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The *Shrimp-Turtle* Case: Implications for Article XX of GATT and the Trade and Environment Debate

**BRUCE NEULING***

**INTRODUCTION**

The Preamble to the Agreement Establishing the World Trade Organization (WTO Agreement)\(^1\) recognizes that trade is not an end in itself, but rather that sustained economic growth must be pursued in the broader context of sustainable development and protection of the environment.\(^2\) Notwithstanding this consensus among the Members of the World Trade Organization (WTO), trade and the environment remain controversial political topics. The WTO Agreement is under attack by environmentalists in the United States and abroad who

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2. *See id.*
believe that its rules have been used to undermine environmental protection. The sustained nature of these attacks, and the inability of free traders and environmentalists to find common ground to discuss their differences, suggest that the problem is deeper than a mere disagreement over policy. It appears that a clash of cultures has arisen. Environmentalists regard the environment as immeasurably more important than trade, which they view simply as a monetary issue. Additionally, they are impatient with arguments that environmental regulations are justifiable only in terms of cost/benefit and must conform to international trade rules. On the other hand, free traders view environmentalists as woolly-headed and animated by an anti-business bias. These radically different perspectives have generated intense debate, but there has been little, if any, progress toward a consensus, or at the least, a mutual understanding.3

In one sense, the "trade versus environment" debate is overstated and perhaps even artificial. The development and growth of the General Agreement on Tariffs and Trade (GATT)4 system has coincided with growing environmental awareness and sustained strengthening of environmental standards in developed countries. Therefore, it is untenable to contend that free trade and environmental protection are inherently in conflict. A series of cases involving GATT and the WTO, however, demonstrate that trade laws and environmental protection clash under certain circumstances. This Article discusses a recent WTO case, United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle),5 as a vehicle for exploring the trade and environmental landscape. Parts I and II of this Article consider how trade measures designed to protect the environment can clash with the basic features and rules in the WTO Agreement. Part III of this Article analyzes the "environmental exception" in Article XX of GATT and queries whether Article XX was intended to

serve an environmental purpose. Part IV reviews several WTO and GATT cases from the 1990s that prefigured Shrimp-Turtle and examined many of the interpretive issues addressed therein. Parts V and VI of this Article analyze the impact of Shrimp-Turtle on WTO and GATT jurisprudence and discuss the implications of the case within the larger scope of the trade-environment debate. Finally, Part VII of this Article cautiously speculates whether Shrimp-Turtle could lay the foundation for a compromise between the WTO regime and legitimate environmental interests.

I. BASIC FEATURES OF THE WTO SYSTEM

Before discussing how a trade measure intended to protect the environment conflicts with the rules of the WTO Agreement, it is helpful to review three basic features of the WTO system. First, a WTO Member is generally required to confer "most-favored-nation" treatment on products imported from other member nations. Second, a WTO Member may not impose domestic regulations or measures that discriminate against imports in favor of local products. Finally, subject to a narrow range of exceptions, a WTO Member may not impose non-tariff border restrictions on imports or exports. Because the vast majority of environmental policies do not clash with these rules, potential conflict with the WTO exists only in a small number of cases. Nevertheless, the number and importance of these cases has grown in recent years as WTO Members have placed increasing emphasis on environmental protection.

GATT's "most-favored-nation" provision is found in Article I of the Agreement. It prohibits WTO Members from singling out trading partners for special privileges. Article I states:

With respect to custom duties and charges of any kind . . . , and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour, 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

6. See GATT art. I.
7. See id. art. III.
8. See id.
9. See id. art. I.
Although there are exceptions to this rule, such as the exception for customs unions and free trade areas, a product imported from a WTO Member is generally entitled to the same treatment afforded a "like" product from any country. For example, according to WTO rules, it would be illegal for the United States to maintain a five-percent tariff on Japanese cars, while subjecting German cars to a ten-percent tariff.

Article III obligates WTO Members to extend national tax and regulatory treatment to products imported from other WTO Members. Article III deals with taxation and states that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

Similarly, Article III deals with regulation of products:

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.

In other words, a product imported from another WTO Member must be taxed and regulated no less favorably than a "like" domestic product. Unless an exception applies, it is illegal under the WTO rules to impose a ten-percent excise tax on domestic beer and a twenty-percent excise tax on imported beer, or to subject imported beer to special regulations from which domestic beer is exempt.

Finally, Article XI prohibits quantitative restrictions on imports and exports, and obligates WTO parties to convert non-tariff trade barriers into tariffs (with some exceptions not
important here). 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.

Using tariffs, instead of non-tariff barriers, enhances the transparency of the trade regime, allowing for precise knowledge regarding levels of protection. Transparency, in turn, facilitates the negotiation of lower tariffs. One of the great successes of GATT was the overseeing of a series of multilateral negotiation rounds between 1947 and 1994 that resulted in reduced tariffs on most traded products.

GATT is a long, complex document with many rules and exceptions, including the exception in Article XX, which contains important implications for environmental protection. At the risk of oversimplification, however, the rules in Articles I, III, and XI are the backbone of the WTO system. They have successfully minimized the incidence of gross trade discrimination and non-transparency. As a result, global competition has been enhanced and the world’s output increased. Nevertheless, these rules have the potential to clash with trade measures taken to protect the environment.

II. HOW DO WTO RULES CONFLICT WITH ENVIRONMENTAL POLICY?

The vast majority of environmental measures pose little or no risk of clashing with the WTO rules, even when they impose a burden on trade. Suppose, for example, that a country passes a non-discriminatory law prohibiting automobiles from emitting more than a certain amount of pollution. Foreign automobile manufacturers might have to alter their automobiles in order to

17. See id. art. XI.
18. Id. art. XI, para. 1.
20. See GATT art. XX.
21. See id. arts. I, III, XI.
sell them in the local market, but this law would not result in less favorable treatment for foreign cars as compared to domestic cars. Local manufacturers would operate under the same burden and not gain an advantage over foreign competition. Under the circumstances, Article III would probably permit this law. Most environmental measures are similar to this example.

In other cases, however, the non-discrimination rules of Articles I and III, and the prohibition of non-tariff border measures in Article XI, could inhibit regulatory action and complicate environmental protection. Consider the case of a country that bans all agricultural uses of the pesticide methyl bromide because it contributes to ozone layer depletion. Local farmers would be forced to use alternative pesticides that are more costly and less effective. Their production costs would rise and their products would become less competitive in world markets. Meanwhile, methyl bromide would still be used in foreign countries, giving those farmers a competitive edge. Notwithstanding the sacrifices of local producers, the ozone layer would still be at risk. Under these circumstances, could a trade measure alleviate the local farmers’ predicament and/or contribute to global environmental protection? Could the country, for example:

1. Ban imports of agricultural products produced with methyl bromide in order to preserve the domestic market for local farmers?
2. Ban imports of these products in order to discourage the use of methyl bromide abroad and thus contribute to the protection of the ozone layer?
3. Impose a tax on the imports to equal the extra costs that domestic farmers incur by using alternative pesticides?

Political pressure to use such trade measures would be strong. Some of the pressure would be protectionist in nature, but most of it would be well intended and motivated by a desire to protect the environment. It is unlikely, however, that any of these measures

22. See id. art. III.
23. See JACKSON, supra note 19, at 235.
24. See GATT arts. I, III.
25. See id. art. XI.
would survive scrutiny under Articles I, III, or XI, although they may be protected by an exception. Unlike the automobile example, where an import ban was not used to achieve an environmental goal, and the emissions regulation was applied in a non-discriminatory fashion to domestic and foreign cars alike, the ban on importation of crops produced with methyl bromide clashes with Article XI’s prohibition of “restrictions other than duties, taxes, or other charges . . . .”26 In addition, a ban in the latter case does not seem to fall into one of the limited exceptions of Article XX.27 It could also clash with the obligation of “national treatment” under Article III, because goods banned at the border plainly receive less favorable treatment than “like” goods produced and marketed domestically.28 The domestic ban only addresses the use of methyl bromide, and crops are not per se banned. Similarly, Article I would not permit a ban that discriminates between foreign crops produced with methyl bromide and those produced without it, if the crops were otherwise “like” products.29

The fact that methyl bromide was used in the production of foreign crops would not distinguish them from domestic crops produced without methyl bromide. Broadly speaking, goods are “like” products within the meaning of Article I and Article III if they are directly competitive.30 The fact that they are produced by different processes or production methods (known as “PPMs” in the literature) does not mean that they are “unlike” and treated as such. In determining whether products are “like” products for the purposes of Article I and Article III, GATT Dispute Panels examine factors such as “the product’s end-uses in a given market; consumers’ tastes and habits; and the product’s properties, nature and quality.”31 How the product was made is usually not relevant. In GATT jurisprudence, a car is a car, whether or not it is assembled by workers who are free to organize unions; lumber is lumber, whether or not it was made from trees harvested in an environmentally sound manner; and a strawberry is a strawberry,

26. Id.
27. See id. art. XX.
28. See id. art. III, para. 2.
29. See id. art. III.
30. See id.
whether or not it was grown in fields treated with methyl bromide. In contrast, the production process is very important from an environmental protection point of view. Thus, proper treatment of PPMs under GATT is one of the core issues in the trade and environment debate.

Although a border tax designed to offset the extra costs imposed on domestic farmers is less Draconian than an import ban, it too could clash with GATT. Article II prohibits the imposition of a border tax on imported goods unless an equivalent internal tax is imposed on domestic products. In the crop example, internal taxes were not imposed on domestic crops produced with methyl bromide. The tax on imports is therefore problematic, even though it merely offsets the extra burden on farmers. Article II also permits a border charge on a product to offset foreign subsidies, but regulatory burdens imposed on domestic producers are not treated by the WTO as subsidies to foreign producers.

Similarly, the import ban could not be justified under the Agreement on the Application of Sanitary and Phytosanitary Measures. Article II of the Agreement permits a WTO Member to take measures to protect humans, animals, and plants within its borders from diseases, pest-infestation, and the like. It also protects against risks arising from additives, contaminants, toxins,

32. GATT Article II reads:
Nothing in this Article [which deals with the Schedule of tariff concessions] shall prevent any contracting party from imposing at any time on the importation of any product: (a) a charge equivalent to any internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product...
GATT art. II, para. 2.

33. See id. art. II, para. 2(b). Businesses often argue that high environmental standards undermine their competitiveness vis-à-vis imports. Some environmentalists support "green" countervailing duties as a way to offset this extra burden. Article I of the Agreement on Subsidies and Countervailing Measures, however, defines "subsidy" as a "financial contribution" by a government that confers a "benefit" on a local producer. See Agreement on Subsidies and Countervailing Measures, Sept. 27, 1994, art. 1, available in 1994 WL 761793 (G.A.T.T.). Other governments can countervail this subsidy by imposing a duty on those imported products that benefited from it. See GATT art. II, para. 2(b). Imposition of a regulatory burden on domestic producers does not confer a countervailing subsidy on its foreign competitors. See id. art. IV, para. 2.

or disease-causing organisms in foods, beverages, or feedstuffs.\textsuperscript{35} The Agreement permits a WTO Member to ban food imports with harmful levels of methyl bromide residue.\textsuperscript{36} It would not permit, however, a ban of otherwise safe food imports merely because the production method posed a threat to the ozone layer. In short, unilateral trade measures to protect the environment could clash with the standards in Articles I, III, and XI. Unless rescued by an exception elsewhere in GATT, they could very well fail a WTO challenge.

It is important to note that Articles I, III, and XI do not distinguish between unilateral and multilateral measures. This is important because Multilateral Environmental Agreements (MEAs) have proliferated in recent decades as nations have recognized that many environmental problems have important transboundary dimensions. MEAs have multiple parties and are usually designed to address particular environmental problems. Some rely on trade measures to achieve their goals. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol)\textsuperscript{37} provides for the phase out of chlorofluorocarbons (CFCs) and other chemicals that deplete the ozone layer. CFCs have a variety of industrial uses and have been an important item in international trade. The Protocol sets up a complex scheme for phasing out the production and use of CFCs.\textsuperscript{38} To reinforce the schedule and encourage non-parties to join, it bans CFC trade with non-parties.\textsuperscript{39}

In addition, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (Basel Convention),\textsuperscript{40} regulates international shipments of hazardous waste. Much of this waste, for example, scrap metal, is traded internationally for recycling. The Basel Convention seeks to minimize the generation of hazardous waste and prevent its

\textsuperscript{35} For a detailed definition of "sanitary or phytosanitary measure," see Agreement on the Application of Sanitary and Phytosanitary Measures art. 3(a).

\textsuperscript{36} See generally id.


\textsuperscript{38} See id. art. 2.

\textsuperscript{39} See id.

shipment to countries lacking the capacity to handle it in an environmentally sound manner. It establishes a system whereby hazardous waste exporters must first notify and obtain consent from the country of destination. It also prohibits most trade in hazardous waste with non-parties.

Also, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) protects species from over-exploitation caused by international trade. The degree of regulation depends on the level of danger faced by the species. If plants and animals are threatened with extinction, commercial trade is prohibited. Commercial trade that impacts less-endangered species can face prohibition if the exporting country believes it detrimental to the species' survival. Appendices specify the species subject to coverage. Tens of thousands are currently covered.

As of 1994, approximately twenty MEAs were in force, most limited to specific regions or animals. Their memberships vary and do not overlap completely with that of the WTO.

Because MEAs and the WTO have developed on separate tracks, their rules do not necessarily mesh well. Banning trade of CFCs or scrap metal could clash with GATT Articles III and XI. Also, discriminating between MEA parties and non-parties could violate GATT Article I if WTO obligations are owed to the non-parties. Moreover, the tendency of MEAs to focus on the environmental effects of the production, use, and disposal of a product, rather than on the product itself, is out of sync with traditional GATT/WTO jurisprudence. Similarly, the use of trade measures against non-MEA parties in order to influence their domestic policies could clash with certain GATT/WTO cases that disfavor extraterritorial application of domestic

41. See id. art. 6, para. 2.
42. See id. art. 4, para. 5.
44. See id. preamble.
45. See generally id. art. II.
46. See id. art. III, para. 3(a)–(c).
47. See id. art. IV, para. 2(a).
48. See generally id. apps. I–III.
49. See generally ESTY, supra note 3, at 275–281.
50. See generally id. at 218–220.
51. See generally id. at 220–221.
environmental standards.\textsuperscript{52}

In the event of a conflict between an MEA and the WTO Agreement, it is not clear which rules apply. According to Article 30 of The Vienna Convention on the Law of Treaties:\textsuperscript{53}

1. [T]he rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. . . .

3. When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.\textsuperscript{54}

What this means is that the later treaty will prevail. It is unclear, however, whether MEAs and the WTO Agreement concern the "same subject-matter." If they do not, then the Vienna Convention's later-in-time rule would not apply.\textsuperscript{55} A dispute between two countries that are parties to both an MEA and the WTO could arise. This is less likely, however, than a dispute between a country that is a party to both the WTO Agreement and an MEA, and a country that is not a party to that MEA. Suppose that Japan, a party to the Basel Convention, banned hazardous waste shipments to the United States because the United States had not ratified the Basel Convention. Would it avail the United States to bring a WTO case against Japan invoking Articles III and XI? The Vienna Convention indicates that the answer is yes. Article 30 of the Vienna Convention provides:

When the parties to the later treaty do not include all the parties to the earlier one: . . . (b) as between a State party to both treaties [Japan, in our example] and a State party to only one of the treaties [the United States], the treaty to which both States are parties [the WTO Agreement, in this example] governs their mutual rights and obligations.\textsuperscript{56}

\textsuperscript{52} See generally id. at 218–220. For the proposition that environmentalists fear GATT or the WTO may override certain international agreements, see id. at 218.


\textsuperscript{54} Id. art. 30.

\textsuperscript{55} See id.

\textsuperscript{56} Id. art. 30, para. 4.
Therefore, GATT rules would govern this dispute. The Vienna Convention provides no practical guidance on how the country that is a party to both treaties is to reconcile conflicting legal obligations. In addition, it is unclear where such a case should be heard. If the dispute is between two MEA parties, it could be dealt with by the MEA's dispute process. The challenging country, however, might bring the case in the WTO on the assumption that it would get a friendlier hearing in that forum. As a result, the dispute might only reach the MEA if the parties agreed to do so, or if it was removed by a decision of the WTO Panel. If the dispute, however, was between an MEA party and a non-party, the challenging country could only bring the matter to the WTO. Where that leaves the environmental interests protected by the MEA is an open question.

III. The Article XX Exception—A Safe Haven for Environmental Measures?

Trade measures used for environmental purposes have the potential to clash with core WTO policies in Articles I, III, XI, and elsewhere. Article XX on General Exceptions, however, lays out a number of specific circumstances under which WTO parties may be exempted from WTO rules. Two of these are relevant for environmental protection. Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same countries prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . [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; . . .

57. See ESTY, supra note 3, at 219.
58. See GATT art. XX.
59. Id. Article XX also has exceptions for measures to protect or promote: public morals; the preservation of national artistic and archeological treasures; customs enforcement; competition laws; patents, trademarks, and copyrights; to block the importation of products of prison labor; and so forth. See id.
Paragraphs (b) and (g) of Article XX allow WTO Members to adopt policies that discriminate, deny national treatment, or are otherwise inconsistent with GATT.\textsuperscript{60} This, however, is only acceptable if the measures are "necessary" to protect human, animal, or plant life or health, which together can be taken to mean "environment," or related to the conservation of exhaustible natural resources if taken in conjunction with domestic restrictions.\textsuperscript{61} The measures are acceptable as long as they do not result in arbitrary or unjustifiable discrimination or constitute a disguised restriction on international trade.\textsuperscript{62}

But what exactly do these paragraphs mean? Given that Article XX is central to the effort to carve out a space for the environment in GATT, it is striking that the word "environment" does not actually appear therein. Also questionable is how well suited the phraseology of paragraphs (b) and (g) is to the goal of giving governments elbowroom to pursue environmental measures. The environment was not a significant public issue when GATT was negotiated in the late 1940s.

Although the negotiating history for Article XX is limited and leaves many questions unanswered, it does shed some light on what the negotiators intended.\textsuperscript{63} The preamble to Article XX stemmed from the International Convention for the Abolition of Import and Export Prohibitions and Restrictions (1927 Convention), a treaty negotiated under the auspices of the League of Nations in 1927, but never put into effect.\textsuperscript{64} The 1927 Convention called for the abolition of all trade barriers, excluding tariffs.\textsuperscript{65} It did contain a number of customary exceptions, however, such as for sanitary and quarantine purposes, subject to the conditions "that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade."\textsuperscript{66}

\begin{thebibliography}{99}
\bibitem{60} See generally id.
\bibitem{61} See id.
\bibitem{62} See id.
\bibitem{64} See id. at 41 (referring to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393 (not in force)).
\bibitem{65} See id.
\bibitem{66} Id. at 42.
\end{thebibliography}
The first draft of GATT came in the proposal by the United States and Great Britain in December 1945.67 It provided for the customary exceptions to free trade, but permitted unconditional applications.68 As the Netherlands and Belgium noted, however, during the London session of the preparatory committee, “Indirect protection is an undesirable and dangerous phenomenon . . . . Many times the stipulations ‘to protect animal or plant life or health’ are misused for indirect protection.”69 To address this problem, the United Kingdom offered an amendment specifying that trade measures could not be “applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade.”70 This formula is the basis for the preamble to Article XX, which is borrowed from the 1927 Convention.71 The exception, however, is that “arbitrary discrimination” no longer applied just to foreign countries. Thus, Article XX incorporates the principle of national treatment as well as non-discrimination.

Article XX(b) is based on the proposal by the United States and Great Britain, which included an exception for measures “necessary to protect human, animal or plant life or health.”72 Numerous pre-GATT commercial treaties contain this formula in what is almost boilerplate language. It was later modified to require “corresponding safeguards under similar conditions” in the importing country.73 This modification, however, was later abandoned because Article XX’s preamble accomplished the same purpose.74 There was no avowal of an environmental purpose during the limited debate on Article XX(b), and the term “sanitary” was commonly used to characterize this Article.75 It is likely the negotiators intended for Article XX(b) only to exempt national regulations designed to keep out unsafe food, block the importation of products bearing pests, and so forth.

67. See id. at 43.
68. See id.
69. GATT SECRETARIAT, GUIDE TO GATT LAW AND PRACTICE 519 (6th ed. 1994) [hereinafter GUIDE TO GATT].
70. Charnovitz, supra note 63, at 44.
71. See id. at 41.
72. Id. at 44.
73. See id. at 44 & n.43.
74. See GUIDE TO GATT, supra note 69, at 521.
75. See Charnovitz, supra note 63, at 44.
Based on a 1946 U.S. proposal, Article XX(g) provided an exception for measures "relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption." This language did not appear in any previous trade agreement. Although there is no official statement of purpose for the exception, it was possibly drafted with oil in mind. Throughout the preparatory meetings, negotiators discussed the language of Article XX(g) in terms of export, rather than import, restrictions, and the conserved natural resource "was typically described as a 'raw material' or 'mineral.'" The term "exhaustible" natural resource apparently meant stock resources, such as oil, in contrast to renewable or flow resources, such as plants or animals. The U.S. proposal ultimately was adopted with the deletion of "the words 'taken pursuant to international agreements.'" Arguably, GATT negotiators intended to specifically exempt national regulations aimed at conserving resources, such as minerals or oil, by prohibiting their exportation, as long as domestic conservation measures applied also.

Based on the above, Article XX was not intended to shield environmental measures from basic GATT disciplines. Arguments to the contrary are not persuasive. Steve Charnovitz, for example, argues that environmental provisions were already in existence in various laws and treaties at the time GATT was negotiated, and that GATT should be construed in a manner consistent with them. Charnovitz cites, for example, a 1911 treaty between the United Kingdom, Japan, Russia, and the United States, that banned imports of seal skins taken in violation of the treaty, in order to preserve and protect seals and sea otters. Other examples cited by Charnovitz include the 1933 London Convention for the Preservation of Fauna and Flora in their Natural State, which prohibited trade in specified animals and trophies from African countries without a certificate; and the U.S.

76. GUIDE TO GATT, supra note 69, at 521.
77. See Charnovitz, supra note 63, at 45.
78. Id. (footnote omitted).
79. See id.
80. Id. (footnote omitted).
81. See generally id.
82. See id. at 39.
Underwood Tariff of 1913, which banned imports of plumes and feathers coming from specified wild birds. Charnovitz argues that no GATT delegation contended that these pre-existing laws and treaties were to be overridden by GATT. It is also possible, however, that GATT negotiators were unaware of these treaties and laws. If they were unknown to GATT negotiators, then the question of whether GATT should make room for measures to protect the environment was never an issue during the negotiations. This interpretation is plausible because no reference to these laws and treaties appears in the negotiating record, and the environment was not a major public issue at the time.

In the final analysis, however, the negotiating history of Article XX may not have much bearing on the Article’s interpretation. According to the Vienna Convention, terms in a treaty are given their ordinary meaning, taking into consideration their context and the object and purpose of the treaty. The negotiating record becomes relevant only if this primary method leaves the terms ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. Because the terms in Article XX (b) and (g) are non-technical and reasonably clear, they can be related to the object and purpose of GATT in an intelligible way. Thus, the negotiating history may not be an issue. The ordinary meaning of the words in paragraphs (b) and (g) seems to permit many environmental measures that are otherwise inconsistent with GATT. Certainly the phrases “necessary to protect human, animal or plant life or health” or “conservation of exhaustible natural resources” could support measures that go far beyond

83. See id. at 39–42 (citing the London Convention for the Preservation of Fauna and Flora in their Natural State, art. 9, 172 L.N.T.S. 241, 254 (1933) and the Tariff Act of 1913, ch. 16, § 345, 38 Stat. 114, 148 (Underwood Tariff Act)).
84. See Charnovitz, supra note 63, at 44.
85. According to the Vienna Convention, Article 31, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See Vienna Convention, supra note 53, art. 31. Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion ... to determine the meaning when the interpretation according to [A]rticle 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id. art. 32.
86. GATT art. XX.
87. Id.
traditional sanitary and quarantine restrictions, or schemes to conserve stockpiles of oil and metals. Even if this interpretive strategy is successful, the fact remains that paragraphs (b) and (g) were probably written for non-environmental reasons, and the phraseology does not lend itself smoothly to environmental goals. A moment's consideration of the language gives rise to many questions. For example:

1. Why must measures protecting human, plant or animal life be “necessary,” when measures to conserve exhaustible natural resources need only “relate to” that goal?

2. What does the modifier “exhaustible” signify in “exhaustible natural resources?” It must exclude something for it to have an effect. Are renewable natural resources, such as forests or animal species, excluded? What could an inexhaustible natural resource be other than a renewable natural resource?

3. Does the notion of “natural resources” refer only to commercially-exploitable resources, such as oil or manganese? Or is it broad enough to include non-tradable “goods,” such as clean air or the ozone layer?

4. Is the term “natural resources” in paragraph (g) broad enough to include biological resources? If so, then is it redundant with the plant and animal exception in paragraph (b)?

5. Do either paragraph (b) or (g) permit a country to protect the environment outside of its borders? If not, then does this seriously limit the power of countries to protect the global commons?

These and other questions serve as reminders that Article XX was not intended to create a broad environmental exception in GATT. Its conscription into this unnatural role leaves it an ineffective tool for achieving environmental objectives.

IV. PRE-SHRIMP-TURTLE ARTICLE XX LITIGATION

In the 1990s, the putative environmental provisions of Article XX were at the heart of several WTO/GATT cases. The results disappointed environmentalists, further fostering their suspicion that “trade bureaucrats” were incapable of taking a broad view of
the relationship between environmental protection and the world trading system. The issues raised in these cases not only framed the jurisprudence in *Shrimp-Turtle*, but also contributed to the polarized political atmosphere in which trade and the environment are continuously debated.

A. Thai Cigarettes

Although not an environmental case, the 1990 Panel Report on *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (Thai Cigarettes)*[^88] has important environmental implications. The Report interpreted the phrase “necessary to protect human . . . life or health” in Article XX(b).[^89] The case dealt with an import ban on cigarettes imposed by the Thai Government.[^90] The United States challenged the ban as a violation of Article XI.[^91] In response, Thailand invoked Article XX(b), arguing that the ban was necessary to protect the public from harmful ingredients in imported cigarettes and to reduce the consumption of cigarettes in Thailand.[^92] The Panel rejected the Thai Government’s argument on the ground that “[t]he import restrictions imposed by Thailand could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”[^93]

The Panel reasoned that alternative methods consistent with GATT, such as advertising restrictions and mandatory labeling, were available to Thailand to achieve its public health objectives.[^94] Therefore, the import ban was not “necessary” within the terms of Article XX.^[95]

[^89]: See id. at 222.
[^90]: See id. at 200.
[^91]: See generally id. at 222.
[^92]: See id. at 223.
[^93]: Id.
[^94]: See id. at 224.
[^95]: See id. In the November 1990 GATT Council discussion preceding the adoption of the Panel Report, the representative of Thailand “took heart from the report that a set of GATT-consistent measures could be taken to control the supply of and demand for cigarettes, as long as they were applied to both domestic and imported cigarettes on a national-treatment basis.” GUIDE TO GATT, *supra* note 69, at 525. He announced that
Many environmentalists have argued that this result set an almost "impossibly high hurdle" for environmental measures under Article XX(b). They argued that a less trade-intrusive policy "is almost always conceivable and therefore in some sense 'available.'" Nonetheless, whether the alternative policy is equally effective in protecting the environment is something that cannot necessarily be known in advance. In any event, there is no requirement to consider less GATT-inconsistent alternatives found within the express terms of Article XX. According to one writer, the Panel's approach ignores "the political difficulty of adopting optimal environmental policies that serve both trade and environmental purposes, effectively eviscerating Article XX[(b)]." Indeed, the restrictive definition of "necessary" does put a heavy burden on a country seeking to use Article XX(b) to defend a trade measure. *Thai Cigarettes* negatively influenced subsequent environmental litigation, making it difficult to use Article XX(b) as a shield for environmental measures. Instead, environmental litigation has revolved around Article XX(g).

**B. Tuna-Dolphin I**

The 1991 Dispute Panel Report in *United States—Restrictions on Imports of Tuna from Mexico (Tuna Dolphin I)* served as a landmark event in the trade and environment debate. Probably more than any other event prior to the implementation of the North American Free Trade Agreement (NAFTA), the Panel Report mobilized environmental NGOs to oppose GATT. To show their discontent with GATT, environmentalists displayed posters in Washington, D.C. that depicted a giant lizard named "GATTzilla" carrying a barrel of DDT and stepping on the U.S. Capitol building. Environmentalists objected not only to the Panel's conclusions, but also to the restrictive way the Panel

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96. ESTY, *supra* note 3, at 48.
97. *Id*.
98. See Charnovitz, *supra* note 63, at 49.
100. See generally *id* at 46–50.
103. See ESTY, *supra* note 3, at 35.
interpreted Article XX.104

*Tuna-Dolphin I* stemmed from violations of provisions of the 1972 U.S. Marine Mammal Protection Act (MMPA).105 The MMPA requires fishermen operating in U.S. waters to use certain techniques to reduce the incidental killing of marine mammals such as dolphins.106 The MMPA also requires that the U.S. Government ban imports of commercial fish caught with fishing technology that result in the incidental killing of marine mammals in excess of U.S. standards.107 In 1988, believing that foreign tuna fishermen were killing dolphins in violation of the MMPA, an environmental NGO brought suit to enforce the legislative mandate.108 A federal judge held that the foreign governments, one of which was Mexico, had failed to uphold the law and banned all foreign tuna imports from the United States unless the Secretary of Commerce found that the foreign nations complied with the MMPA.109

Mexico argued that its right to sell tuna in the United States had been violated and requested a GATT Dispute Panel to adjudicate the matter.110 The Panel ruled in Mexico's favor.111 It rejected the United States' argument that the MMPA was consistent with GATT Article III because it did not treat imported products less favorably than similar products of national origin.112 Even though U.S. and foreign fishermen were both required to reduce the incidental killing of dolphins, the Panel found that GATT Article III was not applicable to the case because it only covers regulations affecting products and does not apply to PPMs.113 Having decided that Article III did not apply, the Panel stated:

[T]he MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the

104. See id. at 47.
106. See id. § 1371(a)(2).
107. See id.
109. See id. at 969.
110. See *Tuna-Dolphin I*, supra note 101, at 155.
111. See id. at 205.
112. See id. at 195 (discussing GATT art. III, para. 4).
113. See id. at 194.
sale of tuna and could not possibly affect tuna as a product. Therefore, . . . the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico . . . did not constitute internal regulations covered by . . . Article III.\textsuperscript{114}

In other words, the United States was obligated to treat tuna produced by Mexico no less favorably than tuna produced by the United States, regardless of how the tuna was harvested. The Mexican and U.S. tuna were "like" products and required equal treatment, even though they were caught under different circumstances. Under Article III, different production methods do not differentiate products and render them "unlike." The Panel next considered the United States' arguments that the ban was justifiable under Article XX(b) and Article XX(g). It rejected the Article XX(b) argument on the basis that the ban was not necessary to protect animal life.\textsuperscript{115} It stated "[t]he United States had not demonstrated . . . that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements . . . ."\textsuperscript{116}

The Panel also rejected the argument that Article XX(g) protected the ban.\textsuperscript{117} Construing the language in Article XX(g) that conservation measures be taken "in conjunction with restrictions on domestic production or consumption,"\textsuperscript{118} the Panel concluded that Article XX(g) applied only to measures aimed at rendering domestic restrictions effective and not to measures taken jointly with, or otherwise related to, domestic restrictions.\textsuperscript{119} It then reasoned:

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or

\textsuperscript{114} Id. at 195.
\textsuperscript{115} See id. at 198–199.
\textsuperscript{116} Id. at 199.
\textsuperscript{117} See id. at 201.
\textsuperscript{118} Id. at 200.
\textsuperscript{119} See id.
consumption within their jurisdiction.\textsuperscript{120}

Because the import ban would not help conserve dolphins found within U.S. jurisdiction, it was not justifiable under Article XX(g).\textsuperscript{121} The clear implication was that Article XX(g) is limited to measures taken to conserve only \textit{domestic} natural resources.

Finally, the Panel rejected the notion that a GATT party could use trade measures to press foreign governments to modify their policies.\textsuperscript{122} It thus dismissed the idea that a GATT party could condition access to its market on its trading partners' adoption of certain environmental practices. According to the Panel:

\begin{quote}
[A] contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own . . . . [I]f the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies . . . they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the CONTRACTING PARTIES were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder.\textsuperscript{123}
\end{quote}

The Report was not adopted by the GATT Council.\textsuperscript{124} Nor did Mexico push for its adoption, partly because of the ongoing NAFTA negotiations.\textsuperscript{125} Environmental groups bitterly denounced the Report. It was perceived as a clear warning that trade considerations would invariably trump the environmental protection in GATT.

\textbf{C. Tuna-Dolphin II}

The European community brought its own case, \textit{Tuna-Dolphin II}, against the MMPA, focusing on the law's "secondary

\begin{footnotesize}
\begin{enumerate}
\item[120.] \textit{Id.}
\item[121.] \textit{See id.} at 200–201. \textit{See also ESTY, supra} note 3, at 268.
\item[122.] \textit{See Tuna-Dolphin I, supra} note 101, at 204.
\item[123.] \textit{Id.}
\item[124.] \textit{See ESTY, supra} note 3, at 269.
\item[125.] \textit{See id.}
\end{enumerate}
\end{footnotesize}
embargo."\textsuperscript{126} This provision barred tuna imports to the United States from countries engaging in tuna trade with an embargoed country such as Mexico.\textsuperscript{127} Several European countries imported tuna from Mexico. The European Community argued that the secondary embargo was not covered by Article III, violated Article XI, and could not be justified under Article XX.\textsuperscript{128}

In June 1994, the Panel ruled that the secondary embargo violated GATT.\textsuperscript{129} Unlike the Panel in Tuna-Dolphin I, the Tuna-Dolphin II Panel concluded that Articles XX(b) and XX(g) could be applied extraterritorially, because "[i]t could not . . . be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure."\textsuperscript{130} The Panel, however, found measures that force other countries to effectively change their policies with respect to persons or things within their own jurisdictions were not covered by Articles XX(b) and (g) in that:

If . . . Article XX was interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as multilateral framework for trade among contracting parties.\textsuperscript{131}

It was clear the embargo was designed to force policy changes in third countries, such as Mexico, because the secondary embargo prohibited imports of tuna regardless of whether the tuna was harvested in a manner harming dolphins, or whether tuna fishing practices in the exporting country as a whole harmed dolphins.\textsuperscript{132} Therefore, the secondary embargo was not justifiable under Article XX.\textsuperscript{133} The Report was not, however, adopted by the

\textsuperscript{126} Id.
\textsuperscript{128} See id. at 851.
\textsuperscript{129} See id. at 899.
\textsuperscript{130} Id. at 891.
\textsuperscript{131} Id. at 894.
\textsuperscript{132} See id. at 897.
\textsuperscript{133} See id. at 898.
GATT Council.

D. Reformulated Gas

United States—Standards for Reformulated and Conventional Gasoline (Reformulated Gas)\textsuperscript{134} was the first environmental case decided after the establishment of the WTO. It involved a provision of the Clean Air Act\textsuperscript{135} that required oil refiners to reduce a variety of smog-causing contaminants in their gasoline from a baseline determined by the composition of the gasoline in 1990.\textsuperscript{136} In 1993, the Environmental Protection Administration (EPA) issued regulations permitting most domestic refiners to establish their baseline using their own actual data from 1990.\textsuperscript{137} Most foreign refiners were required to use the U.S. industry's average level of contaminants in 1990 as their baseline.\textsuperscript{138} The rule for importers stemmed from the EPA's conclusion that requirements applied to U.S. refiners could not be applied to foreign refiners without raising substantial concerns regarding the availability of foreign data and enforcement methods.\textsuperscript{139}

Venezuela and Brazil challenged the regulation arguing that it discriminated against foreign gasoline.\textsuperscript{140} In 1996, a WTO Dispute Panel found that the regulation violated Article III.\textsuperscript{141} The Panel concluded that the inability of foreign refiners to use individual baselines meant that imported gasoline was treated less favorably than domestic gasoline (a “like” product).\textsuperscript{142} The Panel also rejected the argument that the regulation was “necessary” within the meaning of Article XX(b).\textsuperscript{143}


\textsuperscript{135} 42 U.S.C. § 7401 (1994).

\textsuperscript{136} See id. § 7545(k)(1).

\textsuperscript{137} See 40 C.F.R. § 80.91(a)(i) (1994).

\textsuperscript{138} See id.

\textsuperscript{139} See generally Dispute Panel Report II, supra note 134, at 296.

\textsuperscript{140} See id. at 293.

\textsuperscript{141} See id. at 295.

\textsuperscript{142} See id. The Panel noted that the term “like” can mean “similar” or “identical.”

\textsuperscript{143} See id. at 298. The Panel proceeded to examine whether there were measures consistent or less inconsistent with the General Agreement that were reasonably available.
The Panel then considered whether the discrimination was justified under Article XX(g). It rejected the argument of Venezuela and Brazil that clean air is not a "natural resource." It concluded, however, that in the absence of a "direct connection" between the less favorable treatment of foreign gasoline and the air quality goals of the United States, the regulation was not "primarily aimed" at the conservation of a natural resource. The regulation therefore failed the "relating to" condition of Article XX(g).

On appeal, the U.S. Government contended that the regulation met the requirements of Article XX(g), and the Appellate Body agreed. It rejected the finding that the regulation was not "primarily aimed at," and thus not "related to," the conservation of clean air. According to the Appellate Body, the Panel seemed to equate "related to" with "necessary," which was incorrect under the "fundamental" rule of treaty interpretation. The Appellate Body also found the regulation was "made effective in conjunction with" domestic conservation measures. This result was reached because restrictions on domestic production had been "established jointly" with restrictions on foreign gasoline. Under these circumstances the regulation satisfied Article XX(g).

to the United States to further its policy objectives of protecting human, animal and plant life or health. See id. at 296. "In the view of the Panel, baseline establishment methods could be applied to entities dealing in imported gasoline in a way that granted treatment to imported gasoline that was consistent or less inconsistent with the General Agreement." Id. at 299–300.

144. Id. at 299. In the Panel's view, clean air was a resource because it had value, it was natural, and it could be depleted; the fact that a resource was renewable could not be an objection. See id.

145. See id. at 300.

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III—the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline—were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favorable treatment of imported gasoline that was chemically identical to domestic gasoline, and the U.S. objective of improving air quality in the United States.

Id.

147. Id. at 618.
148. Id. at 624.
149. See generally id. at 623–626.
For a measure to be upheld under Article XX, however, it must do more than simply satisfy one of the particular exceptions that are listed in paragraphs (b) and (g).\textsuperscript{150} It must also satisfy the general conditions found in the chapeau.\textsuperscript{151} According to the Appellate Body, the chapeau does not address the content of the measure at issue, but rather, the manner in which the measure is applied:\textsuperscript{152}

[T]he purpose or object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions . . . . The chapeau is animated by the principle that . . . the exceptions of Article XX, . . . should not be so applied as to frustrate or defeat the legal obligations . . . under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused . . . the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.\textsuperscript{153}

Moreover, the party invoking the exception has the burden of demonstrating that a measure provisionally justified under one of the specific exceptions also meets the requirements of the chapeau.\textsuperscript{154} Meeting this burden "is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."\textsuperscript{155}

The chapeau also requires that a measure taken pursuant to one of the specific paragraphs does not constitute "arbitrary or unjustifiable discrimination,"\textsuperscript{156} or a "disguised restriction on international trade."\textsuperscript{157} Although the Appellate Body wrestled with these phrases, it did not provide a clear definition. Perhaps the clearest and most comprehensive analysis it offered was:

'Arbitrary discrimination,' 'unjustifiable discrimination' and 'disguised restriction' on international trade may . . . be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination

\textsuperscript{150} See id. at 623.
\textsuperscript{151} See id.
\textsuperscript{152} See id. at 626.
\textsuperscript{153} Id.
\textsuperscript{154} See id. at 626–627.
\textsuperscript{155} Id. at 627.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
We consider that 'disguised restriction,' whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination . . . . [T]he kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination,' may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.158

It is questionable whether this explanation added much clarity to the language already in the chapeau. It served, however, as the basis for finding the EPA regulation defective. The Appellate Body cited two distinct shortcomings in the regulation. First, the EPA had not adequately explored means of mitigating the verification and enforcement problems associated with individual baselines for foreign refiners.159 In particular, "the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil . . ."160 in order to gather and verify information on gasoline refiners, and thus permit the use of individual company baselines in those countries.161 In this regard, the Appellate Body noted that foreign company data is routinely used in anti-dumping investigations. It also noted that the United States had entered into numerous agreements with other countries to share information in antitrust, tax, securities, and other cases.162 The regulation's second shortcoming was that the EPA had considered the costs of various regulatory options available to domestic refiners, but not to foreign refiners.163 Because of these defects, the Appellate Body concluded that the gasoline regulation constituted "unjustifiable discrimination" and was in reality a "disguised restriction on international trade."164 As a result, the regulation failed to satisfy Article XX.165

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158. Id. at 629.
159. See id. at 631.
160. Id.
161. See id.
162. See id. at 621 & n.52.
163. See id.
164. Id. at 633.
165. See id.
The litigation of the 1990s did much to shape and provide content to the environmental provisions of Article XX. The emerging legal picture, however, was not particularly hospitable to the goal of environmental protection.

A restrictive interpretation of the "life or health" exception in paragraph (b) was adopted. The notion that PPMs could distinguish between products for the purposes of Article III was rejected. Additionally, serious restrictions were placed on the extraterritorial application of environmental measures. Discriminatory measures designed to simplify environmental enforcement might be unjustified if alternative diplomatic solutions are not first explored.

As a result, many environmentalists in the United States, Europe, and elsewhere worried that adequate protection of the environment was not possible within the existing framework of the WTO. Environmentalists were often drawn into trade politics where they tended to side with critics of globalization in order to achieve their goal of environmental protection. Shrimp-Turtle took place within this polarized atmosphere and was watched with great interest by environmentalists everywhere.

V. SHRIMP-TURTLE: THE DISPUTE PANEL REPORT

The facts in Shrimp-Turtle were similar to those in Tuna-Dolphin I and II earlier in the decade. The case originated from the United States' efforts to protect the world's imperiled sea turtle population. Most sea turtles live in tropical or sub-tropical seas. They are "exploited for their meat, shell[s], and eggs." They are also affected by ocean pollution, habitat destruction, and "incidental capture by fisheries." All species of sea turtles are listed as threatened with extinction in CITES.

166. See id. at 632.
167. See id. at 620 (noting that the measures "had not been shown by the United States to be 'necessary' under Article XX(b) since alternative measures either consistent or less inconsistent with the General Agreement were reasonably available to the United States for achieving its aim of protecting human, animal or plant life.").
168. See generally Appellate Body Report I, supra note 5; see also generally Dispute Panel Report I, supra note 5.
169. See Dispute Panel Report I, supra note 5, at 837.
170. Id.
171. Id.
172. See id. at 855.
"[I]ncidental capture and drowning of sea turtles by shrimp trawlers is a significant source of mortality for sea turtles."173 To counteract this threat, the U.S. Government issued regulations under the Endangered Species Act of 1973.174 These regulations require shrimp fishermen operating in U.S. waters to install turtle excluder devices (TEDs) in their trawling nets when fishing in areas of significant sea turtle population.175 A TED allows shrimp to pass to the back of the net while sea turtles and other large objects are directed out of the net.176

In 1989, the U.S. Government enacted Section 609 of Public Law 101-162,177 which called upon the U.S. Government to negotiate bilateral and multilateral treaties for the protection of sea turtles.178 Section 609 also prohibits the import of shrimp harvested with technology dangerous to sea turtles, unless the President annually certifies that:

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting. . . .179

173. Id. at 837.
176. See Dispute Panel Report I, supra note 5, at 837 n.613.
178. The United States negotiated one regional international agreement for the protection and conservation of sea turtles: The Inter-American Convention for the Protection and Conservation of Sea Turtles. See Appellate Body Report I, supra note 5, at 170. This was opened for signing on December 1, 1996, and has been signed, in addition to the United States, by four Latin American countries; but it has not yet been ratified by any of the signatories. See id. The Convention commits parties to take measures to conserve sea turtles, including the reduction of incidental killing of turtles in the course of fishing operations through the use of TEDs and other appropriate technology. See id.
The United States issued guidelines in 1991 and 1993 to implement Section 609. Pursuant to these guidelines, Section 609 applied only to countries in the Caribbean and the Western Atlantic. In December 1995, the U.S. Court of International Trade (CIT) found that the guidelines were illegal insofar as they limited the geographic scope of Section 609. The CIT directed the U.S. Government to prohibit, no later than May 1, 1996, the importation of shrimp harvested anywhere in the world where commercial fishing technology with the potential to adversely affect sea turtles was used.

In April 1996, the U.S. Government issued new regulations in compliance with the CIT's order. "The new guidelines extended the scope of Section 609 to shrimp harvested in all countries." As of May 1, 1996, all shrimp imported into the United States must be accompanied by a Shrimp Exporter's Declaration Form. This form must attest either that the shrimp was harvested under conditions that do not adversely affect sea turtles, or that that shrimp was harvested in waters subject to

182. See Dispute Panel Report I, supra note 5, at 837.
184. See id. at 562.
186. Id.
187. See id.
188. The regulations define "shrimp or shrimp products harvested in conditions that do not adversely affect sea turtles" to include:
   (a) shrimp harvested in an aquaculture facility... ; (b) shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States; (c) shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program, would require TEDs; (d) species of shrimp... harvested in areas in which sea turtles do not occur.
61 Fed. Reg. at 17343. On October 8, 1996, the Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 by allowing the importation of shrimp from non-certified countries where the import was accompanied by a Shrimp Exporter's Declaration Form. See Earth Island Inst. v. Christopher, 942 F. Supp. 597, 605 (Ct. Int'l Trade 1996), vacated, Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998) (vacating the decision of the Court of International Trade on procedural grounds). See
the jurisdiction of a nation currently certified pursuant to Section 609. The regulations provided that certification could be granted annually to harvesting countries that provide documentary evidence of the adoption of a regulatory program designed to reduce the incidental killing of sea turtles. These programs require standards comparable to the United States' standards and an average rate of incidental killing comparable to that of U.S. vessels. Countries shall be certified if their programs include: (i) a requirement that their fishermen use TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program . . . ." and (ii) "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions." The average incidental killing rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program . . . ." In other words, most, if not all, countries that wish to export shrimp to the United States are required to adopt TED programs similar to that imposed by the United States.

India, Pakistan, Malaysia, and Thailand challenged this amended regulation. These countries charged that the import prohibition was a violation of GATT Article XI. As noted earlier, Article XI provides that "[n]o 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 . . . ." In its April 1998 Report, the WTO Dispute Panel agreed with the complaining countries, and noted that "Section 609 expressly

also CIT Strikes Blow at U.S. Compliance with WTO Shrimp-Turtle Ruling, INSIDE U.S. TRADE, Apr. 16, 1999, at 1, 3. In practice, few exemptions from the import ban were available for non-certified countries during the course of the Panel dispute.

190. See Dispute Panel Report I, supra note 5, at 838.
192. Id. at 17344.
193. Id.
194. Id.
195. See Dispute Panel Report I, supra note 5, at 839.
196. See id. (regarding claims of violations of GATT art. XI, para. 1).
197. GATT art. XI, para. 1.
requires the imposition of an import ban on imports from non-certified countries. . . . In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions.”¹⁹⁸ This was deemed a violation of Article XI.¹⁹⁹ Under the circumstances, the Panel did not find it necessary to examine other arguments that the United States also violated Article III and Article I by discriminating against “like” products from other countries.²⁰⁰

The Panel then turned to the United States’ argument that the ban was justified under Article XX (b) and (g).²⁰¹ It never considered, however, the requirements of those specific paragraphs. Instead, it noted that:

Article XX contains an introductory provision, or chapeau, and a number of specific requirements contained in successive paragraphs. . . . [P]anels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse [sic] first the introductory provision of Article XX.²⁰²

Thus, without first considering whether the import ban met the conditions of paragraphs (b) or (g), the Panel proceeded immediately to consider whether the ban constituted “unjustifiable discrimination.” The Panel recognized that this phrase was problematic, because “[t]he word ‘unjustifiable’ has never actually been subject to any precise interpretation, . . . ”²⁰³ and that “[t]he ordinary meaning of this term is susceptible to both narrow and broad interpretations.”²⁰⁴ The Panel therefore reasoned that “it is essential that we interpret the term ‘unjustifiable’ within its context and in the light of the object and purpose of the agreement to which it belongs.”²⁰⁵ According to the Panel, the central purpose of the WTO Agreement is to promote economic

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¹⁹⁸. Dispute Panel Report I, supra note 5, at 841.
¹⁹⁹. See id. at 839.
²⁰⁰. The complaining countries argued that foreign and U.S. shrimp are “like products” in the sense that they have the same physical characteristics, end-uses, and tariff classifications, and are perfectly substitutable. See id. at 841.
²⁰¹. See id. at 843.
²⁰². Id. at 844.
²⁰³. Id. at 846.
²⁰⁴. Id.
²⁰⁵. Id.
development through trade, not protect the environment. It stated that "[w]hile the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through liberal trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis."  

Moreover, the Panel stated that "the WTO Agreement favours a multilateral approach to trade issues ...." In the Panel’s view, the WTO system strongly disfavors unilateral measures by WTO Members. Instead, it favors negotiation among its WTO Members concerning their multi-lateral trade relations.

Given this analysis of the purpose behind the WTO Agreement, the Panel concluded that Article XX allowed WTO Members to derogate from their GATT obligations only if they did so without undermining the WTO multilateral trading system. Any measure that undermines the system constitutes an abuse of that system and is in violation of Article XX. From there, the Panel concluded that the U.S. import ban was unjustifiable under Article XX. It stated that:

[I]f an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT ... and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.... [I]f one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. .... [I]t would be impossible for exporting Members to comply at the same time with multiple

206. See id. at 848.
207. Id.
208. Id.
209. See id.
210. See id. at 849–850.
211. See id.
212. See id. at 856.
conflicting policy requirements.213

As the Panel cautioned, this result could create chaos because “market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.”214 Because U.S. measures posed this type of threat to the WTO system, they constituted unjustifiable discrimination between countries where the same conditions prevailed.215 Thus, the measures were not permitted under Article XX.216

VI. SHRIMP-TURTLE: APPELLATE BODY REPORT

The United States appealed the case to the WTO Appellate Body, which issued an opinion in October of 1998.217 Surprisingly, the Appellate Body rejected the Dispute Panel’s approach to Article XX and identified several serious errors in the Panel’s reasoning.

First, the Appellate Body noted that the Panel misconstrued the ordinary meaning of the words in Article XX by focusing on the content or design of the import ban.218 “The introductory clauses of Article XX,” the Appellate Body noted, “speak of the ‘manner’ in which measures sought to be justified are ‘applied.’”219 This means that an Article XX analysis should focus on the way a trade measure is applied, not on the content of the measure itself.220 The Panel had failed in this respect:

The Panel did not inquire specifically into how the application of Section 609 constitutes ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.’ What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the design of the measure itself. For instance, the Panel stressed that it was addressing ‘a particular situation
The Panel's second error was that it misconstrued the ordinary meaning of Article XX by interpreting the words in light of the object and purpose of the entire WTO Agreement, rather than in terms of the object and purpose of the Article XX chapeau.\textsuperscript{222} According to the Appellate Body, reading Article XX in such a broad context was a serious flaw.\textsuperscript{223} It stated:

Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretive rule which can be employed in the appraisal of a given measure under the chapeau of Article XX.\textsuperscript{224}

The purpose of the chapeau, the Appellate Body wrote, is to prevent abuse of the exceptions under Article XX.\textsuperscript{225} However, "the [P]anel did not attempt to inquire into how the measure at stake was being applied in such a manner as to constitute abuse or misuse of a given kind of exception."\textsuperscript{226}

According to the Appellate Body, both of these errors flowed naturally from the third and most serious defect in the Panel's analysis.\textsuperscript{227} Namely, the Panel's decision to evaluate Section 609 in terms of the standards in the chapeau prior to a determination that the import ban satisfied any of Article XX's specific exceptions.\textsuperscript{228} The Appellate Body criticized the Panel for ignoring the method enunciated in Reformulated Gas,\textsuperscript{229} which was the reverse of the method used by the Panel. It stated that "[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions . . . is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the

\textsuperscript{221} Id. at 150–151.
\textsuperscript{222} See id. at 151.
\textsuperscript{223} See id.
\textsuperscript{224} Id.
\textsuperscript{225} See id.
\textsuperscript{226} Id.
\textsuperscript{227} See id.
\textsuperscript{228} See id.
\textsuperscript{229} Appellate Body Report II, supra note 134.
Panel in this case) has not first identified and examined the specific exception threatened with abuse. This is because the standards in the chapeau only take on specific meaning in the context of a particular case:

When applied in a particular case, the actual contours and contents of these standards vary as the kind of measure under examination varies. What is appropriately characterizable as 'arbitrary discrimination' or 'unjustifiable discrimination,' or as a 'disguised restriction on international trade' in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of 'arbitrary discrimination,' for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

By focusing on the chapeau, the Dispute Panel reached the conclusion that Section 609 fell within a class of illegal measures under GATT because it conditioned access to the U.S. domestic market on the adoption of conservation measures prescribed by the U.S. Government. This missed the point, however, of Article XX. Article XX carves out exceptions to the substantive obligations in GATT precisely because the policies embodied in the exceptions are legitimate and important. Therefore, there is no reason to assume the needs of the multilateral trading system will always trump these domestic policies:

It appears to us . . . that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may . . . be a common aspect of measures falling within the scope of [Article XX] . . . . It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are

231. Id.
232. See id.
233. See generally GATT art. XX.
Having rejected the Panel’s root-and-branch approach, the Appellate Body was compelled to carry out its own analysis to determine whether Section 609 complied with Article XX. The first step was to determine whether Section 609 is provisionally justifiable under a particular Article XX exception. The Appellate Body found it could do so under Article XX(g). Its discussion of Article XX(g) not only clarified the language therein, but also interpreted the paragraph in an extremely environment-friendly fashion.

As noted above, Article XX(g) covers measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . .” Article XX(g) is not limited to the conservation of mineral or non-living natural resources. The Appellate Body wrote, “[w]e do not believe that ‘exhaustible’ natural resources and ‘renewable’ natural resources are mutually exclusive. . . . Living resources are just as ‘finite’ as petroleum, iron ore and other non-living resources.”

Interestingly, this conclusion was not based on an analysis of the paragraph’s negotiating history, or a careful exegesis of its language in the context of Article XX. Instead, the Appellate Body invoked evolving international norms: the words of Article XX(g), ‘exhaustible natural resources,’ were actually crafted more than 50 years ago. They must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment . . . [T]he generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary.’

The Appellate Body emphasized the objective of “sustainable development” as explicitly acknowledged in the Preamble to the

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235. See id.
236. GATT art. XX.
238. Id. at 154–155 (stating that where concepts embodied in a treaty are “by definition, evolutionary,” their “interpretation cannot remain unaffected by the subsequent development of law.” (citation omitted)). The Appellate Body, however, did not offer an explanation as to why the phrase “natural resources” is, by definition, evolutionary. See id.
WTO Agreement.\textsuperscript{239} It also stressed that the United Nations Convention on the Law of the Sea\textsuperscript{240} treats "natural resources" as including both living and non-living resources.\textsuperscript{241} Additionally, the Appellate Body cited two earlier GATT 1947 Dispute Panel Reports that treated fish as an "exhaustible natural resource."\textsuperscript{242} Section 609 is also deemed a measure "relating to" the conservation of a natural resource.\textsuperscript{243} In the Appellate Body's view, Section 609 is directly connected to the goal of conserving sea turtles.\textsuperscript{244} It stated that:

\begin{quote}
[The U.S. measure] is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one.\textsuperscript{245}
\end{quote}

Given this close fit, Section 609 satisfied the "relating to" condition in Article XX(g).\textsuperscript{246}

Finally, the Appellate Body found that Section 609 is a measure made effective in conjunction with restrictions on domestic production or consumption.\textsuperscript{247} The concept of "even-handedness" was central to the Appellate Body's brief discussion of this issue.\textsuperscript{248} Because the restrictions imposed by Section 609 regarding imported shrimp were also imposed on shrimp caught by U.S. vessels, the law was "even-handed," and thus, passed muster.\textsuperscript{249}

In short, Section 609 and the accompanying regulations were found to come within the terms of Article XX(g). Having reached that conclusion, however, the Appellate Body turned to the second stage of the Article XX analysis. It examined the challenged

\begin{thebibliography}{99}
\bibitem{239} See Appellate Body Report I, \textit{supra} note 5, at 156.
\bibitem{241} See Appellate Body Report I, \textit{supra} note 5, at 156.
\bibitem{242} Id. at 155.
\bibitem{243} See id. at 156.
\bibitem{244} See id. at 159.
\bibitem{245} Id.
\bibitem{246} See id.
\bibitem{247} See id. at 159-160.
\bibitem{248} See id. at 159.
\bibitem{249} See id. at 160.
\end{thebibliography}
measure in light of the standards in the chapeau. The Appellate Body began by dismissing a contention put forth by the United States that any bona fide, non-protectionist measure falling within a particular Article XX exception was, by definition, non-abusive and therefore legitimate.\textsuperscript{250} As the Appellate Body pointed out, this argument would read the chapeau out of Article XX.\textsuperscript{251} The opinion then proceeded to the heart of the Article XX analysis.

Taking up the issue of whether Section 609 and the regulations constituted "unjustifiable discrimination," the Appellate Body noted that the statutory provisions in Section 609 did not require other WTO Members to adopt the same policies and enforcement practices as those of the United States.\textsuperscript{252} Harvesting nations were simply required to have programs "comparable" to the U.S. program, and reduce their incidental kills to the average rate attained in the United States.\textsuperscript{253} As the opinion noted:

> Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries. However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.\textsuperscript{254}

The problem with the guidelines, however, was that they required harvesting nations to mandate the use of TEDs comparable in effectiveness to those used in the United States. Effectively, other WTO Members had to adopt turtle conservation programs that were not merely comparable to, but rather essentially the same as, the program applied in the United States. This offended the Appellate Body in that:

> [T]he effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp

\textsuperscript{250. See id. at 161.}
\textsuperscript{251. See id. at 156.}
\textsuperscript{252. See id. at 159.}
\textsuperscript{253. See id. at 158.}
\textsuperscript{254. Id. at 167.}
to the United States. Other specific policies and measures that
an exporting country may have adopted for the protection and
conservation of sea turtles are not taken into account, in
practice, by the administrators making the comparability
determination.255

Moreover, the Appellate Body found the use of an embargo
unacceptable in international trade relations.256 An embargo
would force WTO Members to adopt essentially the same
regulatory program as the United States, without consideration of
the different conditions that may occur in their territories.257

Furthermore, the Appellate Body found it unjustifiable for
the United States to ban imports on shrimp caught by fishermen
who had used TEDs but had fished in the waters of uncertified
countries.258 The Appellate Body viewed this ban on shrimp as
“difficult to reconcile with the declared policy objective of
protecting and conserving sea turtles,”259 because sea turtles had
not been put in jeopardy. They suggested that “this measure, in its
application, is more concerned with effectively influencing WTO
Members to adopt essentially the same comprehensive regulatory
regime as that applied by the United States . . . even though many
of those Members may be differently situated.”260

According to the Appellate Body, unjustifiable discrimination
results whenever the application of a measure does not allow any
inquiry into the appropriateness of the regulatory program for the
conditions prevailing in exporting countries.261 Equally serious
and unjustifiable was “the failure of the United States to engage
the appellees . . . in serious, across-the-board negotiations with the
objective of concluding bilateral or multilateral agreements for the
protection and conservation of sea turtles, before enforcing the
import prohibition . . . .”262 The Appellate Body acknowledged
the efforts of the U.S. Government to negotiate for the
preservation of sea turtles at the Inter-American Convention, but
held these efforts were nevertheless unfair:

255. Id.
256. See id.
257. See id.
258. See id. at 168.
259. Id. at 165.
260. Id. at 167.
261. See id.
262. Id.
The Inter-American Convention . . . provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609 . . . . Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and . . . unjustifiable.263

The unilateral application of Section 609 against the appellees "heighten[ed] the disruptive and discriminatory influence of the import prohibition and underscore[d] its unjustifiability."264

Finally, the Appellate Body was concerned about the discriminatory application of Section 609. Countries in the Caribbean and Western Atlantic had three years to implement the use of TEDs, while India, Malaysia, Pakistan, and Thailand had only four months.265 Because the length of the phase-in period was not inconsequential for countries seeking certification, the United States' failure to ensure equal treatment was deemed unjustifiable discrimination.266

The Appellate Body found ample evidence that Section 609 and the corresponding guidelines arbitrarily discriminated against the appellee countries.267 It regarded the certification process as so unclear and unpredictable that the appellees had been denied basic due process.268 The procedural defects were itemized as follows:

The certification processes . . . consist principally of administrative ex parte inquiry or verification by [U.S. Government] staff . . . . [T]here is no formal opportunity for an applicant country to be heard, or to respond to any arguments

263. Id. at 171.
264. Id.
265. See id.
266. See id. The Appellate Body understood that the ban had been applied to India, Malaysia, Pakistan, and Thailand only as a result of an order from the Court of International Trade. See id. The U.S. Government was given very little time to negotiate agreements. See id. Exporting countries were also given very little time to phase-in TEDs. See id. The Appellate Body wrote, however, that "[t]he United States, like all other Members of the WTO . . . bears responsibility for acts of all its departments of government, including its judiciary." Id. at 171-172.
267. See id.
268. See id. at 173.
that may be made against it, in the course of the certification process . . . [N]o formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for . . . certification . . . . Countries whose applications are denied . . . do not receive notice of such denial . . . or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.269

To the Appellate Body, the certification process was “singularly informal and casual.”270 It fell far short of the “rigorous compliance with the fundamental requirements of due process”271 that should be required “in the application and administration of a measure which purports to be an exception to the treaty obligations . . .”272 of a WTO Member.273 Under the circumstances, the measure was groundless, arbitrary discrimination274 not justified under Article XX.

VII. SHRIMP-TURTLE: IMPLICATIONS FOR THE TRADE AND ENVIRONMENT DEBATE

The Appellate Body’s decision was met with both relief and disappointment by environmentalists. Although they were relieved that the extreme positions taken by the Dispute Panel were rejected, they were disappointed that yet another environmental protection law was not fully protected by Article XX. They questioned whether any law could sustain a WTO challenge. Section 609 and the guidelines failed even though they were designed to achieve an important environmental goal, imposed burdens on both domestic and foreign interests, and lacked a protectionist motive.275

Shortly after the Appellate Body issued its opinion, the National Wildlife Federation (NWF) announced that it was “seriously concerned” about the impact of the WTO case.276 It

269. Id.
270. Id. at 174.
271. Id.
272. Id.
273. See id.
274. See id. Having concluded that Section 609 and the guidelines constituted arbitrary and unjustifiable discrimination, the Appellate Body saw no need to determine whether they were also a disguised restriction on international trade. See id. at 139.
276. See National Wildlife Federation, Breaking News: WTO Appellate Body Strikes
stated:

Since the Appellate body found that the language of the law itself falls within the boundaries of the exceptions allowed to trade rules, they have opened the door for a country to take strong measures to protect shared global resources such as sea turtles. Yet, with their analysis of the implementation of the law, the WTO has also established a stringent requirement that countries implement a conservation law perfectly in order for it to be allowed by the WTO.277

The NWF was most concerned about the difficulties the opinion might cause for future attempts to protect the environment through the use of trade measures. It wrote:

[S]ometimes it is impossible to negotiate with all countries when trying to protect a species on the verge of extinction. Sometimes timing or political situations necessitate that one country take the lead in promoting comprehensive environmental protections. Although they did it imperfectly, the U.S. [G]overnment made a good faith effort to protect endangered sea turtles around the world from death in shrimp nets. While efforts by one country are not enough, and are not the ideal solution to international environmental problems, sometimes, in cases such as this one where an entire life form is threatened, they are necessary.278

The NWF called on the U.S. Government to engage in negotiations with other countries to protect sea turtles, but also continue enforcement and not weaken the law, despite pressure from the WTO.279

It is clear that as a result of the Appellate Body’s opinion, saving sea turtles from destruction is now a more complicated undertaking for both the United States and other countries. Nevertheless, while the opinion fell short of what environmentalists hoped for, the Shrimp-Turtle decision made a number of important and positive contributions to WTO

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277. Id.
278. Id.
279. See id. Other NGOs were even bleaker. David Schorr, Director of the World Wildlife Fund’s Sustainable Commerce Unit, was quoted as saying that the Shrimp-Turtle decision proved that the WTO is “simply not competent to decide issues that require a mature balance between liberalized trade and other legitimate policy goals.” U.S. Loses Appeal on Saving Sea Turtles, supra note 275, at 1A.
jurisprudence.

The Appellate Body’s decision served to clarify the meaning of some of the terms in Article XX(g). First, the Appellate Body interpreted Article XX through the lens of the WTO’s Preamble, which explicitly acknowledges “the objective of sustainable development” and the importance of protecting and preserving the environment. This approach led the Appellate Body to conclude that Article XX is “not static in its content or reference but is rather by definition, evolutionary.” This was a significant step toward ensuring that GATT is interpreted consistently with evolving principles of international environmental law. In addition, the decision clarified that the chapeau regulates how a measure is applied, but does not impose additional substantive standards, such as the Dispute Panel’s undermining of the WTO test. This works to remove one obstacle in the use of trade measures for the protection of the environment.

One of the Appellate Body’s central findings was the conclusion that sea turtles and other living creatures fall within the meaning of the term “exhaustible natural resources” in Article XX(g). The Appellate Body’s rejection of the notion that the term applies only to non-renewable resources, such as oil or minerals, combined with the finding in Reformulated Gas that clean air is also an exhaustible natural resource, should end arguments to use narrow interpretation of Article XX(g). The way is clear for Article XX(g) to be used to protect broad environmental interests.

Another key result was the Appellate Body’s strong endorsement of negotiated agreements as the preferred means of solving environmental problems. This finding makes it unlikely that future Panels will overturn measures taken pursuant to MEAs, at least in any disputes between two parties. It is questionable, however, how a Panel would view a measure taken pursuant to an MEA, but against a non-party. The Panel might treat the MEA as evidence of an international standard and render the trade measure justifiable and non-arbitrary within the meaning of Article XX. It might reject the measure as unjustifiable, however, unless the importing nation made serious efforts to

281. Id.
282. See id. at 151.
283. See generally id. at 154–155.
encourage the non-party to join the MEA prior to the imposition of the measure. This question remains unanswered.

The Appellate Body's finding that the content of Section 609 satisfies Article XX(g) was also very important. It implicitly rejected the conclusion of Tuna-Dolphin II, which states that trade measures are not justified under Article XX if they seek to encourage other countries to change their environmental policies. Unfortunately, the Appellate Body's language on this issue is very carefully hedged. It wrote, "[i]t is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . renders a measure a priori incapable of justification . . . ."284 Whether this will provide effective guidance to Panels dealing with similar, but not identical, circumstances is unclear, but this certainly leaves room for future litigation. The only thing ruled out is an assumption that a measure designed with this intent is unjustified.

Similarly, the Appellate Body implicitly rejected the conclusion in Tuna-Dolphin I, that Article XX(g) is limited to measures that conserve resources within the jurisdiction of the party taking such measures, because sea turtles in the Indian Ocean are not within the jurisdiction of the United States.285 Unfortunately, this portion of the opinion is also somewhat hedged because it emphasizes the migratory nature of the species in question. According to the opinion:

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction . . . . We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).286

284. Id. at 152–153.
285. See generally id. at 156–157.
286. Id. at 157.
The finding that a "sufficient nexus" exists between the United States and turtle species in the Indian Ocean strongly suggests that any jurisdictional limitations in Article XX(g) are fairly limited. Surely, any future effort by a GATT Panel to set a jurisdictional limitation on Article XX(g) would seem extremely artificial if it distinguished Shrimp-Turtle as a case that dealt only with migratory species.

One irony of the Shrimp-Turtle opinion is the absence of any direct discussion of the PPM issue. Section 609 is a classic PPM measure because it singles out certain imports for special treatment because of the manner in which they are produced. PPMs, however, are really an Article III issue involving the question of whether or not two products are "like" products even though they were made differently. The litigation in Shrimp-Turtle was shaped to address Article XX, not Article III. Thus, many questions about environmental PPMs remain unanswered.

Overall, the Appellate Body opinion is clearly "greener" than previous GATT cases, such as Tuna-Dolphin I and II. This probably reflects the trade community's growing sensitivity to environmental concerns. As the comments from the NWF suggest, however, environmental measures will still face serious obstacles under GATT. For example, the Appellate Body's strong suggestion that international negotiations precede the imposition of environmental trade measures might impede environmental protection. Such negotiations could limit the ability of WTO Members to act quickly and unilaterally to protect the environment, especially because comprehensive treaties can take years to negotiate. It also raises many practical questions. Must negotiations result in an international agreement? Presumably not, because Article XX was intended to permit countries to protect important, non-trade interests, and only allowing this pursuant to an international agreement would surely have been mentioned in the text if it were, in fact, intended.²₈⁷ But if the

²₈⁷. See id. at 160. The chapeau states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of [the] measures [found in paragraphs (a) through (j)]." Id. The word "party" is singular, and the words "any contracting party . . ." suggest that Article XX does indeed contemplate action by a member acting alone. See generally GATT art. XX. The sense of the words "any contracting party " seems different from that of alternative formulations not found in the chapeau, such as "several contracting parties operating in unison." Appellate Body Report I, supra note 5, at 160. Even to read a bias against unilateral actions and in favor
negotiations do not have to result in an actual agreement, then how much of a diplomatic effort must the importing nation make? The Appellate Body scolded the United States for failing to engage in “serious, across-the-board” negotiations. 288 Could an importing nation table a take-it-or-leave-it proposal and remain “serious”? Or must it enter into protected negotiations? If so, to what extent must it compromise its environmental objectives in order to strike a deal? And if negotiations are unsuccessful, will Dispute Panels review the negotiating record to determine whether the importing nation acted in good faith and showed sufficient flexibility? Could an importing nation use a trade measure as a bargaining tactic to force other countries to negotiate? Such questions likely suggest that this issue will face litigation again.

Another problematic feature of the Shrimp-Turtle opinion is the suggestion that the U.S. Government should not exclude shrimp caught with TEDs simply because the exporting country was not certified. This shrimp should have been admitted into the United States because it was caught in a manner not threatening to turtles. This implies that the U.S. Government is wrong to concern itself with the practices of all shrimp fishermen in a foreign country. Instead, it should focus only on those who export to the United States. If this reading is correct, a foreign country could adapt to a U.S. trade measure without requiring all of its producers to change their practices. Only those who trade with the United States would need to conform. This clearly limits the ability of the U.S. Government to influence environmental practices abroad by denying access to its huge market. Moreover, any system relying on shipment-by-shipment inspections to determine whether to import shrimp would be vulnerable to fraud. From the standpoint of enforcement, it is far simpler to determine whether or not a country has imposed a TED regime (or some other scheme) on all of its shrimp fishermen.

Finally, future Article XX litigation could be significantly affected by the Appellate Body’s conclusion that a trade measure is “arbitrary” if the exporting nation is not given due process rights, such as prior notification, an opportunity to be heard, written findings, rights of appeal, and so forth. Ideally, greater due

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288. See Appellate Body Report I, supra note 5, at 160.
process will result in a more rational application of laws containing trade measures. It will also, however, give WTO Members endless opportunities to challenge environmental trade measures imposed by other Members.

VIII. CONCLUSION

The litigation has not yet ended. In the aftermath of the Appellate Body opinion, the U.S. Government intensified efforts to negotiate a turtle protection agreement in the Indian Ocean. This shipment-by-shipment approach was designed to address the Appellate Body’s concern that it was unjustifiable discrimination to ban imports simply because the country of origin was not certified. The NWF and other NGOs immediately denounced this decision. According to the NWF:

[S]ea turtles are highly migratory species whose survival depends upon the adoption of comprehensive, international conservation policies . . . . [A] large number of sea turtles [will] still be killed in shrimp nets if only a fraction of a nation’s shrimping fleet use[s] TEDs. Sea turtles which escaped one net equipped with a TED (owned by a shrimper wishing to export their catch to the U.S.) would simply be caught in the next net which was not equipped with a TED (owned by a shrimper who was not planning on exporting their catch to the U.S.).

In a preliminary decision issued on April 2, 1999, the CIT ruled that the proposal to allow shrimp from non-certified countries to enter the United States was “on its face, not in accordance” with the intent of Section 609. The CIT, however, asked the State Department to provide more information before it made a final ruling. According to one environmentalist, the preliminary CIT ruling raised the question of whether the United States is able to comply with the Appellate Body’s opinion without changing Section 609. Notably, the Appellate Body’s ruling on unjustifiable discrimination was based on the cumulative effect of several different problems, only one of which was the requirement


290. CIT Strikes Blow at U.S. Compliance with WTO Shrimp-Turtle Ruling, supra note 188, at 2.

291. See id.

292. See id.
that shrimp come from a certified country. One of the defects was the requirement that shrimp come from a certified country. Should the CIT's order stand, it is unclear whether an inability to retain a shipment-by-shipment scheme would constitute non-compliance if the other defects are remedied. It is politically difficult for the United States to comply with the opinion if it means weakening the law.

The controversy and litigation stemming from Shrimp-Turtle evidence the difficulty in resolving these issues. The trade and environment debate erupted during the course of the Uruguay Round (the Round) and threatened public support for those negotiations. Although the Round did not include trade and the environment as a topic for negotiation, environmental concerns were nonetheless addressed as a result of the negotiations. The Preamble to the WTO Agreement, for example, includes direct references to the objective of sustainable development and the need to protect and preserve the environment. In April 1994, when Trade Ministers met in Marrakesh to approve the results of the Round, a Ministerial Decision on Trade and Environment was adopted. It called for the creation of a Committee on Trade and Environment (CTE), and a broad mandate was imposed on the CTE to identify the relationship between trade and environmental measures in order to promote sustainable development. This mandate also made appropriate recommendations as to whether modifications of the multilateral trading system were required. The overall aim is to make international trade and environmental policies mutually supportive.

That the trade and environment debate still rages is proof that the CTE has not allayed the suspicions and concerns of the environmental community. This failure makes Shrimp-Turtle particularly significant. The Appellate Body's opinion unmistakably nudged GATT jurisprudence in the direction of providing more accommodation for the environment. It opened the door for the use of Article XX(g) as a broad environmental exception to basic GATT disciplines, and it rejected the extreme

294. See id.
jurisdictional limitations associated with the *Tuna-Dolphin* cases. More broadly, the case may have changed the politics of the trade and environment debate by refuting environmentalists who argue that the WTO is institutionally blind to environmental and other non-trade interests. In the long run, *Shrimp-Turtle* might lay the foundation for a process where trade and the environment are accommodated on a case-by-case basis, rather than by amendment or interpretation of basic GATT rules. Although making the world trading regime more environmentally friendly, the case-by-case approach may not be the fastest. It could achieve, however, optimal results without exposing the WTO to undue injury and ill-considered change.