The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the *Shrimp/Turtle* Controversy

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INTRODUCTION

The rapid growth of the shrimp fishing industry over the past several decades has gradually whittled away sea turtle populations. The worldwide focus on the freedom of the global market and the facilitation of international trade has enabled this decline in sea turtle populations to go relatively unchecked. A United States regulation requiring foreign countries to use simple, inexpensive shrimp harvesting nets that afford sea turtles an escape route to safety stands at the forefront of the increasing friction between environment and trade. World Trade Organization ("WTO") Dispute Resolution Panels and the WTO Appellate Body, however, have consistently held such environmental measures invalid under international law.[1]

On April 6, 1998, a Dispute Resolution Panel of the WTO dealt another blow to United States efforts to address pressing international environmental issues through trade sanctions.[2] The Panel invalidated a United States ban on imports of shrimp and shrimp products[3] from countries that did not require the use of certain Turtle Exclusion Devices ("TEDs") on shrimp har-

1. The *Shrimp/Turtle* ruling is the latest of several international trade disputes involving American environmental legislation. *See* Richard J. McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO*, 10 GEO. INT'L ENVTL. L. REV. 29-31 (1997). The *Tuna/Dolphin I* and *II* decisions held that the United States violated GATT by placing embargoes on tuna and tuna products from countries failing to meet certain standards of dolphin protection. *See id.* at 29-30.

2. *See* World Trade Organization Dispute Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 33 I.L.M. 832 (1998) [hereinafter Panel Report].

3. *See* Pub. L. No. 101-162, Endangered Species Act § 609 (codified as amended at 16 U.S.C. § 1537) (1998) [hereinafter Section 609].

vesting vessels.[4] On July 13, 1998, the United States notified the WTO of its decision to appeal certain issues of the Panel Report and filed a notice of appeal with the WTO's Appellate Body.[5] On October 12, 1998, the Appellate Body upheld the Panel decision, but on different grounds.[6] The ruling overturned several key findings of the Panel and concluded that the United States had a right under the General Agreement on Tariffs and Trade (GATT) and WTO rules to adopt its restrictions.[7] The American restrictions failed, however, under general provisions of the GATT because the ban constituted "arbitrary" and "unjustifiable" discrimination in its application to members of the WTO.[8]

The Appellate Body Report revisited issues presented in several previous WTO holdings. The Appellate Body analyzed, among other things, whether the United States conservation measures violated GATT regardless of their beneficial goals and whether such measures were justified under GATT Article XX.[9] The decisions by the Panel and Appellate Body require the United States either to ignore the binding dispute resolution power of the WTO[10] or abandon a program protecting the endangered sea turtle and other species.[11] The dispute has broader ramifications: the WTO, again faced with the trade-environment conflict that has plagued it over the past decade, may have effectively crippled the United States' ability to protect the envi-

4. Shrimp harvesting vessels are trawling boats, 25 feet or longer, that operate in offshore waters with large nets designed to ensnare shrimp as the nets are pulled into the boats. *See* NATIONAL MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, THE TED EXPERIENCE: CLAIMS AND REALITY (Apr. 1992) [hereinafter NMFS Report].

5. United States Notice of Appeal, WT/DS58/11 (July 13, 1998).

6. *See* World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report].

7. *See* Panel Report, *supra* note 2, at para. 7.25.

8. *See id.*

9. *See* Appellate Body Report, *supra* note 6; *see infra* Section II (discussing Article XX (b) and (g)).

10. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex II, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 [hereinafter WTO Final Act]. The World Trade Organization was formally established on January 1, 1995. An important aspect of WTO ruling on the *Shrimp/Turtle* dispute is that, as opposed to previous rulings denouncing similar United States trade sanctions, the WTO has binding adjudicative power.

11. *See* Stephen L. Kass & Jean M. McCarroll, *Environmental Law; Sea Turtles and World Trade*, N.Y.L.J., Apr. 24, 1998, at 3.

ronment on a global level.[12] Meanwhile, the sea turtle and other endangered species continue to diminish in number as these trade issues are debated.

This Note analyzes the application of international trade law by the WTO Dispute Panel and WTO Appellate Body to unilateral environmental regulations designed to protect endangered sea turtles. Part I surveys the history of the *Shrimp/Turtle* dispute. Part II sets forth the reasoning and holdings of the Dispute Panel and Appellate Body. Part III analyzes these holdings and questions whether the WTO can effectively act as a neutral decision-maker in environment-trade disputes. This Note concludes that although unilateral environmental regulations may not be completely consistent with the need for open, even-handed international trade, the WTO Dispute Panel and Appellate Body have unconvincingly disparaged the text of GATT Article XX in order to maintain a strong, predetermined, and unnecessary position against unilateral environmental trade measures.

I. BACKGROUND

A. THE PLIGHT OF THE SEA TURTLE

Over the past two decades, the worldwide market for shrimp has grown exponentially. In 1993, the total harvest from wild fisheries and from shrimp farms was fifty-six percent greater than the 1982 harvest.[13] Commercial shrimping is also among the most devastating threats to marine wildlife, having one of the highest rates of bycatch[14] of any fishing industry. On average, a single shrimp fishing expedition kills over five kilograms of other marine wildlife for every one kilogram of shrimp harvested.[15]

12. *See Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules*, INT'L ENV. DAILY (BNA) *available in* Westlaw Database BNA-IED (Oct. 16, 1998).

13. *See* A. Charlotte de Fontaubert et al., *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L L. REV. 753, 796 (1998).

14. *See generally* NMFS Report, *supra* note 4 (defining "bycatch" as the accidental capture of other organisms).

15. *See* de Fontaubert, *supra* note 13, at 797 (noting that some shrimp fisheries "have recorded bycatch ratios of fifteen to one").

Sea turtles are especially vulnerable.[16] Scientific research over the past twenty years reveals that commercial shrimping significantly threatens the survival of sea turtles.[17] A statement signed by more than 160 scientists from twenty-four countries asserted that five species of sea turtles are in immediate danger of extinction and that commercial shrimping causes as many as 150,000 turtle deaths annually from drowning while entangled in shrimp fishing nets.[18]

To stave off the imminent extinction of these sea turtles, the United States proposed the use of Turtle Exclusion Devices ("TEDs"). These underwater "doggie doors" enable trapped turtles to escape from shrimp nets and avoid certain death.[19] Before the United States implemented and enforced the TED requirement against its own fishing vessels, 55,000 sea turtles drowned annually from the United States shrimping industry alone.[20] TEDs, costing between $50 and $400, provide "a simple, inexpensive solution" that may reduce such turtle casualties by at least ninety-seven percent.[21]

B. THE HISTORY OF THE UNITED STATES SHRIMP EMBARGO

Concern about the high turtle death rate led the United States to implement a voluntary domestic program to test the

16. *See generally* NMFS Report, *supra* note 4 (noting that the NMFS estimated that 47,973 turtles were captured annually in commercial shrimp trawls, and that over 11,000 of those died).

17. *See Endangered Species: Asian Nations Move to Nullify U.S. Law Requiring Device to Protect Sea Turtles,* INT'L ENV. DAILY (BNA) *available in* Westlaw Database BNA-IED (June 19, 1997).

18. *See id.*

19. *See* Paul S. Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L.& POL'Y 57, 61 (1996-97) (citing Jane Kay, *Rare Turtles Fiqure in Trade Pact*, SAN FRANCISO EXAMINER, Sept. 18, 1993, at A4). A TED is a cage-like structure fitting in the neck of a shrimp net that prevents turtles and larger fish from being caught. Since the turtle cannot pass through the cage, the turtle is forced upward through an escape hatch. *See* Margaret D. Tutwiler, *Sea Turtle Conservation in Commerical Fisher*ies. U.S. DEP'T OF STATE DISPATCH 2 (May 6, 1991), at 338.

20. *See* MICHAEL WEBER ET AL., DELAY AND DENIAL; A POLITICAL HISTORY OF SEA TURTLES AND SHRIMP FISHING 12 (1995); *The Futility, Utility and Future of the Biodiversity Convention*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 1, 34 n.187 (1998).

21. *Endangered Species: Asian Nations Move to Nullify U.S. Law Requiring Device to Protect Sea Turtles, supra* note 17 (quoting James Spotila, director of the Center for Biodiversity and Conservation at Drexel University); *Environmentalists Win CIT Decision That Could Yield Shrimp Import Bans*, INT'L ENV'T DAILY (BNA), *available in* Westlaw database BNA-IED (Jan. 17, 1996).

effectiveness of TEDs.[22] The United States National Marine Fisheries Service built and delivered TEDs to United States fishermen volunteering for the program.[23] Although the program succeeded in reducing turtle kills, the Fisheries Service determined that significant numbers of fishermen, fearing the loss of shrimp through the devices, would not voluntarily adopt the use of TEDs. The United States then issued regulations, pursuant to the Endangered Species Act of 1973,[24] requiring the use of TEDs by American commercial shrimp vessels in specified areas.[25]

Two years later, the United States enacted The 1989 Sea Turtle Conservation Amendments to the Endangered Species Act, with Section 609 of the statute establishing the TED regulations for imports.[26] Section 609 banned imports of shrimp and shrimp products harvested through commercial fishing methods that harm sea turtles.[27] Specifically, it targeted shrimp and shrimp products from countries that failed to receive certification by the United States under the regulations.[28] Section 609(a) required the Secretary of State to initiate negotiations with all foreign countries to develop treaties protecting sea turtles and to report such negotiations to Congress.[29] Section 609(b) required the Secretaries of State, Commerce, and Treasury to prohibit shrimp products from entering the United States if the exporting country failed to mandate use of shrimp nets equipped with TEDs.[30]

Section 609 provided two alternative types of annual certification through which a nation could avoid the import ban.[31]

22. *See* NMFS Report, *supra* note 4; Marlo Pfister Cadeddu, Note, *Turtles in the Soup?*, 11 GEO. INT'L ENVTL. L. REV. 179, 184 (1998).

23. *See* NMFS Report, *supra* note 4.

24. 16 U.S.C. § 1531 *et. seq.* (1975).

25. *See* 52 Fed. Reg. 24,244 (1987) [hereinafter 1987 Regulations]. Five species of sea turtles fell under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*). The 1987 Regulations, prior to taking full effect in 1990, were modified so as to mandate the use of approved TEDs in areas where shrimp trawling would interact with sea turtles.

26. *See* Pub. L. No. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (Supp. IV 1992)).

27. *See id.*

28. *See* 16 U.S.C. § 1537 note ("certification" under the Turtle Conservation Amendments means that a country will be allowed to continue to export shrimp to the United States).

29. *See* § 609(a), *supra* note 3.

30. *See* § 609(b), *supra* note 3.

31. *See* 61 Fed. Reg. 17,342 (1996).

First, the United States would grant certification to countries with fishing environments that posed no threat of the incidental taking of sea turtles in the course of shrimp harvesting.[32] Second, the United States would certify harvesting nations that provided evidence of regulatory programs similar to those of the United States.[33] Absent such certification, the regulations required the United States to block the importation of shrimp and shrimp products from any non-compliant country.

The State Department elaborated the certification requirements in a series of guidelines promulgated in 1991, 1993, and 1996.[34] The 1991 guidelines narrowed the scope of Section 609 geographically to certain countries in the Caribbean/Western Atlantic region.[35] Potential administrative and economic consequences, however, delayed implementation of the law.[36] Congress realized that federal agencies would need time to develop specific guidelines and plans for regulatory enforcement.[37] Then, in 1993, the United States eliminated the Section 609 alternative certification option and required that by May of 1994 the listed countries[38] must commit themselves to 100 percent TED usage.[39] After such a commitment and the requisite Section 609(b) certification, shrimp and shrimp products could enter the United States regardless of method of harvest.

Two years later, in 1995, the United States Court of International Trade (CIT) found the guidelines limiting the scope of the law contrary to Section 609. It ordered the U.S. government to "prohibit the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce."[40] Under this ruling, the CIT

32. *See* § 609(b)(2)(C), *supra* note 3.

33. *See* § 609(b)(2)(A) and (B), *supra* note 3.

34. 56 Fed. Reg. 1,051 (1991) [hereinafter 1991 Guidelines]; 58 Fed. Reg. 9,015 (1993) [hereinafter 1993 Guidelines]; and 61 Fed. Reg. 17,342 (1996) [hereinafter 1996 Guidelines], respectively.

35. *See* 1991 Guidelines, *supra* note 34, at 1,051. Specifically, the 1991 Guidelines named Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guinea, and Brazil.

36. *See* Kibel, *supra* note 19, at 63.

37. *See id.*

38. *See* 1993 Guidelines, *supra* note 34, at 9,015. The 1993 Guidelines applied to the countries listed in the 1991 Guidelines.

39. *See id.*

40. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 579 (Ct. Int'l. Trade 1995) ["Earth Island I"]. The CIT refused a subsequent request by the

permitted affected nations four months to comply without imposing trade sanctions.[41]

In April 1996, Congress again revised the guidelines and extended Section 609 to shrimp harvested under the jurisdiction of all foreign nations.[42] In implementing Section 609(a), the guidelines assert that the import prohibitions contained Section 609 do not apply to shrimp or shrimp products harvested using sea turtle-safe methods.[43] The 1996 Guidelines further provide that the State Department may certify: (1) any harvesting nation without any of the relevant species of sea turtles living in waters subject to its jurisdiction; (2) any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles;[44] and (3) any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles cannot be found at any time.[45]

The 1996 Guidelines also instruct the State Department, under Section 609(b), to assess the regulatory program of the shrimp-harvesting nation. The Department should provide certification if the program requires the use of TEDs that are "comparable in effectiveness to those used in the United States and if it contains "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions."[46] The United States considered the average incidental bycatch "comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program."[47]

The economic reasoning and policy objectives behind Section 609 were simple. Because the United States is a large importer of shrimp and shrimp products, foreign nations have a material interest in preserving their access to this market. Conditioning access on compliance with environmental regulations would thus effectuate those regulations.[48] Moreover, Section 609 would create an even international playing field for U.S.

Department of State to postpone the May 1, 1996 deadline. *See Earth Island Inst. v. Christopher,* 922 F. Supp. 616 (Ct. Int'l. Trade 1995) [Earth Island II].

41. *See* Earth Island I, *supra* note 40.

42. *See* 1996 Guidelines, *supra* note 34, at 17,343.

43. *See id.*

44. For example, artisanal shrimping does not pose a threat to sea turtles.

45. *See id.*

46. *Id.* at 17,344. Note that any exceptions to the TED requirement "must be comparable to those [TEDs] of the United States program." *Id.*

47. *Id.*

48. *See* Kibel, *supra* note 19, at 63.

fishermen, who were already required to use TEDs under domestic law.[49]

C. THE GATT/WTO AND ENVIRONMENTAL TRADE MEASURES

An environmental trade measure is "a restriction on international trade with the announced purpose of promoting an environmental objective."[50] There are essentially two types of international trade measures: multilateral and unilateral.[51] The distinction is important because GATT and WTO policies and decisions favor multilateral agreements over unilateral trade measures.[52] Trade measures also fall into two classes of application. They may either be applied within the territory of the country adopting them, or they may be applied extraterritorially.[53]

The absence of an international judicial system that provides a comprehensive, neutral dispute resolution body able to cover conflicts such as the *Shrimp/Turtle* dispute has led to conflict and divergent policies within the international community.[54] Without a fully evolved international judicial system,

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49. *See id.* (citing *Giant Legal Victory for Sea Turtles! Viva La Tortuga* (Sea Turtle Restoration Project, San Francisco, Cal.), 1996, Issue No. 1, at 1, which reports that United States shrimp fishermen applauded the decision for "level[ing] the playing field" in the international shrimp market).

50. Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1, 3 (1993).

51. *See* Mark Foster, *Trade and Environment: Making Room for Environmental Trade Measures Within GATT*, 71 S. CAL. L. REV. 393, 410 (1998). Multilateral agreements are typically characterized as mutually agreed upon actions adopted by two or more countries. *See id.* at 413. Unilateral measures, however, are measures taken pursuant to one country's specific environmental policies, subjecting other countries to the policies and/or sanctions for failure to enforce or abide by them. *See id.*

52. *See id.* at 410. Foster argues that even though there is a distinction between the negotiation of multilateral and unilateral trade measures, enforcement of either is essentially the same because each constitutes an unsolicited infringement upon another state's trade rights. *Id.* at 412-13. Foster further argues that unilateral environmental trade measures are often crucial in changing international environmental norms and are an important catalyst for protecting the environment. *Id.* at 414-15. Foster focuses on the utility and legality of unilateral environmental trade measures, concluding that the GATT/WTO regime must allow both multilateral and unilateral trade measures under Article XX in order to maintain its legitimacy. *Id.* at 443.

53. *See id.* at 413.

54. *See* Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, *in* 2 FAIR TRADE AND HARMONIZATION 59 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 776-77 (1998).

environmental measures disputed for their effect on trade must come before a WTO Dispute Panel and, if the Panel's decision is appealed, the Appellate Body.[55] The GATT/WTO regime, however, lacks a coherent framework for assessing the trade effects of environmental measures. Dispute Panels and the Appellate Body consist mostly of experts focused on advocating free trade.[56] The WTO consistently favors the use of multilateral environmental trade measures over unilateral measures with the same goals without explicitly ruling that extraterritorial unilateral environmental trade measures are *per se* invalid.

Past decisions handed down by the GATT/WTO regime provide an important backdrop to the recent rulings in the *Shrimp/Turtle* case. These decisions analyzed trade measures imposed by the United States under Articles I, III, XI, XIII and XX of GATT.[57] In *Tuna/Dolphin I*,[58] a GATT Dispute Resolution Panel reviewed a United States embargo banning tuna imports from Mexico that did not comply with dolphin-protective provisions of the Marine Mammal Protection Act (MMPA).[59] The GATT Panel invalidated the MMPA under Article III[60] because the MMPA contained an import restriction based on the *process* by which a product is manufactured instead of a direct regulation on the *product* as a product.[61] The Panel stated that "these regulations could not be regarded as being applied to tuna prod-

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Strauss notes that there are alternate forums for achieving agreements, including the United Nations Conference on Environmental Development (Rio Conference), the Convention on Biological Diversity, and the United Nations Conference on Trade and Development. *Id.* at 819-20. Strauss argues, however, that many of these alternate forums and multilateral agreements are unfit for producing meaningful agreements or standards in a timely manner. *Id.* They also suffer because they have no binding adjudicative power. *See id.* Currently, the WTO appears to be the most effective, if not the only, dispute resolution mechanism available to handle environment-trade disputes.

55. *See* Farber & Hudec, *supra* note 54.

56. *See id.*

57. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

58. GATT Dispute Settlement Panel, *United States Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.), 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I*].

59. 16 U.S.C. §§ 1361-1407 (1988 & Supp. IV 1992).

60. Article III(4) provides the following:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT, *supra* note 57, at art. III:4.

61. *See Tuna/Dolphin I*, *supra* note 58, ¶¶ 5.13, 5.14.

ucts as such because they would not directly regulate the sale of tuna and could not possibly affect the tuna as a product."[62] The Panel, making the "process-product" distinction, took all Article III defenses away from the United States. Moreover, because the United States did not dispute Mexico's Article XI[63] claim that the embargo was a prohibited quantitative restriction, the Panel ruled in Mexico's favor.[64]

The United States argued that the MMPA regulation, even if not allowable under Article III, was justified under the exceptions detailed in Article XX.[65] The GATT Panel disagreed, focusing on the extraterritorial scope of the regulation.[66] Essentially, the Panel rejected the application of Article XX(b) and (g), finding that the exceptions do not apply to actions outside the jurisdictional borders of the member enacting the measure.[67] The Panel also held that the ban did not meet the requirements of Article XX(b)'s "necessary to protect" clause because the United States had other international methods to negotiate an agreement—even though the United States had attempted several times to negotiate multilateral agreements.[68] With respect to Article XX(g), the Panel failed to find the re-

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62. *Id.* ¶ 5.14.

63. Article XI of GATT states the following:

> 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.

GATT, *supra* note 57, at art. XI:1.

64. *See Tuna/Dolphin I*, *supra* note 58, ¶¶ 5.13, 5.14. 5.18, 5.36.

65. Article XX embodies the "General Exceptions" provisions of the GATT. The pertinent language of Article XX is:

> 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 shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .
>
> (b) necessary to protect human, animal or plant life or health; [or]
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT, *supra* note 57, at art. XX. Subsections (b) and (g) are two of the "general exceptions" listed by Article XX as immune from GATT Articles prohibiting restrictions on trade. *See id.*

66. *See id.*

67. *See Tuna/Dolphin I*, *supra* note 58, ¶¶ 5.26-5.27, 5.31-5.32.

68. *See* Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVT'L. L. REP. 10,567, 10,570 (1994).

quired relationship between the embargo and the conservation of an exhaustible natural resource.[69] The Panel did not think that the regulation, which imposed restrictions based on the actual taking rate of United States fishermen, made the MMPA either "necessary" (Article XX(b)) or "primarily aimed" at conservation (Article XX(g)).[70] The Panel held that the United States could have used less arbitrary methods to achieve the same goals.[71]

After Mexico chose to negotiate an agreement with the United States rather than pursue the formal adoption of the Panel's findings,[72] the European Union and the Netherlands again challenged the MMPA.[73] In *Tuna/Dolphin II*, the Panel focused significantly more on the Article XX exceptions than it did in *Tuna/Dolphin I*.[74] Departing from the previous ruling, the Panel deemed dolphins an "exhaustible natural resource" for purposes of the Article XX(g) exception.[75] Moreover, the Panel rejected the notion that measures under Article XX(g) could not be applied extraterritorially.[76] The Panel reasoned, however, that GATT members may not implement extraterritorial measures that *force* other GATT members to enact measures governing activities "within their own jurisdiction."[77] In other words, under *Tuna/Dolphin II*, a country may assert Article XX exceptions to support the protection of resources occurring outside its borders, but it cannot affirmatively require another country to adopt and implement specified policies and regulations.[78] Although permitting extraterritorial measures, the Panel would not justify the MMPA's intrusive requirements

69. *See Tuna/Dolphin I*, *supra* note 58, ¶ 5.28.

70. *Id.* ¶¶ 5.28, 5.33.

71. *See id.*

72. *See* Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1, 12 (1994). Prior to adoption of the WTO, for a GATT Panel finding to be binding on the countries in dispute, it must have been officially adopted by all the involved parties. *See e.g.*, GATT Dispute Settlement Panel, United States-Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) ¶ 5.26 (1990).

73. *See* GATT Dispute Settlement Panel, *United States—Restrictions on Imports of Tuna*, 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II*].

74. *See id.* The Panel concluded that the United States violated Article XI and that Article III was inapplicable, following the precedent of the *Tuna/Dolphin I*.

75. *Id.* ¶ 5.13.

76. *See id.* ¶ 5.15.

77. *Id.* ¶ 5.15-5.20.

78. *See Tuna/Dolphin II*, *supra* note 73, ¶¶ 5.23-5.32. Similarly, the Panel analyzed the embargo under Article XX(b), determining that the extrajudicial

under the "necessary/related" clauses of Article XX (b) and (g). It should be noted, however, that neither *Tuna/Dolphin I* nor *Tuna/Dolphin II* constitutes binding precedent on the WTO, because neither was formally adopted by the GATT contracting parties.[79]

In 1996, the WTO Appellate Body took a different path to defeat a United States environmental trade measure. *U. S. Gasoline*[80] involved provisions of the Clean Air Act Amendments of 1990 that required changes in the composition of gasoline sold to consumers.[81] Instead of focusing on the language of Article XX(b) and (g), the Appellate Body turned its attention to Article XX's chapeau for guidance.[82] It reads as follows:

> 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 Member of measures [meeting the requirements of the any of the exceptions listed (a) through (j)].[83]

The Appellate Body in *U.S. Gasoline* found that the Clean Air Act Amendments met the Article XX(g) requirements and reversed the Panel on two grounds. First, the Panel erred when it concluded that "'the less favourable baseline establishments [sic] methods' were *not* primarily aimed at the conservation of exhaustible natural resources" for purposes of Article XX(g) analysis.[84] According to the Appellate Body, the correct question to ask was whether the measure itself was related to the conservation of natural resources, not the "less favourable treatment." The Appellate Body found that the Gasoline rules did indeed "relat[e] to" conservation of a resource.[85] The Panel also erred by misinterpreting Article XX(g) to mean that the measure

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nature of the measure was allowable, but forcing other countries to follow was not justified under the "necessary" requirement. *See id.* ¶¶ 5.34-5.39.

79. *See* Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 311 (1997); DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 268-69 (1994).

80. World Trade Organization Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 35 I.L.M. 603 (1996) [hereinafter *U.S. Gasoline*].

81. *See* Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 274 (1997).

82. *See id.* at 274-75.

83. *Id.*

84. *U.S. Gasoline, supra* note 80, at 620.

85. *Id.*

must be "necessary or essential."[86] The Appellate Body reversed, stating that the Panel had "overlooked a fundamental rule of treaty interpretation"—namely, that a treaty should be interpreted in accordance with its ordinary meaning in the light of its object and purpose.[87]

Nevertheless, the Appellate Body held that, under the chapeau, the United States measure constituted "unjustifiable discrimination" and was a "disguised restriction on international trade."[88] The Appellate Body thus opened the Article XX(b) and (g) doors to environmental trade measures only to slam them shut with its restrictive interpretation of the chapeau.[89] In analyzing the chapeau, the Appellate Body added teeth to a provision in GATT that had seen little attention. The Appellate Body noted that the purpose and object of the chapeau, whose conditions must be met in order to invoke the exceptions following it, was to avoid the abuse and illegitimate use of Article XX.[90] The Appellate Body reasoned that the United States' failure to meet the requirements of the chapeau barred it from invoking Article XX's exceptions. Therefore the Clean Air Act Amendments were invalid.[91]

In summary, the *Tuna/Dolphin I* case held that extraterritorial enforcement of any regulation is contrary to GATT policies. In *Tuna/Dolphin II,* the WTO reopened the possibility that countries may enforce environmental regulations abroad, but only if they do not infringe the sovereignty of other member countries. While the decision in *U.S. Gasoline* allowed environmental trade measures to fit within the Article XX exceptions,

86. *Id.*

87. *Id.* at 620-22 (citing the Vienna Convention on the Law of Treaties, opened for signature May 3, 1969, art. 31, 1155 U.N.T.S. 331).

88. *U.S. Gasoline, supra* note 80, at 633.

89. *See* Steve Charnovitz, *Future Challenges: New Substantive Areas Environment and Health Under WTO Dispute Settlement*, 32 INT'L LAW. 901, 910-11 (Fall 1998).

90. *See U.S. Gasoline, supra* note 80, at 626. The Appellate Body stated that the United States could have met the requirements of the chapeau by applying less arbitrary and discriminatory means. *See id.* at 626-33. The Appellate Body makes clear that there is a difference between the discrimination that results in a violation of Article III and the "unjustifiable" discrimination that constitutes a violation of the chapeau. *See id.* at 627. If the Article XX and Article III "discrimination" provisions are interpreted as the same standard—in other words that a simple discrimination on trade violates the chapeau—then Article XX would be meaningless. *See id.* The Appellate Body supported this conclusion invoking the Vienna Convention Standard of Interpretation, which requires that a provision is not to be interpreted so as to empty another provision of all meaning. *See id.*

91. *Id.* at 633.

the WTO looked unfavorably upon the unilateral nature of the challenged measure. It is against this backdrop that the United States embargo on shrimp and shrimp products harvested without the use of TEDs came to the WTO Dispute Panel and to the Appellate Body.

II. THE DISPUTE—POSITIONS OF THE VARIOUS KEY ENTITIES IN THE DEBATE

A. THE CHALLENGING COUNTRIES' POSITION

The Asian delegations asserted that Section 609 was arbitrary and that countries should not impose unilateral measures affecting trade regardless of the environmental grounds.[92] The complaints filed before the Dispute Panel alleged that the United States violated Articles I,[93] XI, and XIII, and that these violations constituted "a nullification and impairment of benefits" granted under GATT.[94] The challengers also contended that the United States' claim of justification under Article XX was incorrect.[95]

India, Pakistan, and Thailand claimed that Section 609 violated Article I[96] because physically identical shrimp from different nations were being treated differently based on the method of harvest and the policies of the foreign government under whose jurisdiction the shrimp were harvested.[97] They also argued that, under the certification requirement, shrimp harvested by an uncertified country using the correct harvesting method would be forbidden from entering the United States, while shrimp harvested using the same method by a certified

92. *See* Appellate Body Report, *supra* note 6, ¶ 35. The delegation included India, Pakistan, Thailand, and Malaysia. *See generally* Appellate Body Report, *supra* note 6 (describing the Asian delegation).

93. Malaysia did not join in the argument that the United States' provision violated Article I.

94. First Submission of Thailand, World Trade Organization Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products, *available in* 1997 WL 304829, at *22 (W.T.O. May 20, 1997).

95. *See id.*

96. Article I of GATT provides in its pertinent part that:

> [W]ith respect to all rules and formalities in connection with importation and exportation . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 57, at art. I:1.

97. *See id.* at *9.

country would be granted entry.[98] India, Pakistan and Thailand further contended that the embargo was inconsistent with the most-favored-nation ("MFN") principle embodied in Article I because the law discriminated between harvesting nations whose conservation policies differed from those of the United States and harvesting nations with the same equipment and method of harvest but with different certification status.[99]

All four challengers cited Article XI, which eliminates quantitative restrictions on imports and exports, including outright quotas and other restrictions made effective through import or export licenses.[100] The countries argued that the shrimp embargo was "a prohibition or restriction" on importation of shrimp and shrimp products and that requiring all countries to install TEDs on shrimp vessels before being allowed to export harvested shrimp constituted an "unreasonable restriction" on trade.[101]

The challengers also claimed that Section 609 violated Article XIII[102] because it allowed the United States to permit or deny entry to shrimp or shrimp products based on the method of harvest.[103] Because the method of harvest does not affect the nature of the product's physical characteristics, end use, or tariff classifications, the embargo provided for differential treatment of "like products" from certified and uncertified nations, thereby violating Article XIII.[104] In the alternative, the countries argued that even if the method of harvest affects the nature of the product, the ban nevertheless violated Article XIII. Countries yet to receive certification could not export their shrimp to America even though they were harvesting shrimp with TEDs, while certified countries using the same methods could.[105] Be-

98. *See id.*

99. *See* First Submission of Pakistan, World Trade Organization Panel on United States— Import Prohibition of Certain Shrimp and Shrimp Products, *available in* 1997 WL 304819 (W.T.O. May 20, 1997), at *4.

100. *See* Submission of Thailand, *supra* note 94, at *7.

101. Submission of Pakistan, *supra* note 99, at *4.

102. Article XIII of GATT requires that:

> No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party . . . unless the importation of the like product of all third countries is similarly prohibited or restricted.

GATT, *supra* note 57, at art. XIII:1

103. *See* Submission of Thailand, *supra* note 94, at *8.

104. *Id.*

105. *See id.* at *8-10.

cause identical products received dissimilar treatment, Section 609 violated Article XIII.[106]

Finally, the countries disputed the contention that the shrimp embargo fit under exceptions contained in XX(b) and XX(g). They contended that the policy underlying the embargo did not fit within XX(b). The challenging countries reasoned that the Article XX(b) exception only encompasses measures "necessary to protect human, animal or plant life or health."[107] Because the Article does not *expressly* permit a contracting party to take measures concerning the humans, animals or plants located *within the jurisdiction of another contracting party*, Article XX must not have been intended to allow such measures. The challenging countries argued that because the text is silent on exactly where an enacting member may take measures to protect the environment, the GATT text should be construed in light of Articles 1.2, 2.1 and 2.7 of the Charter of United Nations.[108] The U.N. Charter provides for the sovereignty of individual nations and non-interference in the internal affairs of other nations.[109] The countries asserted the classic rebuttal to an Article XX(b) defense—namely, that Section 609 was not "necessary" to fulfill policy objectives and that it constituted arbitrary and unjustified discrimination between contracting parties, thereby making it a disguised restriction on international trade.[110]

The challenging countries argued that Article XX(g) was inapplicable to Section 609 because the Article XX(g) exception applies only to a finite physical resource located inside the jurisdiction of the member enacting the measure.[111] The countries first reasoned that turtles are not a finite resource such as minerals, and therefore Article XX(g) does not apply to Section 609.[112] The challengers further reasoned that, under a strict reading of the Article XX(g) exception, Section 609 should not have applied to natural resources located outside the jurisdiction of the contracting party enacting the measure.[113] The countries further relied on the drafting history of GATT Article XX and rules of interpretation to find the embargo outside the

106. *See id.*
107. *Id.* at *10.
108. *See id.*
109. *See id.*
110. *Id.* at *13-15.
111. *See* Submission of Thailand, *supra* note 94, at 13-15.
112. *See id.* at *17-18.
113. *See id.* at *18-19.

intended scope of the exceptions.[114] The challengers also noted that the application of Article XX(g) to Section 609 uncovered several deficiencies in the embargo: first, the United States embargo did not have the requisite policies related to conservation of natural resources; second, the embargo itself was not sufficiently related to the protection of sea turtles; and third, Section 609 had been applied in an arbitrary and unjustifiable manner constituting discrimination and a disguised restriction on international trade.[115]

All the challengers complained that they had historically protected sea turtles and that the United States embargo constituted an unwanted intrusion on their sovereign rights. The challengers thus argued that because they implemented sea turtle conservation measures, there was no need for the United States to impose its own extraterritorial measures. For example, Thailand argued that its culture "embraces a traditional belief that it is sinful to kill sea turtles."[116] Additionally, Thailand noted that three branches of its government are responsible for implementing conservation legislation, education, and regulatory programs sufficient to protect the sea turtles indigenous to the country.[117] Furthermore, the countries argued that although conservation is an important goal, it fails to justify unilateral actions that infringe upon the sovereign rights of member countries to set environmental and conservationist policies.

In response to the United States' appeal, the challengers maintained that the Panel's ruling on the chapeau of Article XX[118] was correct.[119] The challenging countries argued that Section 609 failed to meet the necessary standards because conditioning access to markets for a given product upon the adoption of certain policies violated GATT:[120]

> If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist. By preventing the abuse of Article XX, the chapeau protects against threats to the multilateral trading system. The prevention of abuse and the prevention of threats

114. *See id.* The countries challenging the measure argued that the *Tuna/Dolphin II* decision was "not instructive because it fails to take this drafting history into account." *Id.*

115. *See id.* at *20-22.

116. *Id.* at *6.

117. *See id.*

118. *See supra* note 65 (setting forth the chapeau of art. XX).

119. *See* Appellate Body Report, *supra* note 6, at ¶ 34.

120. *See id.* ¶ 35.

> to the multilateral trading system are therefore inextricably linked to the object, purpose and goals of Article XX of the GATT 1994.[121]

B. THE UNITED STATES' POSITION

United States trade experts and officials alleged several fundamental legal flaws with the May 1998 Dispute Panel ruling. In particular, the United States claimed that the Panel incorrectly found that Section 609 was outside the scope of Article XX.[122] The United States asserted that Article XX plainly authorizes the use of trade sanctions to support Section 609's requirement of TEDs on commercial fishing nets.

The United States conceded that Section 609 and its implementing regulations constituted "prohibitions and restrictions" on trade under Article XI of GATT.[123] The United States argued that Article XX(b) and (g) of GATT justify Section 609's violation of Article XI.[124] The United States supported this argument by claiming that the TED requirement was necessary to protect animal life and was related to the conservation of an exhaustible natural resource.[125]

The United States also contended that the Panel erred in its application of the Article XX chapeau. According to the United States, in adopting the "threat to the multilateral trading system" analysis, the Panel ignored the ordinary meaning of the text.[126] The Panel and Appellate Body stated that acting unilaterally and failing to negotiate adequately with other member countries before enacting the measure constituted a threat to the multilateral trading system.[127] The United States argued, however, that nothing in Article XX requires a Member to seek to negotiate an international agreement instead of or before adopting unilateral measures.[128] Regardless, the United States claimed that it did offer to negotiate, but the complainants did not reply.[129] According to the United States, by expanding the

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121. *Id.* ¶ 10.
122. *See id.*
123. *Id.*
124. *See id* ¶ 11.
125. *See id.*
126. *Id.* ¶ 13; *accord U.S. Gasoline, supra* note 80, at 20 (stating that "the basic international law rule of treaty interpretation . . . that the terms of the treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here . . .).
127. *See* Panel Report, *supra* note 2, ¶¶ 7.45, 7.49-7.55; Appellate Body Report, *supra* note 6, ¶¶ 166-168, 171-173.
128. *See* Panel Report, *supra* note 2, ¶¶ 7.45-7.46.
129. *See id.*

ordinary meaning of the text to encompass a broader, more substantive inquiry, the Panel adopted "an entirely new obligation under Article XX of the GATT 1994."[130]

The United States further contended that the Panel misapplied the plain and ordinary meaning and context of the term "unjustifiable discrimination."[131] The United States argued that by interpreting the chapeau prohibition against "unjustifiable discrimination" to exclude measures which *result* in "reduced market access" or "discriminatory treatment," the Panel erased the exceptions set forth in Article XX.[132] In support of this assertion, the United States turned to *U.S. Gasoline*.[133] By engaging in hypothetical speculation regarding the effects of other measures in differing circumstances while ignoring the circumstances of the case at hand, the Panel violated the Appellate Body's instructions in *U.S. Gasoline* that Article XX must be applied on a "case-by-case" basis with careful attention paid to the particular facts of the case at hand.[134] According to the United States, in the case at hand *U.S. Gasoline* required the conclusion that Section 609 did not constitute "unjustifiable discrimination."[135]

The United States asserted that the proper inquiry under the Article XX chapeau is whether the action by the member has a non-protectionist rationale, such as a rationale based on the policy goals of Article XX(b) and (g).[136] The United States argued that Section 609, either on its face or as applied, did not threaten the multilateral trading system under this interpretation.[137] The United States further argued that Section 609 differentiated between countries on the basis of risk posed to the endangered species sought to be protected. The measure did not treat differently those countries whose shrimp trawling industries posed similar risks to sea turtles, nor did it treat differently United States and foreign shrimp fisherman.[138] The United States concluded that because Section 609 did not unjustifiably discriminate between similarly situated members, it satisfied the Article XX chapeau. Therefore the Panel should have

130. Appellate Body Report, *supra* note 6, ¶ 13.
131. *Id.* ¶ 11.
132. *Id.* ¶ 15.
133. *See id.* ¶ 19.
134. *Id.*
135. *Id.* ¶ 22.
136. *See id.* ¶ 15.
137. *See id.* ¶¶ 19-21.
138. *See id.* ¶ 21.

allowed the analysis to proceed to the exceptions contained within Article XX.

Turning to those exceptions, the United States claimed that Section 609 met every element required under Article XX(g). First, sea turtles were an important, exhaustible natural resource found in the challenging countries' waters and facing the threat of extinction. Second, Section 609 was substantially related to the conservation of those turtles.[139] Alternatively, the United States contended that the Panel should have found Section 609 "necessary to protect human, animal or plant life or health" within the meaning of Article XX(b).[140]

Finally, the United States argued that the Panel inappropriately applied the object and purpose of the Agreement Establishing the World Trade Organization.[141] The United States claimed that the Panel committed legal error by holding that, under GATT 1994, trade concerns must prevail over all other concerns arising under GATT rules.[142] While the first clause of the preamble to the WTO Agreement calls for the expansion of trade and economic relations, the same clause demands that such trade and economic relations allow for "optimal use of the world's resources in accordance with the objective of sustainable development . . . [and should seek to] protect and preserve the environment."[143] The United States called the Panel's interpretation a "one-sided view of the object and purpose of the WTO Agreement"[144] and stated that the ruling should have been overturned.

United States Trade Representative Charlene Barshefsky responded by declaring that the Panel's decision "does not affect

139. *See id.* ¶¶ 26-27.

140. *Id.* ¶ 28

141. *See id.* ¶ 16; *see also* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex II, art. 3, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 1, (1994), 33 I.L.M. 1125 (1994) [hereinafter the DSU]. The DSU consists of twenty-seven articles and four appendixes. *See id.* The purpose of the WTO dispute settlement system is to confer predictability and security of outcome upon an international legal system that is lacking such attributes. *See id.* The DSU established a judicial-type settlement system, in contrast to the earlier, less binding system under the GATT. *See id.*

142. *See* Appellate Body Report, *supra* note 6, ¶ 16.

143. *Id.* ¶ 17 (quoting the WTO Agreement).

144. *Id.*

[the United States'] efforts to protect the sea turtles."[145] She further averred that "the WTO Panel reached the wrong decision."[146] Barshefsky noted that the decision was

> narrowly cast, focusing on one aspect of the United States law that conditions shrimp imports on the adoption by the exporting nation of a specific sea turtle conservation policy . . . . The United States is committed to the protection of the environment and, in particular, protection of endangered species [and] will continue to play a leadership role in promoting international conservation measures to protect endangered sea turtles.[147]

In response to the Appellate Body decision, Barshefsky stated that "[t]he Appellate Body has rightly recognized that our shrimp-turtle law is an important and legitimate conservation measure and not protectionist."[148] "The Appellate Body Report," said Barshefsky, "does not suggest we weaken our environmental laws in any respect, and we do not intend to do so. . . . We will evaluate our options in light of what best achieves our firm objective of protecting endangered sea turtles."[149]

On November 25, 1998, the United States informed the WTO that it intended to comply with the recent ruling, but it did not give any specific details as to when and how it would come into compliance.[150] The United States reiterated that the decision did not suggest that the United States weaken its environmental laws and actually welcomed the portion of the ruling that declared the environmental purpose of the restriction legitimate.[151]

C. THE POSITION OF NATIONAL AND INTERNATIONAL ENVIRONMENTAL GROUPS

Non-governmental organizations and other influential international organizations backed the United States and voiced their opposition to both the Panel and the Appellate Body Reports. The National Wildlife Foundation ("NWF"), which actively campaigns to protect the endangered sea turtles,

145. *WTO Shrimp-Turtle Ruling Will not Halt U.S. Protection Efforts Barshefsky Vows*, INT'L TRADE DAILY (BNA) *available in* Westlaw database BNA-IED (Apr. 9, 1998).

146. *Id.*

147. *Id.*

148. *Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules*, *supra* note 12.

149. *Id.*

150. *See Trade: U.S. Says it Will Comply with WTO Ruling on Shrimp-Turtle, but Fails to Say When*, INT'L TRADE DAILY (BNA) *available in* Westlaw database BNA-IED (Dec. 1, 1998).

151. *See id.*

responded to the ruling of the Dispute Panel by urging the Clinton administration to appeal, noting that the Panel's decision undermined legitimate efforts to conserve wildlife.[152] In its analysis, the NWF argued that "[s]hrimping without the use of TEDs causes more sea turtle deaths than all other human causes combined."[153] The NWF also asserted that the decision declared that "trade trumps wildlife conservation"[154] and argued that trade rules need to recognize the legitimacy of environmental considerations. Finally, the NWF commented that the international judicial process needs to reflect "the democratic principles of due process."[155]

In an *amicus curiae* brief submitted to the WTO Panel, the World Wildlife Foundation (the Foundation) argued that the WTO would be strongly criticized if it continued to ignore important environmental concerns.[156] The Foundation declared that by failing to consider environmental interests in the Panel rulings, the WTO undermined multilateral environmental agreements.[157] The Foundation also called the decision a "blow against endangered sea turtles" and asserted that the WTO had "elevated concerns for market access over concerns for critically endangered species and the environment."[158] "[The WTO] has relied on a contorted and dangerous interpretation of WTO rules—ignoring language that plainly allows non-projectionist limits on international commercial activity when necessary to protect the environment."[159]

Charles Arden-Clarke, head of the trade and investment unit at the Worldwide Fund for Nature International (WWF), commented that despite some positive aspects of the Appellate Body ruling, the decision "still prevents countries from taking unilateral action on the global commons when irreversible environmental damage takes place."[160] He concluded that "[i]t will

152. *See* National Wildlife Federation, *Breaking News: WTO Further Endangers Sea Turtles* <http://ww.nwf.org/nwf/international/trade/turtles/analysis.html>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See Shrimp: WTO's Review of Dispute Panel's Ruling on U.S. Ban on Shrimp Imports Completed*, INT'L TRADE DAILY (BNA) *available in* Westlaw database BNA-BTD (Aug. 21, 1998).

157. *See id.*

158. *Trade: WTO Shrimp-Turtle Ruling Will Not Halt U.S. Protection Efforts, Barshefsky Vows, supra* note 145.

159. *Id.*

160. *Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules, supra* note 12.

be virtually impossible for any country to comply with these [rulings]. . . . If they [the WTO Panel and Appellate Body] don't allow it in this case, where the measure in question is clearly not protectionist and where the protection of sea turtles is covered under international agreements, when are they ever going to allow it?"[161] While the Appellate Body "moved some way to recognizing environmental concerns," the WWF noted that it also erected a "new and demanding set of tests" regarding the use of trade measures for environmental purposes.[162] Similarly, Stewart Elgie, an attorney with the Sierra Legal Defense Fund, opined that the GATT and WTO are "willfully blind" in ignoring serious environmental issues.[163] The Center for International Environmental Law, in conjunction with the Center for Marine Conservation, Defenders of Wildlife, and the NWF, stated that the ruling "exposes the failure of current international trade rules to adequately balance trade and environmental priorities."[164]

D. THE DECISION AND POSITION OF THE WTO

1. WTO Dispute Panel Decision

The WTO Dispute Panel found the ban inconsistent with Article XI:1[165] and unjustifiable under Article XX.[166] The Panel also found that the "[e]nvironmental issues should be resolved by international agreements, not by unilateral sanctions."[167] The Panel concluded "that the issue [in dispute] was not the urgency of protecting sea turtles" but whether countries adopting and implementing environmental protections do so consistently with the GATT/WTO policies and provisions.[168]

In deciding that the exceptions set forth in Article XX do not apply to Section 609, the Panel focused on the chapeau. The

161. *Id.*
162. *Id.*
163. *See Treaties: Product Process Actions Taken by U.S. Pose Threat to Trading System, Lawyer Says,* INT'L TRADE DAILY (BNA) *available in* Westlaw database BNA-BDT (Sept. 24, 1998).
164. *Trade: WTO Shrimp-Turtle Ruling Will Not Halt U.S. Protection Efforts, Barshefsky Vows*, *supra* note 145.
165. Having deciding that Article XI was violated, the Panel did not address the challenging countries' arguments that Section 609 violated Articles I and XII. *See* Panel Report, *supra* note 2, ¶ 8.1.
166. *See id.* ¶ 7.17; *see also* John R. Schmertz & Mike Meier, *WTO Circulates Dispute Settlement Report in Shrimp/Turtle Case, Finding U.S. Violations of GATT*, 4 INT'L L. UPDATE 74, 74 (June 1998).
167. Schmertz & Meier, supra note 166.
168. *Id.*

specific language cited by the Panel stipulates that no trade measure may "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[169] The Panel held that because the TED requirement aids protection of endangered species, it is not "arbitrary." However, the Panel found the TED restriction "unjustifiable" for purposes of the preamble in light of the free-trade focus of GATT/WTO.[170] The Panel noted that the GATT/WTO regime focuses on the facilitation of trade and liberalization of market access.[171] In light of this trade liberalizing objective, the Panel interpreted the chapeau to allow members to deviate from GATT provisions only if they do not undermine multilateral trading objectives, despite the exceptions noted in Article XX.[172] Because the TED restriction constituted a unilateral restriction on international trade and an unjustifiable discrimination between countries,[173] the Panel deemed it outside the scope of Article XX and a violation of GATT.[174]

Feeling pressure from the United States, Canada, and international environmental groups, the WTO Director-General Renato Ruggiero noted that the WTO "should not be asked to act as the 'judge, jury and police' of global environmental and ethical values."[175] He added that "[a]sking the WTO to solve issues which are not central to its work—especially when these are issues which governments have failed to address satisfactorily in other context—is not just a recipe for failure. It could do untold harm to the trading system itself."[176] Other trade experts, in-

169. Panel Report, *supra* note 2, ¶ 7.25.

170. *Id.* ¶ 7.49.

171. *See id.* ¶ 7.44.

172. *See id.* ¶¶ 7.44-7.49.

173. *See supra* notes 130-31 and accompanying text. Although the Panel did not find the issue dispositive, it did comment that lack of adequate negotiations with other member countries is inherent in unilateral measures and, as such, are contrary to the multilateral trading system. *See also* Panel Report, *supra* note 2, ¶ 7.55 (stating that "[t]he negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.")

174. *See id.* ¶ 7.62. The Panel, finding that Section 609 was stopped at the gates of the chapeau, did not consider whether Section 609 would meet the scope and requirements of Article XX(b) or (g). *See id.*

175. *Trade: WTO Cannot Be "Judge, Jury, Police" of Environmental Issues, Ruggiero Says*, INT'L TRADE DAILY (BNA) *available in* Westlaw database BNA-BTD (Mar. 18, 1998).

176. *Trade: WTO Shrimp-Turtle Ruling Will Not Halt U.S. Protection Efforts, Barshefsky Vows*, *supra* note 145; *see also Trade: WTO Cannot Be "Judge, Jury, Police" of Environmental Issues, Ruggiero Says*, *supra* note 175.

cluding former WTO Dispute Panel members, agree that the decision exemplifies the inability of the WTO to deal with complicated issues which intermingle environmental and international trade policies.[177] Experts also note that the WTO is increasingly faced with the tendency of countries to bring before it disputes on issues that those countries failed to address in earlier negotiating rounds.[178]

2. *Holding of the Appellate Body*

The Appellate Body upheld the Dispute Panel ruling on different grounds, but it overturned several key considerations of the Panel.[179] The Appellate Body found the Panel's conclusion flawed, largely "from the fact that the Panel disregarded the sequence of steps essential for carrying out" a proper analysis under Article XX.[180] A proper analysis, according the Appellate Body, requires examining the measure under the general exceptions allowed by Article XX and then, if qualifying, appraising its application under the chapeau of Article XX.[181]

The Appellate Body also ruled that the Panel failed to apply "the customary rules of interpretation of public international law" as required by the DSU.[182] The Appellate Body disagreed with the Panel's analysis because the Panel "looked into the object and purpose of the whole of GATT 1994 and the WTO Agreement" rather than "the object and purpose of the chapeau of Article XX" alone.[183] By doing this, the Panel reached an overly

177. *See Trade: WTO Cannot Be "Judge, Jury, Police" of Environmental Issues, Ruggiero Says*, *supra* note 175. One notable trade expert speaking out about the inadequacies of the WTO was Thomas Cottier, a professor of law at the University of Bern, Switzerland. Professor Cottier has served on several former WTO Dispute Panels.

178. *See id.*

179. *See Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules*, *supra* note 12.

180. Appellate Body Report, *supra* note 6, ¶ 117.

181. *See id.* para. 118.

182. *Id.* ¶ 114. The Appellate Body noted that the DSU rules call for an examination of the "ordinary meaning of the words of a treaty, read in their context, and in light of the object and purpose of the treaty involved." *Id.* The Appellate Body held that the Panel disregarded the *U.S. Gasoline* instructions that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied." *Id.* ¶ 115 (citation omitted). *See also supra* note 141 and accompanying text (defining and explaining the DSU system).

183. Appellate Body Report, *supra* note 6, ¶ 116.

broad formulation of the chapeau, thus creating "a broad standard and a test" not within the text of Article XX.[184]

Having reversed the Panel's analysis and conclusion regarding Section 609 under the chapeau of Article XX, the Appellate Body continued where the Panel left off.[185] The Appellate Body noted that the United States' primary claim was that Section 609 qualified under Article XX(g). The first level of analysis, then, must ask whether the measure concerns conservation of "exhaustible natural resources."[186] Rejecting the challenging countries' argument that Article XX(g) covers only mineral and non-living resources and construing the term "natural resources" more broadly, the Appellate Body determined that the exhaustibility of the species combined with their migratory patterns and status as an endangered species qualified sea turtles as an "exhaustible natural resource."[187]

The Appellate Body also determined that there must be a reasonable relationship between a measure's purported purpose of conserving exhaustible natural resources and the means applied in effectuating that purpose.[188] The Appellate Body determined that Section 609 and its implementing regulations were directly connected with their purpose of conserving sea turtles.[189] Section 609 therefore related to the conservation of an exhaustible natural resource within the meaning of Article XX(g).[190] Having thus decided that Article XX(g) provided a justification for Section 609, the Appellate Body found it unnecessary to analyze the measure in terms of Article XX(b).[191] The Appellate Body then noted that even if Section 609 fell under subsection (b) or (g), it must also satisfy the requirements of the introductory clauses in the chapeau of Article XX.[192] The Appellate Body rejected the United States' argument that if a policy measure falls within the terms of Article XX (b) or (g), then the

184. *Id.* ¶¶ 116-122. *See also Trade: WTO Upholds Ruling that U.S. Restrictions Linked to Sea Turtles Violate Trade Rules*, *supra* note 12.

185. The Appellate Body stated that Article 17 of DSU grants the Panel jurisdiction to make a finding on a legal issue which was not addressed by the Panel. *See* Appellate Body Report, *supra* note 6, ¶ 123.

186. *Id.* ¶ 126.

187. *Id.* ¶¶ 128-134.

188. *See id.* ¶¶ 137, 141.

189. *See id.* ¶¶ 141-142

190. *See id.*

191. *See id.* ¶ 146. The Appellate Body noted that the United States, in its appeal, invokes Article XX(b) only if and to the extent that Section 609 falls outside the scope of Article XX(g).

192. *See id.* ¶ 147.

measure necessarily complies with the requirements of the chapeau.[193]

The Appellate Body concentrated on the three standards contained in the chapeau that, if met, would cause a measure to fail. First, the measure must result in *discrimination*.[194] Second, the discrimination must be *arbitrary* or *unjustifiable* in character.[195] Third, the discrimination must occur *between countries where the same conditions prevail*.[196] Applying these standards, the Appellate Body held that Section 609 constituted unjustifiable discrimination because the *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of the administrators, required that WTO Members adopt regulatory programs not only *comparable* to but *essentially the same as* those applied by United States vessels.[197] The Appellate Body reasoned that if Section 609 required countries to apply "essentially the same" standard as that applied to United States vessels, then the measure constituted "a rigid and unbending standard by which the United States officials determine whether or not countries will be certified."[198] Because Section 609 did not take into consideration conditions unique to each member's territory, the measure promoted the differential treatment of countries desiring certification.[199] The Appellate Body also ruled that the United States had exerted different levels of effort in helping countries come into compliance with the required TED technology.[200]

The Appellate Body then questioned whether 609 had been applied in a manner constituting "arbitrary discrimination." The Appellate Body stated that "[t]here appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States."[201] Because the application of

193. *See id.* ¶ 149.
194. *See id.* ¶ 150.
195. *See id.*
196. *See id.*
197. *See id.* ¶ 163.
198. *Id.*
199. *See id.* ¶ 164. The Appellate Body also noted that the United States had negotiated with certain countries more than others. *See id.* ¶ 172. Thus, the Appellate seemed to hint that the lack of uniform negotiations prior to implementing Section 609 contributed to the determination that Section 609 was discriminatory. *See id.* ¶ 172.
200. *See id.* ¶ 175.
201. *Id.* ¶ 181.

Section 609 constituted arbitrary and unjustifiable discrimination, it was contrary to the requirements of the chapeau of Article XX.[202] Finding Section 609 contrary to the chapeau, despite the determination that Article XX(g) was applicable, the Appellate Body ruled that Section 609 does not qualify for exemption under any of the subsections of Article XX.[203]

Recognizing the political sensitivity and past turbulence of trade-environment issues, the Appellate Body publicly noted their concern for environmental policies:

> 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 other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[204]

The Appellate Body deemed Members free to adopt their own environmental policies "aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*."[205]

For the above reasons, the Appellate Body reversed the Panel's finding that Section 609 was not within Article XX's exceptions. Section 609, while justified under Article XX(g), failed to meet the requirements of the chapeau of Article XX. In its recommendations, the Appellate Body suggested that the United States bring Section 609 into conformity with the obligations of the United States under the WTO Agreement.[206]

III. CRITICAL ANALYSIS OF THE DISPUTE PANEL AND WTO APPELLATE BODY HOLDINGS

The Dispute Panel and Appellate Body reports contain significant problems. Each bends the text of GATT in order to find extraterritorial unilateral regulations *per se* invalid because they run contrary to the WTO's overriding policy to facilitate trade internationally. Both reports are thus consistent with the WTO's unfortunate tendency to compromise environmental issues for the sake of increased trade levels.

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202. *See id.* ¶ 186.
203. *See id.*
204. *Id.* ¶ 185.
205. *Id.* ¶ 186.
206. *See id.* ¶¶ 187-188.

A. DISPUTE PANEL HOLDING

The Dispute Panel ruling attempts to fashion a new test applicable to unilateral but not multilateral environmental trade measures despite the developments advanced by *Tuna/Dolphin I, Tuna/Dolphin II,* and *U.S. Gasoline.* The Panel found that Section 609 violated Article XI:1 of GATT because it created a restriction on trade.[207] Assuming *arguendo* that Section 609 violated Article XI:1[208] (or, for that matter, any provision in Articles I or XIII), the only real issue lies in whether the United States may justify its action under an Article XX exception. If applicable, an Article XX exception renders moot any discussions regarding the Article III "process/production" distinction.[209] It also makes any analysis under Article XIII's prohibition of "differential treatment of like products" non-dispositive.[210] Simply stated, if the United States can justify its actions under either Article XX(b) or XX(g), regardless of other GATT violations, Section 609 should be upheld.

The Panel, however, found a way to avoid directly addressing whether Section 609 met the elements of Article XX(b) or (g). The Panel looked exclusively to the chapeau, but concluded that the chapeau's "arbitrary or unjustifiable discrimination" clause was silent as to whether Section 609 was within Article XX's scope. For guidance in interpreting the chapeau, the Panel looked to GATT's broad purposes of opening international market access and promoting free trade.[211] With these purposes in mind, the Panel decided that the correct interpretation of the chapeau only allows Article XX exceptions if members "do not undermine the WTO multilateral trading system."[212] The Panel, under this new interpretation, ruled that Section 609 threatened to undermine the multilateral trading system and therefore fell outside the scope of the chapeau.[213]

The Panel, in creating this new standard for trade-environment disputes under the chapeau, stripped the authority for environmental protection granted to individual nations by Article

207. *See* Panel Report, *supra* note 2, ¶ 7.17.

208. It is important to mention that there are arguments beyond the scope of this Note stating that the "product-production" distinction followed by the Panel and similar to that of the *Tuna/Dolphin* decisions may in itself have interpretive flaws.

209. *See supra* note 63.

210. *See supra* notes 102 and 106 and accompanying text.

211. *See* Panel Report, *supra* note 2, ¶ 7.43.

212. *Id.* ¶ 7.44, 7.45.

213. *See id.* ¶ 7.61.

XX. The very nature of an exception allows something that would not normally qualify under the general requirements to be justified in a particular situation. The Panel's interpretation of the chapeau raises the bar to a seemingly unattainable level. Any measure creating a prohibition or restriction on trade may violate Article XI; yet, at the same time, all unilateral measures can be seen as a threat to the multilateral trading system and therefore fall outside the scope of the exceptions. Under this new standard, then, no unilateral environmental measure amounting to a restriction on trade can be sustained.[214] The exceptions in Article XX may never apply.[215]

The Panel realized that, after the *Tuna/Dolphin* and *U.S. Gasoline* decisions, the WTO had already conceded that extra-territorial environmental trade measures were permissible and that the Article XX exceptions encompassed the protection of endangered species. The Panel had to find other means to dismantle the United States' shrimp embargo, and it therefore blue penciled its own interpretation into GATT categorically prohibiting any unilateral measure with a negative impact on the flow of trade.[216] This interpretation lacks basis in the text of Article XX.[217] Article XX carefully carves out several exception, recognizing that in certain circumstances a unilateral measure may be justified to protect an important environmental resource despite the measure's effect on trade.[218] Article XX(b) provides an exception for measures, whether unilateral or multilateral, "necessary to protect human, animal or plant life or health"[219]; Article XX(g) provides the same exception for measures "relating to the conservation of exhaustible natural resources." The Panel's reading would render unilateral measures *per se* invalid regardless of the statutory exceptions.

The Panel relied too much on the object and purpose of GATT for clarification of Article XX. Looking outside the text of Article XX to such a broad standard runs contrary to the inter-

214. *See generally* Appellate Body Report, *supra* note 6, ¶ 122.

215. *See id.* ¶ 121 noting that "[s]uch an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."

216. *See supra* note 214 and accompanying text.

217. *See id.* Nowhere in the text of either the chapeau or the exceptions themselves does Article XX exclude unilaterally enacted environmental regulations.

218. *See id.*

219. *See supra* note 65.

pretive rules of international public law.[220] Even so, while elucidating the meaning of the chapeau, the Panel ignored the acknowledgement of environmental purposes in the preamble to the Marrakesh Agreement Establishing the World Trade Organization.[221] The Agreement's preamble states that international trade should be viewed "with the objective of sustainable development . . . and should protect and preserve the environment."[222] Asserting that GATT/WTO merely facilitates trade without deference to the environment, the Panel misinterprets Article XX and renders the provisions of Article XX(b) and (g) toothless.[223]

The Panel compounded its flawed analysis by finding it unnecessary to analyze whether Section 609 met the requirements of Article XX(b) and (g). The Panel avoided this inquiry by relying completely on the interpretation of the chapeau it had pulled from the air. This left member countries with no precedent to help them determine whether and how unilateral environmental regulations protecting endangered species could be enforced.

The Panel's holding thus illustrates the WTO's tendency to favor trade at the expense of needed international environmental regulations. Section 609 presented a compelling case for reversing this tradition and upholding a carefully drafted and necessary environmental measure. Based on the facts of the *Shrimp/Turtle* dispute and on the text of Article XX, the Panel should have found in favor of the United States regulation. In failing to do so, the Panel effectively dismissed one of GATT's most important environmental protection provisions.

B. APPELLATE BODY HOLDING

Although affirming the result, the Appellate Body reversed the Panel's analysis of the Article XX chapeau. The Appellate Body went to great lengths in an effort to remedy the flaws of the Panel's decision, yet still avoided approving the United

220. *See* Appellate Body Report, *supra* note 6, ¶ 114. The Vienna Convention on the Law of Treaties instructs that a treaty should be interpreted in accordance with its ordinary meaning in light of its object and purpose and that

> [o]ne of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

U.S. Gasoline, supra note 80, at 627.

221. *See* Appellate Body Report, *supra* note 6, ¶ 12.

222. *Id.*

223. *See id.* ¶¶ 114, 121.

States' attempt to follow the map drawn by the *Tuna/Dolphin* and *U.S. Gasoline* cases. The Appellate Body found that the Panel erred in failing to analyze Article XX(b) and (g). More important, the Appellate Body specifically held that Article XX(g) applied to Section 609 because sea turtles were an "exhaustible natural resource" and that Section 609 constituted a measure "relating to" the conservation of a natural resource.[224] The Appellate Body appropriately criticized the Panel's reasoning that unilateral measures inherently threaten the multilateral trading system.[225] The Appellate Body failed, however, in its application of the chapeau of Article XX.

Like the Panel, the Appellate Body began its analysis trumpeting the "customary rules of interpretation of public international law"[226] and the application of "the ordinary meaning of the words . . . read in the light of the object and purpose of the treaty involved."[227] Yet after advocating a textual reading of Article XX, the Appellate Body refocused on the chapeau of Article XX and deemed Section 609 invalid under GATT. Beginning with the chapeau language, "such measures are not to be applied in a manner which would constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail [or] a disguised restriction on international trade,"[228] the Appellate Body crafted a balancing test "between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of other Members."[229] The Appellate Body held that the language "makes clear" that the Article XX exceptions have limits and conditions.[230] In explaining those limits and conditions, the Appellate Body removed its "textualist" hat and looked to the negotiating history of GATT for support.[231] The Appellate Body made a substantial interpretive leap in its construction of the chapeau's language excluding arbitrary and unjustifiable discrimination, whittling a high standard down to a mere balancing test of rights.

224. *Id.* ¶¶ 134, 142-144.
225. *See id.* ¶ 115 and accompanying notes.
226. *Id.* ¶ 114.
227. *Id.*
228. *Id.* ¶ 156.
229. *Id.*
230. *Id.* ¶ 157.
231. The Appellate Body invoked Article 32 of the Vienna Convention to allow itself "supplementary means of interpretation, including the preparatory work." *Id.* ¶ 157 n.152.

The Appellate Body, like the Panel, used the chapeau as a way out of upholding Section 609. Under its newly conceived test, the Appellate Body found the United States requirements arbitrary and unjustifiable because the 1996 Guidelines mandated that WTO members adopt programs not only comparable to but "essentially the same as" those applied to United States vessels.[232] The Body held that the 1996 Guidelines established "a rigid and unbending standard by which the United States officials determine whether or not countries will be certified."[233] Relying on this analysis, the Appellate Body found Section 609 outside the scope of Article XX.

Although strong, the Appellate Body's argument is rebuttable. The 1996 Guidelines specifically provide that shrimping operations "comparable" to those of the United States may be certified.[234] The Appellate Body adduces no support for its assertion that the United States requires foreign shrimping policies to be "essentially the same" as those of the United States. Additionally, Section 609 treated all countries posing the same threat to sea turtles similarly with relation to each other and to the United States.[235] The 1996 Guidelines provided several other mechanisms for the State Department to certify a nation in areas without significant sea turtle populations or which harvest shrimp from shrimp farms.[236]

Finally, the Appellate Body found the United States' failure to seek multilateral solutions an important factor in determining Section 609 unjustifiably discriminatory.[237] This finding ignores two important points. First, nothing in Article XX requires multilateral efforts.[238] Second, stating a preference for

232. *See supra* note 197 and accompanying text.

233. *Id.*

234. *See supra* note 46 and accompanying text.

235. *See* Appellate Body Report *supra* note 6, ¶ 20. Additionally, the Appellate Body found that a factor in determining that Section 609 constituted "unjustifiable discrimination" was that the United States did not try to reach a multilateral agreement. *Id.* ¶¶ 171-173. However, by simply stating that a multilateral agreement is preferable, the Appellate Body provides no guidance as to how a *unilateral* environmental trade measure could be drafted in order to satisfy GATT/WTO scrutiny. This may provide further evidence that the WTO, while claiming that some unilateral measures could qualify under Article XX, has created an insurmountable hurdle for unilateral environmental measures.

236. *See supra* notes 42-43 and accompanying text.

237. *See supra* notes 127-29 and accompanying text; *see also supra* note 52 and accompanying text (noting the limited difference in the actual application of unilateral and multilateral agreements).

238. *See supra* notes 127-29 and accompanying text. It is also important to note that the Appellate Body, in discussing the alleged lack of adequate multi-

multilateral agreements provides no guidance as to how a *unilateral* environmental trade measure could be drafted in order to satisfy GATT/WTO scrutiny. The Appellate Body's reasoning provides further evidence that the WTO, while claiming that some unilateral measures could qualify under Article XX, creates an insurmountable hurdle for unilateral environmental measures. Section 609's narrowly tailored requirements and careful implementation did not rise to the level of "unjustifiable discrimination" or "disguised restrictions on international trade" under the chapeau. Therefore, after appearing to correct the interpretive error of the Panel, the Appellate Body changed the standard of analysis of the chapeau to reach the same ultimate conclusion.

The Appellate Body, after bending over backwards to ensure that the WTO would not automatically strike unilateral measures, essentially demonstrated that although environmental measures are recognized as legitimate under Article XX(g), unilateral environmental measures will constitute "arbitrary and unjustifiable discrimination" and will fail the Article XX chapeau analysis. By doing so, the Appellate Body raised the standard of review of the chapeau and closed the door on member countries' abilities to initiate much needed extraterritorial environmental measures.

The Report of the Appellate Body, unfortunately, leaves the United States few alternatives. One alternative would be for Congress to redraft Section 609 so that the measure complies with GATT. As this Note argues, however, Section 609 in its unilateral form is unlikely to clear the new bar set by the WTO.[239] Another option would be for the United States to ignore the WTO altogether and continue to implement Section 609. Yet the United States has already indicated that it will not do so.[240] The only viable option under the Appellate Body's ruling is for the United States to abandon unilateral measures altogether and attempt a multilateral global environmental agreement even though multilateral agreements can be much

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lateral negations, cited several other international treaties and conventions for the proposition that multilateral negotiations are preferred, but pointed to no language in Article XX or GATT requiring such negations prior to initiating a unilateral measure. *See* Appellate Report, *supra* note 6, ¶¶ 166-172.

239. *See* Cadeddu, *supra* note 22, at 202-03.

240. *See Trade: U.S. Says it Will Comply with WTO Ruling on Shrimp-Turtle, but Fails to Say When*, *supra* note 150; *see also* Cadeddu, *supra* note 22, at 203 (stating that the United States would face serious consequences if it ignored the WTO's decision).

harder to create and often are much less effective than unilateral measures.[241] Although GATT favors multilateral agreements, the text does not say that unilateral trade measures are *per se* invalid. The WTO, unfortunately, refuses to clarify exactly how the United States could create needed unilateral environmental trade measures in compliance with current GATT analysis.

The United States is thus left in a precarious position. In creating a new standard for analyzing unilateral extraterritorial environmental trade measures, the Appellate Body muddied the waters with flawed legal reasoning, arriving at what appears to have been the predetermined destination of invalidating Section 609. Meanwhile, the sea turtle remains unprotected.

C. THE WORLD TRADE ORGANIZATION AS A NEUTRAL DECISION-MAKER?

Many question the ability of the WTO to preside effectively as a "court" over international environmental issues. When created, the WTO replaced GATT's consensual dispute resolution procedures with a system of binding dispute resolution.[242] GATT's initial enactment provided post-World War II trade-facilitating rules; as international law developed, GATT became responsible for governing nearly all trade-related disputes on the international front.[243] As environmental awareness grew and it became clear that environmental needs do not bend nicely within territorial boundaries, environmental legislation and trade regulation collided. This development left a dispute resolution body with a trade-promoting purpose to settle these disputes. Not surprisingly, the WTO often leans too heavily on its initial trade-protecting purpose, and it sometimes seems incapable of acting as a neutral decision-maker. Many have criticized the *Shrimp / Turtle* ruling for being completely one-sided: "It declares that trade trumps wildlife conservation, not just in efforts to conserve endangered sea turtles, but for all similar efforts."[244]

241. Because this Note addresses the analysis of unilateral measures under GATT, a discussion of the effectiveness of multilateral agreements is beyond its scope. However, several commentators have discussed the pros and cons of such agreements at great length. For good discussions regarding the effectiveness and legitimacy of unilateral versus multilateral trade agreements, see de Fontaubert, *supra* note 13; Foster, *supra* note 51, and Strauss, *supra* note 54.

242. *See* McLaughlin, *supra* note 1, at 41.

243. *See* Strauss, *supra* note 54, at 776-78.

244. *See* National Wildlife Federation, *supra* note 152.

The complaints that followed the *Shrimp/Turtle* decision mirrored those in response to *Tuna/Dolphin I* and *II*.

The WTO/GATT regime has interpreted Article XX(g) of GATT to include dolphins, clean air, and shrimp as exhaustible natural resources for the purposes of the exception.[245] The WTO/GATT Panels and Appellate Bodies have overcome their previous misinterpretation that GATT Article XX applies only within the territory of the country promulgating the measure.[246] The *Shrimp/Turtle* Appellate Body initially seemed to build on prior decisions and to continue liberalizing the interpretation of Article XX exceptions by stating that the chapeau does not categorically exclude unilateral trade measures as long as they are applied in a non-discriminatory way.[247] The Appellate Body, however, in determining the meaning of "non-discriminatory," followed its instinct to promote trade.[248] After beginning in the right direction, the Appellate Body changed course and put forth a self-cancelling interpretation or standard to guide international environmental programs.

The WTO *could* effectively act as a neutral decision-making body, however. The *Shrimp/Turtle* dispute presented a very compelling case for the WTO to approve of a unilateral, extraterritorial measure that protects the global environment. Although GATT policies protect trade, the preamble to the agreement that established the WTO explicitly recognizes that protection of trade should not completely override principles of sustainable development and environmental protection.[249] The WTO could have decided for the United States, consistent with GATT provisions and policy, and could have done so without dismantling any of its previous decisions. If Article XX justifies the measure, analyses of whether and how the United States violated GATT Articles I, III, XI or XIII become irrelevant.

The Article XX exceptions in GATT allow for the protection of endangered species as long as the measure protecting them is necessary and related to that purpose.[250] No previous GATT/WTO ruling has held unilateral environmental measures *per se*

245. *See supra* Section I (discussing the holdings of *Tuna/Dolphin II*, *U.S. Gasoline* and *Shrimp/Turtle*).

246. *See supra* notes 73 through 76 and accompanying text (discussing the *Tuna/Dolphin II* ruling).

247. *See supra* notes 192 through 192 and accompanying text (discussing the *Shrimp/Turtle* Appellate Body's analysis of the chapeau).

248. *Id.*

249. *See supra* note 222 and accompanying text.

250. *See supra* note 65 and accompanying text.

invalid. The chapeau could and should have been read to prevent only the use of these Article XX exceptions upon a showing of a measure's egregious discriminatory effect or disguised discriminatory intent.[251] There was no showing of either in the *Shrimp/Turtle* dispute. Although Section 609 violated other articles of GATT, it could easily have been justified under Article XX. Such an interpretation would maintain a high level of scrutiny for measures affecting trade, yet recognize that some such measures constitute necessary means to protect the environment.

By simply following the guidance set forth in GATT itself, even acknowledging that GATT is a trade-protective agreement, the WTO could have effectively acted as a neutral decision-maker and found in this specific case that the unilateral measure was justified. Unfortunately, through the development of previous environment-trade disputes, the WTO instead demonstrated that it may not be competent to act as a neutral adjudicative body capable of reaching well-reasoned, equitable decisions in environment-trade disputes.

CONCLUSION

The *Shrimp/Turtle* ruling failed to clarify how a GATT-member country may act unilaterally to protect an endangered species such as the sea turtle. Unilateral trade restrictions seem to provide a much more effective method of enforcing environmental protection than multilateral agreements, but unilateral restrictions may achieve their results at the expense of free trade and carry a potential for abuse. Apparently, the WTO will continue to find ways to strike down unilateral measures. This practice, without more candid and clearer reasoning that countries may follow, may in time hurt or even destroy its credibility as a dispute resolution mechanism. Unfortunately, due to the WTO's textual acrobatics in interpreting Article XX and its professed intention to analyze issues case-by-case, countries wishing to help sea turtles survive have no guidance and can only proceed with the hope that their protective measure is not brought before the WTO.

251. *See id.*