international trade."⁴⁸ The

42. See GATT Thailand-Cigarettes Report, *supra* note 26, para. 1 (explaining that the United States wanted consultations with Thailand, but requested a panel and set forth a complaint when consultations failed). Prior to the formation of the GATT panel the United States had also threatened Thailand with retaliation against Thai exports to the United States under Section 301 of the United States Trade Act of 1974. See *id.* para. 34.

43. See *id.* para. 16 (arguing that since 1966 Thailand's licensing regime for cigarettes was inconsistent with Article XI).

44. Tobacco Act of 1966 (Thailand), *quoted in* GATT Thailand-Cigarettes Report, *supra* note 26, para. 63.

45. See GATT Thailand-Cigarettes Report, *supra* note 26, para. 6.

46. GATT, *supra* note 1, art. XX(b).

47. GATT Thailand-Cigarettes Report, *supra* note 26, para. 22.

48. *Id.*

United States did not question the health hazards of smoking. Rather it asserted that the true intention of the Tobacco Act was to protect the Thai domestic tobacco industry. The United States stated that, "Thailand could not argue that the ban on imports was necessary to protect human life or health since domestic production, sales and exports of cigarettes and tobacco remained at high levels."⁴⁹

In sum, the United States argued that any measure that could be taken in pursuance of an Article XX(b) objective should be taken on a national treatment basis and Thailand, like other countries, should pursue the objective of seeking to prevent an increase in the number of smokers in ways that are more consistent with the GATT.⁵⁰

Thailand responded by stating that Article XX(b) "reflected the recognition that public health protection is a basic responsibility of governments,"⁵¹ and that the Tobacco Act was exactly the type of measure covered by that exception because:

the production and consumption of tobacco undermined the objectives set out in the Preamble of the General Agreement [of 1947] which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods.⁵²

In other words, Thailand argued, smoking tobacco lowered the standard of living, increased sickness, and led to billions of dollars spent on medical costs, thereby reducing real income.⁵³ Thailand also noted that the Tobacco Act was only one part of a comprehensive national program for control of tobacco use that it had developed in compliance with the resolutions of the World Health Organization ("WHO"), and therefore it was clearly based on health concerns.⁵⁴

49. *Id.* para. 23

50. *See id.* para. 30 (setting forth the argument made by the United States concerning Thailand's failure to meet the obligations of GATT).

51. *Id.* para. 24

52. *Id.* para. 21.

53. *See* GATT Thailand-Cigarettes Report, *supra* note 26, para. 21 (discussing Thailand's argument that the Tobacco Act was based on health concerns).

54. *See id.* paras. 54-56 (explaining that the WHO supported the position of the Government of Thailand in its submissions solicited by the GATT panel). The

Thailand denied that the objective of the Tobacco Act was to protect the domestic cigarette industry.⁵⁵ It argued that it did not ban domestic cigarette production because of the fear that a total ban on cigarettes would lead to increased production and consumption of more harmful narcotic drugs. Thailand distinguished foreign cigarettes from domestic ones on the following grounds: (1) American cigarettes are specifically targeted at women while Thai cigarettes are not; (2) experience in Asia and Latin America has shown that once a market is opened, the United States cigarette industry exerts great efforts to force governments to accept its terms and conditions, which undermine public health, circumvent advertising bans, and use modern marketing techniques to boost sales; and (3) cigarettes manufactured in the United States may be more harmful than Thai cigarettes because United States cigarette companies use unknown chemicals in cigarettes, in part to compensate for lower tar and nicotine levels.⁵⁶

The GATT panel decided in favor of the United States and found that the import prohibition was not "necessary" under Article XX(b).

WHO confirmed that Thailand had adopted the recommendations of the WHO's Expert Committee on Smoking Control Strategies in Developing Countries, including prohibition of all advertising and promotion of tobacco products. *See id.* para. 56. The WHO also supported Thailand's position by asserting the following: (1) experience in Latin America and Asia has shown that opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking; (2) American cigarettes (unlike Thai cigarettes) included special brands aimed at the female market and because they had lower tar and nicotine level they made it easier for women to inhale the smoke and some even made appeal to women by the addition of perfume and their long and slender shape "to suggest that smoking would result in thinness;" (3) the type of cigarettes available in Thailand and locally produced are harsher and smoked with less facility and therefore less likely to be used by women or adolescents; (4) adult rate of smoking in Thailand had declined since 1981 as a result of the adoption of WHO recommended smoke control policies; and (5) as other cases in Asian countries had shown, if multinational tobacco companies entered the Thai market, cigarette consumption, death and disease attributable to such consumption, will increase because local, poorly-financed public health programs would be unable to compete with the marketing budgets of the multinational tobacco firms. *Id.* paras. 52-56.

55. In its defense, Thailand showed that there was a ban on advertising for both domestic and foreign cigarettes and that no new cigarette factories had been built in the last twelve years that would have expanded the state-controlled cigarette industry. GATT Thailand-Cigarettes Report, *supra* note 26, para. 33.

56. *See id.* paras. 27, 28, 34.

In coming to this conclusion, the panel adopted the "least-GATT-inconsistent" test that it had previously applied to interpret the word "necessary" under Article XX(d).⁵⁷ The panel explained this principle in the following manner:

[I]mport restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. . . .⁵⁸

The panel went on to conclude that Thailand had failed to meet the least-GATT-inconsistent test because there were other measures that it could have legitimately invoked.⁵⁹

In *Thailand-Cigarettes*, the panel limited the basis of its decision to the interpretation of the word "necessary" in subparagraph (b), using by analogy the interpretation of the word "necessary" in subparagraph (d).⁶⁰ In interpreting the word "necessary," the panel gave no consideration to the subject matter of the measure in question, namely tobacco. There is no indication that the panel would have interpreted the word "necessary" any differently if another product was involved. Furthermore, there is no discussion by the panel of the requirements of the Article XX chapeau to determine whether the Tobacco Act resulted in "arbitrary or unjustified discrimination," or was an attempt at "disguised restriction," or protectionism. The panel makes no reference to the language of the GATT 1947 preamble that Thailand had referred to in support of the cigarette import prohibition.⁶¹ Notably the narrowness of the interpretation and analysis did

57. *See id.* para. 74.

58. *Id.* para. 75.

59. The panel suggested that Thailand could use strict, non-discriminatory labeling and ingredient disclosure regulations to control the quality of cigarettes. *See id.* para. 77. The panel also examined the possible use of a ban on the advertisement of both domestic and foreign cigarettes. *See id.* para. 78. The panel even suggested the use of governmental monopolies to regulate the overall supply of cigarettes. *See id.* para. 79.

60. *See* GATT, *supra* note 1, art. XX(d).

61. *See generally* GATT Thailand-Cigarettes Report, *supra* note 26.

The production and consumption of tobacco undermined the objectives set out in the

not prevent the panel from commenting on how the government of Thailand should have achieved its stated public health policy objective.⁶²

3. *United States-Restrictions on Imports of Tuna ("Tuna I")*

In *Tuna I*, Mexico brought an action against the United States for violation of its GATT obligations under Articles XI and XIII as a result of the application of the United States' Marine Mammal Protection Act of 1972 ("MMPA").⁶³ Mexico argued that the relevant provisions of the MMPA were not covered by the exceptions in Article XX subparagraphs (b) and (g).

The MMPA prohibited the importation of tuna or tuna products into the United States that had been harvested by purse-seine nets in the Eastern Tropical Pacific Ocean ("ETP").⁶⁴ The MMPA defines the ETP as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west latitude, and the coasts of North, Central and South America.⁶⁵ The basis for this prohibition was that schools of tuna in the ETP often swim below herds of dolphins. This means that the use of purse-seine nets⁶⁶

Preamble of the General Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods.

Id. para. 21.

62. *See id.* paras. 77-81 (setting forth the suggestions of the Panel); *see also supra* note 59.

63. Pub. L. No. 92-522, 86 Stat. 1027 (1972).

64. *See* GATT Tuna I Report, *supra* note 26, para. 2.1.

65. *See id.* para. 2.3.

66. *See id.* para. 2.1 (defining purse seine nets and how they are used for fishing tuna). Purse seine nets are commonly used in commercial fisheries. *See id.* Two vessels are necessary to use the net. The larger fishing vessel keeps one end of the net attached to it, while a small boat (a "seine skiff") carries the other end around a school of tuna. *See id.* Once the seine skiff encircles the school and meets the larger vessel, it returns its end of the net to the larger vessel, which in turn draws in the cables at the top and bottom of the net. This creates a "pursing" effect as the net gathers the fish. *See id.*

to catch tuna necessarily resulted in the incidental killing and injury to dolphins, an endangered species.⁶⁷

The United States responded first that the MMPA was not a violation of the GATT because it subjected domestic United States fishing vessels to the same requirements as those imposed on foreign vessels. Therefore, GATT Article III:4—national treatment—permitted the measure in question, and Article XI—prohibition of quantitative restrictions—did not apply to the measure at issue.⁶⁸ In the alternative, the United States argued that the Article XX subparagraphs (b) and (g) exceptions covered the MMPA.

The GATT panel in *Tuna I* found the national treatment argument irrelevant to the MMPA provisions at issue. The panel held that the measure in question was outside the scope of Article III because Article III is only applicable to measures involving “products,” i.e., tuna, and not to measures involving a “process,” i.e., the method of catching tuna.⁶⁹ Furthermore, the product that the law seeks to protect, namely, dolphins, is different than the product that was made subject to quantitative restrictions, namely, tuna.

The United States argued that the MMPA was justified under Article XX(b) as “necessary to protect human, animal or plant life or health”⁷⁰ because: (1) dolphins are a threatened species, (2) there is credible scientific evidence that yellowfin tuna and dolphins can be found in the same waters, (3) catching tuna does result in incidental killing of dolphins, and (4) prohibiting the use of purse seine nets can minimize the incidental killing of dolphins.⁷¹ Invoking the defi-

67. See *id.* para. 2.2 (arguing that fishermen intentionally locate dolphins and use their large “purse seine” nets to encircle them with the expectation that tuna will be found below the dolphins).

68. See *id.* paras. 3.11-3.16. Mexico on the other hand argued that Article III:4 was not applicable to the measure at issue because the measure was not aimed at a “product” but rather a “process,” i.e., the process of catching tuna and that it was therefore outside the scope of Article III and in violation of Article XI. See *id.* para. 3.16. Clearly, the process/product distinction that the panel formulated in *Tuna I* has had far reaching implications for any environmental measure, most of which are directed at processes rather than products. See *id.*

69. GATT Tuna I Report, *supra* note 26, paras. 5.11-5.15.

70. GATT, *supra* note 1, art. XX(b)

71. See *id.* para. 3.33.

inition of "necessary" as previously interpreted in *Thailand-Cigarettes*, the United States stated that:

the MMPA embargo was necessary to protect the life and health of dolphins. No alternative measure was available or had been proposed that could reasonably be expected to achieve the objective of protecting the lives or health of dolphins. Purse-seining for tuna in the ETP meant deliberate encirclement of schools of dolphin with nets. Without efforts to protect them, they would be killed when the tuna was harvested.⁷²

The United States also invoked Article XX(g), which permits measures that are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁷³ The United States stated that dolphins are an "exhaustible natural resource" and that the measure was "in conjunction with" restrictions on domestic production or consumption of tuna. Using language from *Herring and Salmon*, the United States argued that the measures were "primarily aimed at" rendering effective these same restrictions on domestic fishing vessels.⁷⁴

The GATT panel ruled that the MMPA embargo failed to satisfy the requirements of both Article XX subparagraphs (b) and (g).⁷⁵ First, with regard to Article XX(b), the panel held:

The United States had not demonstrated to the Panel—as required of the party invoking an Article XX exception—that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which

72. *Id.*

73. *Id.* para. 3.40 (quoting GATT, *supra* note 1, art. XX(g)).

74. *See id.* para. 3.41 (arguing the reason for enacting measures to conserve natural resources).

75. *See id.* paras. 5.30-5.33 (analyzing the extra jurisdictionality of Article XX). The panel in *Tuna I* asserts that Articles XX(b) and (g) have no extra-jurisdictional application. *See id.* para. 5.32. The extra-jurisdictional analysis made of Article XX in *Tuna I* indicates the length to which GATT panels went in order to limit the scope of Article XX. *See id.* *See* GATT *Tuna II* Report, *supra* note 26, paras. 5.30-5.33, for recognition that, in principle, international law and the GATT allow countries to regulate beyond their territory.

would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.⁷⁶

The panel interpreted the word "necessary" as used in subparagraph (b) to mean that the measure must not only be the least-GATT-inconsistent measure,⁷⁷ but that the United States must have imposed the measure after it exhausted all other options.⁷⁸

The panel rejected the United States' Article XX(g) argument based on the failure of the MMPA embargo to satisfy the "primarily aimed at" requirement of that subparagraph, which had been previously interpreted in *Thailand-Cigarettes*. The panel explained that under the MMPA provisions, the "maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States was linked to and based on the taking rate actually recorded for United States fishermen during that same period,"⁷⁹ the embargo therefore cannot be primarily aimed at conservation.⁸⁰ According to the panel, "a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins."⁸¹

In sum, the panel held that to successfully meet its burden of proof under Article XX (b), a party must: (1) adopt the least-GATT-inconsistent measure; (2) prove that it has exhausted all options before adoption of the measure; and (3) apply it in a manner that is least-GATT-inconsistent, meaning that the treatment of domestic and

76. GATT Tuna I Report, *supra* note 26, para. 5.28

77. *Id.* para. 5.28. The Appellate Body explained that:

[t]he United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

Id.

78. *See id.* para 5.33.

79. *Id.*

80. *See id.*

81. *Id.*

foreign parties must be identical. It is less clear what a country must do in order to successfully meet its burden of proof with regard to Article XX(g). What is known is that Article XX(g) was intended to permit Members to "take trade measures *primarily aimed* at rendering effective restrictions on production or consumption within their jurisdiction,"⁸² and any measure that creates "unpredictable conditions" cannot be regarded as "primarily aimed at."⁸³

4. *United States-Restrictions on Imports of Tuna ("Tuna II")*

The MMPA⁸⁴ resulted in another unadopted GATT panel decision a few years later in *Tuna II*.⁸⁵ This time, however, the countries who were affected under the "intermediary nation embargo"⁸⁶ provisions of the MMPA filed the complaint.⁸⁷ The MMPA provisions at issue stated that intermediary nations that both import yellowfin tuna and yellowfin tuna products, and export these same tuna products to the United States, "must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months."⁸⁸ The MMPA prohibited intermediary nations

82. GATT Tuna I Report, *supra* note 26, para. 5.31 (emphasis added).

83. *Id.*

84. *See generally* GATT Tuna II Report, *supra* note 26 (implying that the MMPA had been amended and modified during the time period between the two decisions, but the basic prohibitions had stayed intact).

85. *Id.*

86. *See* GATT Tuna I Report, *supra* note 26, para. 2.7 (explaining the embargoes established by the MMPA). The MMPA had two categories of embargo: primary nation embargo (which was the subject matter of *Tuna I*) and intermediary nation embargo (which was the subject of *Tuna II*). *See id.* Under the primary nation embargo, the MMPA prohibited imports into the United States of tuna or tuna products harvested by a method that resulted in the incidental killing or serious injury of marine mammals in excess of United States standards. *See generally* GATT Tuna II Report, *supra* note 26.

87. *See* GATT Tuna II Report, *supra* note 26, para. 3.1 (listing the arguments given by the EEC and the Netherlands as intermediary embargo nations, filing this complaint against the United States).

88. *Id.* para. 2.12 (highlighting MMPA section 101(a)(2)(C)); *see also id.* para. 2.14 (noting that this provision was amended in 1992 after the intermediary embargo provisions were interpreted by a United States court to mean that an intermediary country had to itself prohibit tuna that was barred under the direct embargo provisions of the MMPA).

that failed to certify from exporting to the United States. The EEC and the Netherlands, as intermediaries, argued that none of the Article XX exceptions covered the embargo.⁸⁹ The United States responded that the intermediary nation embargo was not a violation of the GATT because it came within the scope of Article XX subparagraphs (b), (d), and (g).⁹⁰

The GATT panel held that Article XX(b) did not cover the intermediary embargo provisions because they were not the least-GATT-inconsistent in their implementation and therefore not "necessary" as subparagraph (b) requires.⁹¹ The GATT panel asserted that the intermediary nation embargo provisions prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and policies that harmed or could harm dolphins. As a result, the intermediary nation embargo failed the least-GATT-inconsistent alternative test and was, therefore, not "necessary" for purposes of Article XX(b).⁹² The panel concluded that a measure cannot be considered "necessary" under Article XX(b) if it is intended to "[f]orce other countries to change their policies within their own jurisdictions and if it require[s] such changes in order to be effective."⁹³

The panel also rejected the United States argument with regard to Article XX(d), which provides an exception from other GATT obligations in cases where a violation is "necessary to secure compliance with laws or regulations which are not inconsistent with this [GATT]

89. See *id.* paras. 3.1 (a), (b) (explaining that MMPA, according to the EEC and the Netherlands, was a violation of Article XI:1 and did not qualify as border adjustments under Article III).

90. See GATT, *supra* note 1, arts. XX (b), (d), (g).

91. See GATT Tuna II Report, *supra* note 26, paras. 5.30-5.33 (stating further that the panel disagreed with the prior panel in *Tuna I* that Article XX(b) cannot be applied extra-jurisdictionally).

92. The panel used the same analysis for primary embargo provisions because they prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins as long as the practices and policies of that country were not comparable to that of the United States. See *id.*

93. *Id.* para. 5.38.

agreement.”⁹⁴ The GATT panel limited the scope of subparagraph (d) to cover only those laws or regulations which in themselves are justified. Furthermore, since the “primary embargo” provisions were not justified under Article XX,⁹⁵ the panel concluded that the intermediary nation embargo cannot be justified under subparagraph (d) as “necessary” to secure compliance with the laws or regulations that imposed the primary embargo.⁹⁶

The GATT panel articulated a three-step analysis in analyzing Article XX(g).⁹⁷ The first step of the analysis asks whether the intermediary nation embargo was part of the policy to conserve exhaustible natural resources. The second step considers whether the intermediary nation embargo provisions were “related to” conservation efforts and made effective “in conjunction with” domestic production or consumption.⁹⁸ Finally, the third issue raised is whether the intermediate embargo provisions were applied in a manner, which would constitute arbitrary and unjustifiable discrimination between countries where the same conditions prevail.⁹⁹

Applying this three-step analysis, the panel concluded that the intermediary nation embargo provisions of the MMPA satisfied the

94. GATT, *supra* note 1, art. XX(d).

95. See *supra* notes 76-90 and accompanying text.

96. See GATT Tuna II Report, *supra* note 26, para. 5.41.

97. See *id.* para. 5.12 (setting forth the panel’s three tier test).

First, it had to be determined whether the *policy* in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources.

Second, it had to be determined whether the *measure* for which the exception was being invoked—that is the particular trade measure inconsistent with the obligations under the General Agreement—was “related to” the conservation of exhaustible natural resources and whether it was made effective “in conjunction” with restrictions on domestic production or consumption.

Third, it had to be determined whether the measure was applied in conformity with the requirement set out in the preamble to Article XX, namely that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute disguised restriction on international trade.

Id.

98. See *id.*

99. See *id.*

first step but not the second.¹⁰⁰ The GATT panel accepted the United States view that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource because such dolphin stocks have the potential of being exhausted.¹⁰¹ The GATT panel, however, applied the interpretation of prior panels in *Tuna I* and *Herring and Salmon* by concluding that “relating to” is interpreted to mean “primarily aimed at the conservation of natural resources” and “in conjunction with” to be taken to mean “primarily aimed at rendering effective the restrictions on domestic production or consumption.”¹⁰² Furthermore, the GATT panel asserted that “primarily aimed at” referred not only to the purpose of the measure but also to the actual effect of the measure on conservation of the natural resources. For example, an assessment of the success of the measure in reaching its conservation goals should be taken into account in determining whether a provision meets the requirements of subparagraph (g).¹⁰³

As a result, the GATT panel held that “the prohibition on imports of tuna into the United States taken under the intermediary nation embargo could not, by itself, further the United States conservation objectives.”¹⁰⁴ The panel reasoned that the intended “conservation” effect could be achieved only if the primary nations that were the targets of the primary nation embargo, and not the intermediary nations, actually changed their policies or practices.¹⁰⁵ The panel further held that the primary embargo could not by itself further the United States’ conservation objectives because it prohibited the import of any tuna “whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country’s tuna harvesting practices and policies were not comparable to those of the United States.”¹⁰⁶ The panel concluded that measures such as the

100. See *id.* paras. 5.13-5.16 (implying that since the GATT panel found the intermediary embargo provisions were not applicable, it did not discuss the third step).

101. See *id.* para. 5.13 (stating the reasoning used by the panel to recognize the conservation of dolphins as an effort to conserve an exhaustible natural resource).

102. See GATT Tuna II Report, *supra* note 26, para. 5.22.

103. *Id.*

104. *Id.* para. 5.23.

105. See *id.*

106. *Id.* para. 5.24.

MMPA, which were implemented in order to *force* other countries to change their policies and that were effective only if such changes occurred, could not be primarily aimed at either conservation of an exhaustible natural resource or rendering effective restrictions on domestic production or consumption within the meaning of Article XX(g).¹⁰⁷

The Panel's tone and analysis of Article XX in *Tuna II* were significantly different from those employed in prior decisions. The panel objected to the MMPA because of the impact of such a measure on the "objectives of the General Agreement."¹⁰⁸ Specifically, the panel refused to extend an exception to allow a trade measure aimed at forcing other countries to change their policies "including policies to protect living things."¹⁰⁹ According to the panel, if permitted under Article XX, such measures would "seriously impair" the "objectives of the General Agreement."¹¹⁰

Additionally, in *Tuna II* there is an explicit recognition of the importance of the environment and, for the first time, a GATT panel refers to the "objective of sustainable development:"

The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. *The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction.*¹¹¹

These words foreshadow a new era under the WTO. The dual objectives of the trading system were recognized for the first time: free trade on the one hand, and the objective of sustainable development, including the protection and preservation of the environment, on the other.

107. See *id.* para. 5.27.

108. See GATT *Tuna II* Report, *supra* note 26, para. 5.38.

109. *Id.*

110. *Id.*

111. *Id.* para. 5.42 (emphasis added).

B. INTERPRETATION OF ARTICLE XX UNDER WTO/GATT 1994

The GATT panel decisions beginning with *Herring and Salmon* and ending with *Tuna II* demonstrate an evolution in the analysis of Article XX. In *Herring and Salmon*, *Thailand-Cigarettes*, and *Tuna I*, the panels based their decisions on narrow interpretations of the words "necessary," "related to," and "in conjunction with" in subparagraphs (b), (d), and (g) of Article XX. Notably, there is no discussion in any of those decisions about the goals and policies that the Article XX exceptions generally seek to promote and protect within the multilateral trading system. For the first time, in *Tuna II*, the panel refers to the "objectives of the General Agreement," the importance of the "objective of sustainable development," and "the environment."¹¹²

The WTO dispute settlement body ("DSB") has tackled Article XX in two instances: *Reformulated Gasoline*¹¹³ and *Shrimp-Turtle*.¹¹⁴ In both cases, the Appellate Body reversed the DSB panel's interpretations of Article XX while upholding the final rulings.¹¹⁵ The Appellate Body expanded the application of Article XX by applying the interpretative principles of public international law found in the Vienna Convention.¹¹⁶ These principles require that the terms of a treaty be interpreted in good faith in light of their context and in light of its purpose¹¹⁷ and that the context and purpose of the treaty include

112. See *id.* para. 5.38.

113. See *Reformulated Gasoline Panel Report*, *supra* note 4; *Reformulated Gasoline Appellate Report*, *supra* note 2.

114. See *Shrimp-Turtle Panel Report*, *supra* note 4; *Shrimp-Turtle Appellate Report*, *supra* note 3.

115. Under the DSU, the Appellate Body can only modify, reverse or uphold the legal findings and conclusions of the panel. It cannot remand a decision. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 17.13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

116. See Vienna Convention, *supra* note 6.

117. See *id.* The Convention states, in part:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

its preamble¹¹⁸ as well as the “preparatory work of the treaty and the circumstances of its conclusion.”¹¹⁹

1. *United States-Standards for Reformulated and Conventional Gasoline*

In *Reformulated Gasoline*, Venezuela and Brazil brought a complaint against the United States claiming that the regulations implementing the United States Clean Air Act of 1990 (“CAA”)¹²⁰ violated the United States’ substantive obligations under the GATT 1994 and were not justified under Article XX of the GATT 1994.¹²¹ The specific regulation at issue was the baseline establishment method set forth in the Environmental Protection Agency’s (“EPA”) *Regulation of Fuels and Fuel Additives-Standards for Reformulated and Conventional Gasoline* (“Gasoline Rule”)¹²² promulgated pursuant to the provisions of the CAA.¹²³ Venezuela and Brazil specifically objected to the application of different “baseline establishment methods” for domestic refiners and foreign importers and refiners, which had the effect of discriminating against the foreign importers or refiners.¹²⁴

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . its preamble and annexes. . . .

Id. art. 31.

118. *See id.*

119. *Id.* art. 32.

120. 42 U.S.C. sec. 7545(k) (1994). The CAA was aimed at reducing air pollution resulting from the combustion of gasoline. *See also* Reformulated Gasoline Panel Report, *supra* note 4, paras. 2.1-2.13.

121. *See* Reformulated Gasoline Panel Report, *supra* note 4, para. 3.1. Specifically, Venezuela and Brazil argued violation of Article I (most favored nation) and Article III (national treatment) of GATT 1994 and Article 2 of the Agreement on Technical Barriers to Trade. *See id.*

122. 40 C.F.R. sec. 80 (1994).

123. *See* Reformulated Gasoline Panel Report, *supra* note 4, para. 2.5. The Gasoline rule used 1990 data on the level of pollution from gasoline combustion for both reformulated and conventional gasolines as baselines for determining compliance with the CAA requirement that pollution levels should not exceed 1990 levels. *See id.*

124. Under the baseline establishment method set out in the Gasoline Rule, individual baselines were established for domestic refiners by using the quality data and volume records of gasoline produced in 1990, or, in the alternative, if such data was not available, an individual baseline was established by looking at the

Venezuela and Brazil complained that the Gasoline Rule discriminated against foreigners by not allowing foreign refiners to use individual baselines and by limiting the methods by which domestic importers could calculate their baselines.¹²⁵ The United States responded that the baseline establishment method of the Gasoline Rule was not in violation of the GATT 1994, and that in the alternative, even if it was a violation, it fell within the scope of Article XX subparagraphs (b), (d), and (g).¹²⁶

The DSB panel held that the baseline establishment methods were not consistent with Article III:4 of the General Agreement and could not be justified under subparagraphs (b), (d), and (g) of Article XX.¹²⁷ The DSB panel's analysis of subparagraphs (b), (d), and (g) was identical to the analysis of both adopted and unadopted GATT panels, including *Herring and Salmon*, *Thailand-Cigarettes*, *Tuna I*, and *Tuna II*.¹²⁸ The Gasoline Rule failed under subparagraph (b) of

domestic refiners post-1990 gasoline blendstock and/or gasoline quality data and then adjusting that in light of the refinery changes since 1990 to show what the 1990 gasoline composition would have been. For importers of foreign gasoline, in the absence of an individual baseline based on 1990 records, a statutory baseline was adopted. Importers of foreign gasoline were not allowed to use the two alternative methods which domestic refiners were allowed to use to determine their baselines. In addition, the Gasoline Rule did not provide individual baselines for foreign refiners, but rather restricted them to the statutory baseline. Venezuela and Brazil based their complaint on the treatment of importers of foreign gasoline and foreign refiners. *See id.* paras. 2.5-2.8.

125. *See id.* paras. 3.12-3.15. Venezuela and Brazil argued that the Gasoline Rule violated Article I of the GATT because it allowed only an importer, which was at the same time a foreign refiner, to establish an individual baseline, provided that it imported in 1990 into the United States at least 75% of the gasoline produced in that refinery. *See id.* para. 3.5. As a result, the 75% rule granted an advantage to gasoline exported from certain third countries, thus violating Article I. *See id.* Venezuela and Brazil further argued that by denying foreign refiners the possibility of establishing an individual baseline, the Gasoline Rule violated Article III:4 because it accorded less favorable treatment to imported gasoline, both reformulated and conventional, than to US gasoline. *See id.* para. 3.12.

126. *See id.* paras. 3.37, 3.39, 3.55, 3.58.

127. The panel held that the baseline establishment rule did not satisfy the requirements of Article XX(b) because it was not "necessary to protect human, animal or plant life or health." *Id.* paras. 6.22-6.29. In addition, the panel found that the baseline establishment rule was not justified under Article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions" of GATT. *Id.* paras. 6.30-6.33.

128. *See, e.g.,* Reformulated Gasoline Panel Report, *supra* note 4, paras. 6.24,

Article XX because it was not the least-GATT-inconsistent measure. It treated foreign refiners less favorably than domestic ones and, according to the DSB panel, this discriminatory treatment was not "necessary" to attain the policy objectives of the Gasoline Rule and the CAA.¹²⁹ Subparagraph (d) did not cover the Gasoline Rule for the same reasons that the MMPA failed under *Tuna II*.¹³⁰ Subparagraph (d), an exception for measures necessary to secure compliance with laws and regulations that are not in violation of the GATT 1994, cannot be invoked if the measure at issue itself has violated the GATT 1994 and is not excepted under any other provision. Subparagraph (g) did not save the Gasoline Rule because the "less favorable baseline establishment methods" applied to importers of foreign gasoline was not "primarily aimed at" or "relating to" the conservation of exhaustible natural resources.¹³¹

On appeal, the Appellate Body departed significantly from the prior analysis of Article XX exceptions employed by the DSB panel. Unfortunately, the scope of the Appellate Body decision is limited to Article XX(g), which is the only exception that the United States ap-

6.37, 6.39, 6.40.

129. See *id.* paras. 6.21-6.29. The panel agreed that the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health, see *id.* para. 6.21, but that it was not "necessary" for the promotion of that policy that "imported gasoline be effectively prevented from benefiting from as favorable sales condition as were afforded by an individual baseline tied to the producer of a product." *Id.* para. 6.22.

130. See discussion *supra* Part II.A.4 (discussing the failure of the MMPA in *Tuna II*).

131. According to the DSB panel, the baseline establishment method of the Gasoline Rule was not justified under Article XX(g) because although clean air was an exhaustible natural resource, there was:

no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. . . . [B]eing consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. . . . [T]he above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies

Reformulated Gasoline Panel Report, *supra* note 4, para. 6.40 (emphasis added).

pealed.¹³² Applying a two-tier analysis to Article XX, the Appellate Body first analyzed the baseline establishment rule under the requirements of subparagraph (g) of Article XX, and then appraised the implementation of the measure under the chapeau of Article XX.¹³³

The Appellate Body reversed as an “error in law” the DSB panel holding that the baseline establishment rules do not fulfill the requirements of subparagraph (g). The Appellate Body held that the baseline establishment rule, while it was inconsistent with GATT Article III:4, does fulfill the requirements of subparagraph (g) because the baseline establishment rule can be regarded as “primarily aimed at” the conservation of natural resources for the purposes of Article XX(g).¹³⁴ While applying the “primarily aimed at” standard, the Appellate Body asserted that there is nothing in the statute that would indicate that either “related to” or “in conjunction with” should be interpreted to mean “primarily aimed at.”¹³⁵ This was a significant departure from prior panel decisions and is a signal that

132. The Appellate Body noted:

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of . . . the applicability of Article XX(b) and Article XX(d) of the *General Agreement* and of the *TBT Agreement*. Understandably, the United States has also not appealed from the Panel’s ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*.

Reformulated Gasoline Appellate Report, *supra* note 2, at 9-10.

133. *See id.* at 22.

134. *See id.* at 19.

135. The Appellate Body explained:

All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be “primarily aimed at” the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, *save, perhaps, to note that the phrase “primarily aimed at” is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).*

Id. at 18-19 (emphasis added) (footnote omitted).

the Appellate Body does not intend to continue on the narrow interpretative path of prior panels with regard to Article XX(g).¹³⁶

The Appellate Body also concluded that the baseline establishment rules were “made effective in conjunction with restrictions on domestic production.”¹³⁷ In reaching this conclusion, the Appellate Body reversed prior interpretations of the GATT panels where the requirement of “in conjunction with” was interpreted to establish “an empirical effects test.” As a result, in prior GATT decisions any difference in effect of the measure between foreign and domestic was used to exclude a measure from coverage under subparagraph (g) of Article XX.¹³⁸ The Appellate Body interpreted “in conjunction with” as “a requirement of even-handedness in the imposition of restrictions, in the name of conservation.”¹³⁹ The Appellate Body stated that Article XX(g) requires “even-handedness” and not “identity of treatment,” and so long as domestic restrictions were also subject to equivalent restrictions, then the requirements of subparagraph (g) as indicated by the words “in conjunction with” are satisfied.¹⁴⁰

The Appellate Body then turned to the interpretation of the Article XX chapeau and stated that while the requirements of the subparagraph (g) were applicable to the measure itself—i.e., the baseline establishment rule—the chapeau “by its express terms” addresses “the manner in which that measure is applied.”¹⁴¹ In this regard, any analysis that takes place under the chapeau should be independent of the analysis used to determine a violation of the substantive provisions of the GATT 1994.¹⁴² The Appellate Body pointed out that by

136. In *Shrimp-Turtle*, there is no mention of the “primarily aimed at” requirement when interpreting Article XX(g). See discussion *supra* Part II.B.2.

137. Reformulated Gasoline Appellate Report, *supra* note 2, at 21.

138. The Appellate Body stated, “We do not believe, finally, that the clause ‘if made effective in conjunction with restrictions on domestic production or consumption’ was intended to establish an empirical ‘effects test’ for the availability of Article XX(g) exception.” *Id.*

139. *Id.* at 20.

140. *Id.* at 20-21.

141. *Id.* at 22.

142. The Appellate Body stated:

In our view, the Panel here was in error in referring to its legal conclusion in Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on

applying the same standard that it used to find inconsistency with Article III:4 to also find abuse of the exceptions, the DSB panel in effect “empt[ied] the chapeau of its contents [and] deprive[d] the exceptions (a) to (j) of meaning.”¹⁴³ According to the Appellate Body, such a recourse would “confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified,” and would have the effect of “reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁴⁴ This approach would violate the principles of public international law on the interpretation of treaties as stated in the Vienna Convention. Interestingly, this is exactly what the GATT panel in *Thailand-Cigarettes* had done.

The Appellate Body expanded the scope of Article XX by holding that the Vienna Convention requires that each Article XX subparagraph imposes a different burden based on the different words in the statute,¹⁴⁵ and each subparagraph must be interpreted differently based on the specific facts of each case. “[I]t does not seem reasonable to suppose that WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”¹⁴⁶ The Appellate

its head. Obviously, there had to be a finding that the measure provided “less favourable treatment” under Article III:4 before the Panel examined “General Exceptions” contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the “measures” which are to be examined under Article XX(g), and not the legal finding of “less favourable treatment.”

Id. at 16.

143. Reformulated Gasoline Appellate Report, *supra* note 2, at 20.

144. *Id.*

145. The Appellate Body stated:

Applying the basic principle of interpretation that the words of a treaty . . . are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs . . . “necessary”—in paragraphs (a), (b) and (d); “essential”—in paragraph (j); “relating to”—in paragraphs (c), (e) and (g); “for the protection of”—in paragraph (f); “in pursuance of”—in paragraph (h); and “involving”—in paragraph (i).

Id. at 17.

146. *Id.* at 18.

Body maintained that Article XX should be read in the *light and purpose of the whole agreement*—as the Vienna Convention requires—and that analysis should be based on *case-by-case application* of the relevant provisions of Article XX.¹⁴⁷

Ultimately, in *Reformulated Gasoline*, the Appellate Body was not convinced that the anticipated administrative burden on the EPA in determining individual baselines for foreign refiners would have been so great as to justify a discriminatory and stricter treatment of foreign refiners under the baseline establishment rule.¹⁴⁸ In this respect, the Appellate Body agreed with the DSB panel that established techniques and procedures exist that would have allowed the EPA auditors to evaluate information given by foreign refiners in order to establish individual baselines.¹⁴⁹ Applying the foregoing analysis, the Appellate Body concluded that:

[t]he baseline establishment rules in the Gasoline Rule, in their application, constitute “unjustifiable discrimination” and a “disguised restriction on international trade.” We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.¹⁵⁰

In its reversal of the DSB panel’s analysis of Article XX(g), the Appellate Body rejected the analysis of subparagraph (g), which had been consistently used by the preceding GATT panels. In addition, it justified its decision based on the facts of the case and not the statutory interpretation of Article XX.¹⁵¹ In fact, the Appellate Body went

147. *See id.*

148. The Appellate Body discussed alternatives that the United States could have pursued:

These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners.

Id. at 25.

149. *See Reformulated Gasoline Appellate Report, supra* note 2, at 27.

150. *Id.* at 29.

151. The Appellate Body noted:

We have above located two omissions on the part of the United States: to explore ade-

to great lengths to make it explicitly clear that the basis for the affirmation of the DSB panel decision is narrow and should not be viewed as a decision that holds trade liberalization goals above the environment. Specifically, the Appellate Body stated:

It is of some importance that the Appellate Body point out what this [decision] does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* [GATT 1994] contains provisions designed to permit important state interests including—the protection of human health, as well as the conservation of exhaustible natural resources—to find expression. . . . Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment.¹⁵²

As these words indicate, the Appellate Body in *Reformulated Gasoline* explicitly recognized its duty to balance Article XX interests with the trade liberalization goals of the GATT 1994 in each case that comes before it.

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

Shrimp-Turtle grappled with yet another United States law: Section 609 of Public Law 101-162 and its implementing regulations, guidelines, and judicial rulings (collectively referred to as “Section 609”).¹⁵³ Specifically, Section 609 prohibited the importation of certain shrimp and shrimp products into the United States that were

quately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States in rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place.

Id. at 28.

152. *Id.* at 29-30 (footnote omitted).

153. Endangered Species Act of 1973, sec. 609, 16 U.S.C. secs. 1531, 1537 (1989); see also *Shrimp-Turtle Panel Report*, *supra* note 4, para. 2.7 (discussing Section 609).

harvested with commercial fishing technology that "may adversely affect certain sea turtles, [an endangered species.]"¹⁵⁴

Section 609 exempted certified shrimp harvesting nations from the import ban.¹⁵⁵ Pursuant to the law, the United States Secretary of State grants certification under two conditions. First, certification is granted to countries with a fishing environment that does not pose a threat to the incidental taking of sea turtles in the course of shrimp harvesting.¹⁵⁶ Second, certification is granted to those harvesting nations that "provide documentary evidence of the adoption of a regulatory program . . . that is comparable to the United States program."¹⁵⁷ This condition is fulfilled when "the average rate of incidental taking of sea turtles by their vessels is comparable to that of the United States vessels."¹⁵⁸

In 1991, 1993, and 1996 Guidelines were issued pursuant to Section 609.¹⁵⁹ As a result of these Guidelines, the United States held special negotiations with certain countries in the wider Caribbean/Western Atlantic region regarding their shrimp harvesting techniques.¹⁶⁰ The 1996 Guidelines provided that in order to obtain

154. Shrimp-Turtle Panel Report, *supra* note 4, para. 2.7.

155. See *id.* paras. 2.11, 2.16 (addressing the existence of a certification procedure and listing countries that are currently certified); see also Endangered Species Act, *supra* note 153, sec. 609 (b)(2) (setting forth certification requirements).

156. See Pub. L. No. 101-162, sec. 609(b)(2)(A) (codified at 16 U.S.C. sec. 1537); see also Shrimp-Turtle Panel Report, *supra* note 4, para. 2.14 (reiterating section 609(b) certification requirements).

157. *Id.* sec. 609(b)(2)(A) & (B).

158. Endangered Species Act, *supra* note 153, sec. 609(b)(2)(B) (emphasis added); see also Shrimp-Turtle Panel Report, *supra* note 4, para. 2.14 (delineating the second requirement for certification); Shrimp-Turtle Appellate Report, *supra* note 3, para. 4.

159. See Shrimp-Turtle Panel Report, *supra* note 4, paras. 2.8-2.9, 2.11.

160. Under the 1991 and 1993 Guidelines, the United States limited the geographical scope of Section 609 import ban to countries in the wider Caribbean/Western Atlantic region, and granted those countries a three year phase-in period. See *id.* para. 2.8. In 1995, however, the United States Court of International Trade ("CIT") held that the 1991 and 1993 Guidelines violated Section 609 by limiting the geographical scope "to shrimp harvested in the wider Caribbean/[W]estern Atlantic region and directed the Department of State . . ." to extend the ban world wide by May 1, 1996. *Id.* para. 2.10 (cited in *Earth Island Institute v. Warren Christopher*, 913 F. Supp. 559 (CIT 1995)).

certification under Section 609, a harvesting nation must require use of Turtle Excluder Devices ("TEDs") that are "comparable in effectiveness to those used in the United States."¹⁶¹ Furthermore, in order to determine acceptability of foreign programs, a harvesting nation's "average incidental take rate will be deemed comparable if the harvesting nation requires use of TEDs in a manner comparable to that of the [United States] program [and] includes a credible enforcement effort that includes monitoring for compliance and additional sanctions."¹⁶²

India, Malaysia, Pakistan, and Thailand complained that Section 609 violated Articles XI:1 and XIII:1 of the GATT 1994, and was not justified under Article XX exceptions.¹⁶³ The United States responded that Section 609 did nothing more than impose the same requirements on foreign shrimp trawlers that were already imposed domestically, including mandated use of sea-turtle safe commercial fishing technology.¹⁶⁴ Furthermore, the measure was justified under Article XX(g) or, in the alternative, Article XX(b) of the GATT 1994.¹⁶⁵

The DSB panel held that the United States' import ban on shrimp and shrimp products on the basis of Section 609 was inconsistent

161. Shrimp-Turtle Panel Report, *supra* note 4, para. 2.12.

162. *Id.* para. 2.14. The 1996 Guidelines provide that the regulatory program may be in the form of regulations, or may, in certain circumstances, take the form of a voluntary arrangement between the industry and the government. *See id.* Furthermore, the 1996 Guidelines require that all shrimp imported into the United States contain a Shrimp Exporter's Declaration form attesting that the shrimp were harvested either in the waters of a nation currently certified under Section 609, or "under condition that do not adversely affect sea turtles." *Id.* para. 2.11.

163. Shrimp-Turtle Panel Report, *supra* note 4, paras. 1.1, 3.1 (delineating Section 609's alleged violations of different articles in the GATT 1994).

164. In 1987, regulations issued under the Endangered Species Act of 1973 required United States trawlers to use approved Turtle Excluder Devices (TEDs) or tow-time restrictions in specified areas of shrimp harvesting with significant sea turtle mortality. *See id.* para. 2.6. These rules, once they became effective in 1990, were amended to mandate TED use to all areas and all times where there is a significant likelihood that shrimp trawling will interact with sea turtles. *See id.*

165. The Appellate Body's analysis of Article XX is limited to XX(g) without discussion of XX(b). Based on the United States submission, the Appellate Body reasoned that it only needed to look at subparagraph (b) if the measure had not fallen under subparagraph (g). *See* Shrimp-Turtle Appellate Report, *supra* note 3, para. 24.

with GATT Article XI:1, and could not be justified under Article XX.¹⁶⁶ In reaching this conclusion, the DSB panel first analyzed Section 609 under the chapeau of Article XX. The DSB panel concluded that Section 609 fell outside the scope of Article XX because "even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system."¹⁶⁷ The threat to the multilateral trading system arises from the fact that if other countries adopted the same type of unilateral measure as adopted by the United States, it would undermine the multilateral trading system.¹⁶⁸

On appeal, the Appellate Body reversed the panel's analysis of Article XX, but upheld the ultimate ruling.¹⁶⁹ The Appellate Body stated that Section 609 was within the scope of Article XX of the GATT 1994, and that the measure did qualify under subparagraph (g) of Article XX. It held, however, that the implementation of Section 609 failed to meet the requirements of the chapeau of Article XX. Once again, the Appellate Body's analysis of Article XX is more significant than the final ruling.

The Appellate Body made it clear that any analysis of Article XX requires two steps. The first step requires an analysis of the measure in question under a subparagraph. If the measure is justified under the subparagraph of Article XX, the second step requires an analysis

166. *Id.* para. 7.62.

167. Shrimp-Turtle Appellate Report, *supra* note 3, para. 12, quoting Shrimp-Turtle Panel Report, *supra* note 4, para. 7.61.

168. See generally Shrimp-Turtle Appellate Report, *supra* note 3, para. 122.

169. Equally significant, the Appellate Body reversed the panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the dispute settlement understanding ("DSU"). See *id.* paras. 100-110. The Appellate Body held that the word "seek" in DSU Article 11, which states that panels can seek information outside the parties, should not be read in "too literal a manner." *Id.* para. 107. The Appellate Body stated:

authority to *seek* information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by the panel or not.*

Id. para. 108.

of the manner of implementation of the measure under the Article XX chapeau.¹⁷⁰

The Appellate Body held that Section 609 did satisfy the requirements of subparagraph (g) because the sea turtles are "exhaustible natural resources."¹⁷¹ It further held that although the measure was unilateral and certification was based on the adoption of the same policies and laws as the United States, it was still "related to" conservation of the sea turtles, and it was made "in conjunction with restriction on domestic production."¹⁷²

The Appellate Body categorically rejected the DSB panel's argument that a unilateral measure, such as Section 609, falls outside the scope of Article XX.¹⁷³ The Appellate Body repeated its analysis of Article XX in *Reformulated Gasoline*, stating that the meaning and scope of Article XX, both in terms of the chapeau and the subpara-

170. The Appellate Body stated that the panel had erred in looking at the chapeau first, as it must fit a measure under one or more of the exceptions prior to looking at the introductory provision. *See id.* para. 119. "The sequence of steps indicated . . . in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX." *Id.* para. 119.

171. *Id.* paras. 132-134.

172. GATT, *supra* note 1, art. XX(g). The Appellate Body held that:

[i]n its general design and structure. . . Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences . . . of the mode of harvesting employed. . . . Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States—Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.

Shrimp-Turtle Appellate Report, *supra* note 3, para. 141.

173. In response to this argument the Appellate Body stated:

[i]t appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member 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.

Shrimp-Turtle Appellate Report, *supra* note 3, para. 121.

graphs, depends upon not only the measure at issue, but also the subparagraph in question.

The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail" or as "a *disguised restriction* on international trade." When applied in a particular case [Article XX], the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination," or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination," for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals¹⁷⁴ than for one relating to the products of prison labor.

As the above language indicates, the Appellate Body adopted a case-by-case balancing approach to Article XX, arguing that with each case the analysis changes. Often times the meaning of a word, such as "necessary," can vary depending upon the type of measure and the specific subparagraph of Article XX involved.

The Appellate Body also rejected the United States' argument that "discrimination between countries," as stated in the chapeau, is justifiable if the policy goal is "conservation." It held that the rationale or justification for a measure is not relevant to analysis under the chapeau, but is only relevant to the analysis under the subparagraph. In this case, the Appellate Body held that although, as enacted, Section 609 does not require discrimination between countries, the implementation of Section 609 does result in "unjustifiable discrimination" between countries where the same conditions prevail.¹⁷⁵ The Appellate Body held that the discrimination is unjustifiable for two reasons. First, the implementation of the Section 609 "requires other WTO members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels."¹⁷⁶ Second, the Appellate Body

174. See *id.* para. 120.

175. See *id.* para. 161.

176. *Id.* para. 163. The Appellate Body further noted:

reasoned that shrimp caught in uncertified countries under Section 609 would be excluded from the United States, even if the commercial shrimp trawl vessels used TEDs comparable in effectiveness to those utilized in the United States.¹⁷⁷ The Appellate Body concluded that Section 609 did not meet the requirements of the "arbitrary and unjustified discrimination" test under the Article XX chapeau because the manner of implementation of the law indicates that it is "more concerned with effectively influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers"¹⁷⁸ than the declared policy of protecting and conserving sea turtles.¹⁷⁹

Again, as in *Reformulated Gasoline*, the Appellate Body went to great lengths to assure all WTO Members that exceptions can and should justify measures, such as Section 609, if implemented correctly.

In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it 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.

Id. para. 164.

177. *See id.* para. 165.

178. *Id.*

179. Just as in *Reformulated Gasoline*, the Appellate Body in *Shrimp-Turtle* is likewise concerned that the United States failed to engage in cross-border negotiations with countries affected by the Section 609, in violation of Section 609, which required international negotiations. *See Shrimp-Turtle Appellate Report, supra* note 3, para. 166.

other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.¹⁸⁰

It is evident from the foregoing language that the Appellate Body recognizes the growing importance of the environment, sustainable development, and Article XX within the WTO system.

III. WHAT COURSE WILL THE APPELLATE BODY TAKE IN THE FUTURE: FREE TRADE OR SUSTAINABLE DEVELOPMENT?

As we enter the next millenium the multilateral trading system is faced with an important challenge. Can the WTO system and its dispute settlement mechanism survive and maintain its legitimacy if it continues to value "free trade" above all other concerns? The answer is no, it cannot.

The question that is then raised is: when, and under what circumstances, can Article XX interests have preeminence over the market access goals of the multilateral trading system? The Appellate Body does not provide a clear answer to this question. Instead, the Appellate Body proposes a balancing test to be applied on a case-by-case basis between Article XX interests involved and the GATT/WTO goals of market access and trade liberalization. However, by applying the interpretative principles of the Vienna Convention to Article XX the Appellate Body provides interpretative guidance as to methodology that should be used as part of any balancing test. Appellate Body decisions in *Shrimp-Turtle* and *Reformulated Gasoline* provide the following interpretative guidance for balancing Article XX interests:

First, a measure must be initially analyzed under one or more subparagraphs of Article XX. If the measure fulfills the requirements of an Article XX subparagraph then it should be analyzed under the chapeau for whether it is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . , or a disguised restriction on international trade."¹⁸¹

180. *Id.* para. 185.

181. GATT, *supra* note 1, art. XX.

Second, both the requirements of the chapeau and each subparagraph of Article XX are fact-specific and therefore vary according to the facts of the case and the measure in question.

Third, the requirements of the chapeau change depending upon the subparagraph involved and the specific facts of the case. This means that the same subparagraph can be interpreted differently depending on the case.

Fourth, in fulfilling the requirements of the chapeau of Article XX, the extent to which the international community is consulted prior to implementation of a measure must be taken into account, as well as, the extent to which attempts have been made to minimize the negative impact of the measure on an international level.

Last, balancing the objectives of sustainable development and the protection of the environment is required under the preamble of the WTO Agreement because the preamble "informs" the GATT 1994 and Article XX as well as the other covered agreements.¹⁸²

Given the foregoing interpretations of Article XX, the Appellate Body can uphold a GATT-inconsistent measure as justified under Article XX without necessarily threatening the integrity of the multilateral trading system. The Appellate Body must be encouraged to seize an appropriate opportunity to uphold an Article XX measure.

The United States government, environmental groups, and the development community must have patience with the WTO dispute settlement system. The United States has played a pivotal role in the evolution of Article XX from its drafting history to the present.¹⁸³ The drafting history of Article XX indicates that the United States has historically supported the policies and interests contained in Article XX, and in particular Article XX(g).¹⁸⁴ Furthermore, the process of balancing competing and equally legitimate interests on a case-by-

182. See *Shrimp-Turtle Appellate Report*, *supra* note 3, para. 129; see also *Marakesh Agreement Establishing the World Trade Organization*, preamble, Apr. 15, 1994, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 7, 33 I.L.M. 1125, 1144 (1994).

183. See *supra* Part I (discussing the drafting history of Article XX).

184. See *WILCOX*, *supra* note 22, at 182.

case basis is very compatible with the United States' model of adjudication. But the WTO has 134 members, many of which are far more suspicious of Article XX and its exceptions and must therefore proceed cautiously.¹⁸⁵ The Appellate Body's analysis of Article XX generally, and subparagraph (g) in particular, in *Reformulated Gasoline* and *Shrimp-Turtle*, indicates that although supporters of Article XX interests may have lost the battle, the prospects look good for winning the war.

185. Some developing countries have already asserted that they will not tolerate "eco-imperialism" through the WTO DSU. See, e.g., Cato Center for Trade Policy Studies Real Audio and Video Archives, *The WTO's Shrimp-Turtle Decision: Free Trade v. the Environment?* (visited Dec. 8, 1998) <<http://www.freetrade.org/realmedia/realmedia.html>> (providing comments by Kanthi Tripathi, Minister of Commerce Embassy of India regarding the sentiment of some developing countries against "eco-imperialism" through the WTO DSU).