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COMMENT

THE UNITED STATES AND SHRIMP IMPORT PROHIBITIONS: REFUSING TO SURRENDER THE AMERICAN GOLIATH ROLE IN CONSERVATION

The debate over environmental conservation versus liberalized trade reached the focal point of academic discussions again after the recent ruling of the World Trade Organization's [hereinafter "WTO"] Appellate Body on the *United States - Import Prohibition on Certain Shrimp and Shrimp Products.*[1] Ruling in favor of complainants, India, Malaysia, Pakistan and Thailand, the WTO Appellate Body found that the United States' unilateral trade measures to assist in preserving endangered sea turtles were unfairly implemented against the complainants.[2] The WTO found that while many conservation goals of the United States are genuine, no implementation plan which discriminates against less developed nations should stand. Environmental conservation and liberalized trade often create academic debate over the benefits and detriments of both. It may be too hard to resist the human propensity to spend time arguing over an issue instead of simply attempting to work toward solutions. Arguably, the conflict between "environmentalists" and "free traders" does not exist except in the minds of extremists. Naturally, few issues do not have flipsides, both good and bad. Nonetheless, solutions which attempt to use the power of one strong nation, to force compliance from other nations will fail in the end. Progress can rarely be made without understanding all sides of an issue, and the important role that each side plays. In reality, there may be no conflict between environmental conservation and liberalized trade. Perhaps both may simply exist on the same path of an intricately interwoven, crowded world.

In *Shrimp Imports,* the Appellate Body of the WTO concluded that the 1996 Guidelines for the implementation of conservation measures under the Endangered Species Act[3] [hereinafter "Section 609"], calling

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1. *See* WTO Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (visited May 22, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1998 WL 720123 (WTO) [hereinafter "*Shrimp Imports*"].

2. *See id.*

3. Endangered Species Act of 1973, 16 U.S.C. §1537 (1998), *amending* the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*

for the protection and conservation of sea turtles, could not be justified, as they were implemented, as an environmental exception[4] under Article XX[5] of the General Agreement on Tariffs and Trade ("GATT").[6] The United States offered numerous unacceptable excuses for an obviously discriminatory measure, proffered under the guise of a selfless attempt to protect an endangered natural resource.[7]

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4. To date, only one Panel has come close to justifying an environmental law under the environmental exceptions on Article XX grounds. GATT Panel Report on *United States - Taxes on Automobiles*, WTO Doc. DS/31/R (Oct. 11, 1994) (visited May 22, 1999) <http://www.wto.org/wto/dispute/panel.htm>, *also available in* 1994 WL 910937 (GATT) [hereinafter "*Auto Taxes*"]. *See also* Eric Phillips, Note, *World Trade and the Environment: The CAFE Case*, 17 MICH. J. INT'L L. 827 (1996); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, vol.25 no.5, 37 (1991).

5. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶¶ 187-88.

6. *See* General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *amended by* Final Act Embodying Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter "GATT"].

7. Two previous GATT Panel decisions on the Tuna-Dolphin controversy were hauntingly similar to the *Shrimp Imports* dispute. The Tuna-Dolphin controversy started with the relationship that exists between dolphins and yellowfin tuna in the Eastern Tropical Pacific Ocean. The controversy actually revolved around the purse-seine fishing technique used to capture tuna. Dolphins, which swim over schools of yellowfin tuna, are herded together. The tunaboat then encircles the dolphins with a net which is drawn together at the bottom. In this manner, yellowfin tuna are caught. Unfortunately, dolphins are often wounded or killed in the hauling process. In response to outcries by environmentalists, the U.S. enacted the Marine Mammal Protection Act ("MMPA"), which imposed a general moratorium on the taking and importation of marine mammals and marine mammal products. *See* 16 U.S.C. §1371(a) (Supp. 1991). The ban was subject to limited exceptions that required the issuance of permits. *See id.* at § 1373. The permits may only be issued by the National Marine Fisheries Service ("NMFS") if the particular mammal is not considered depleted by more than 60% of its historic population levels. *See* 58 Fed. Reg. 58285 (1993). For dolphins, the MMPA was applied differently between U.S. and foreign fishing fleets. In 1984, Congress statutorily issued a permit to the American Tunaboat Association ("ATA") to avoid the complexities of the permit process for U.S. fleets. *See* 16 U.S.C. 1374(b)(2) (1985). *See also* Earth Island Institute v. Brown, 25 Envt'l L. Rep. 20,560, 865 F. Supp. 1364, 1368 (N.D. Cal. Jan. 27, 1994); Earth Island Institute v. Brown, 16 I.T.R.D. 1321, 17 F.3d 1241 (Mar. 3, 1994); Earth Island Institute v. Brown, 16 I.T.R.D. 1914, 28 F.3d 76 (June 28, 1994); Earth Island Institute v. Brown, 513 U.S. 999 (Nov. 14, 1994), *cert. denied.* These types of discriminatory affects led Mexico and later members of the European Union to question the validity of the MMPA under the GATT Agreement. *See* GATT Panel Report on *United States - Restrictions on Imports of Tuna*, WTO Doc. WT/DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (1993), *available in* 1991 WL 771248 (GATT) (1991), *not adopted* [hereinafter "*Tuna I*"]; and GATT Panel Report on the *United States - Restrictions on Imports of Tuna*,

This paper explores a different perspective on the environmental conservation versus liberalized trade debate in the context of the recent WTO Appellate Body decision in the *Shrimp Imports* dispute. A brief legal background section gives attention to the history of the WTO and dispute resolution under GATT. First, the paper examines the initial *Shrimp Imports* Panel Report[8] and the issues raised on appeal. Part III offers the Appellate Body's ruling in *Shrimp Imports*. Part IV scrutinizes the Appellate Body's decision which opened the door to the possible future acceptance of amicus briefs from interest groups and examines Article XX(b), Article XX(g) and the Preamble to Article XX. It looks at the effects of the use of "might" in the international arena and offers possible solutions to the environment and trade conflict.

I. LEGAL BACKGROUND

A. *General Agreement on Tariffs and Trade*

In Bretton Woods, New Hampshire, in 1944, national representatives of the United States and Great Britain gathered to create a mechanism for liberalizing trade.[9] It was believed that liberalized trade would create a more efficient use of labor and natural resources, while increasing standards of living.[10] In 1947, the Bretton Woods Conference produced the General Agreement on Tariffs and Trade for a proposed International Trade Organization ("ITO").[11] Since the U.S. never ratified the ITO, other members abandoned the organization.[12] The first six rounds of GATT multilateral trade negotiations, from the Kennedy Round in 1947 to the mid 1960s, focused on tariff reduction.[13] The GATT became both

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WTO Doc. WT/DS29/R (June 16, 1994), 33 I.L.M. 839 (1994), *available in* 1994 WL 907620 (GATT), *not adopted* [hereinafter "*Tuna II*"].

8. WTO Panel Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS/58/R (May 15, 1998), 33 I.L.M. 832 (1998), *also available in* 1998 WL 256632 (WTO) [hereinafter "*Shrimp Imports*"].

9. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 27-39 (1989).

10. *See id.* at 8-17.

11. *See* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 194. There has been some debate as to whether or not GATT is binding under U.S. law. For both sides of the debate compare Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law,* 26 STAN. J. INT'L. L. 479 (1990), with John H. Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law*, 66 MICH. L. REV. 250 (1967).

12. *See generally* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990).

13. *See generally* John Odell and Barry Eichengreen, *The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership, in* THE WTO AS AN INTERNATIONAL ORGANIZATION 181 (Anne O. Kreuger ed., 1998).

the Agreement and an organization to fill the void left by the failure of the ITO.[14] The GATT organization provided a forum for trade negotiations and for settlement of disputes.[15] By the Tokyo Round in the 1970s, the focus had shifted to negotiations on the reduction of non-tariff barriers.[16]

On April 15, 1994, the Uruguay Round progressed a step further by strengthening and developing "GATT 1947" into "GATT 1994."[17] To further reduce tariffs and to establish rules for non-tariff barriers, the Uruguay Round created the World Trade Organization ("WTO").[18] The new WTO formalized dispute resolution, incorporated the original GATT rules and added new rules.[19] The three founding rules for liberalized trade upon which the GATT Agreement and all side agreements were built include: (1) Article 1,[20] the most-favored-nation principle, prohibited discriminatory trade practices between contracting members and required that all contracting members must be treated as favorably as any other member; (2) Article III[21] required parties to treat foreign and domestic parties alike; (3) Article XI[22] limited the use of quantitative restrictions such as quotas.[23] Recognizing that these obligations might occasionally have to breached, the GATT parties created Article XX which allowed for a variety of exceptions including "human, animal or plant, life or

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14. *See* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 13 (1987). *See also* Odell, *supra* note 13, at 182.

15. *See* OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 5 (1985).

16. Some of the Tokyo Round codes included the Agreement on Technical Barriers to Trade, April 12, 1979, 1186 U.N.T.S. 276, GATT B.I.S.D. (26th Supp.) at 8 (1980); Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, GATT B.I.S.D. (26th Supp.) at 56 (1980) [Subsidies Code]; Arrangement Regarding Bovine Meat, GATT B.I.S.D. (26th Supp.) at 84 (1980); and Agreement on Import Licensing Procedures, GATT B.I.S.D. (26th Supp.) at 154 (1980).

17. *See generally* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990).

18. *See* GATT, *supra* note 6.

19. *See e.g.*, Agreement on Subsidies and Countervailing Measures, Annex 1A, Law & Practice of the World Trade Organization 271 (Joseph F. Dennin ed., 1996); Agreement on Technical Barriers to Trade, Annex 1A, Law & Practice of the World Trade Organization 135 (Joseph F. Dennin ed., 1996); and Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1A, Law & Practice of the World Trade Organization 59 (Joseph F. Dennin ed., 1996).

20. *See* GATT, *supra* note 6, art. I.

21. *See id.*, art. III.

22. *See id.*, art. XI.

23. *See generally* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 129-31 (1989).

health" and "conservation of exhaustible natural resources."[24] GATT Panels have interpreted these exceptions narrowly. To date only one previous Panel has come close to justifying an environmental law on Article XX grounds.[25] In *United States - Taxes on Automobiles* [hereinafter "*Auto Taxes*"], the Panel was reviewing the Corporate Average Fuel Economy ("CAFE") law which required manufacturers of autos to meet certain minimum fuel efficiency standards for the entire fleet of autos that they sell in the United States.[26] While the Panel found that important elements of the CAFE law violated GATT, they also found much of the law to be compatible with GATT, thereby offering support to those who believe that environmental protection can coexist with the WTO system.[27]

II. THE CASE

In 1989, the United States enacted Section 609,[28] which called upon the U.S. Secretary of State, in consultation with the U.S. Secretary of Commerce, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries engaged in commer-

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24. For the text of Article XX see *infra* note 74.
25. *See Auto Taxes* Panel Report, *supra* note 4.
26. *See* Phillips, *supra* note 4, at 828.
27. *See Auto Taxes* Panel Report, *supra* note 4, ¶¶ 5.57-.59.
28. Section 609(a) of the 1996 Guidelines directs the Secretary of State to:

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;

(2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;

(3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;

(4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and

(5) provide to the Congress by not later than one year after the date of enactment of this section: . . .

(C) a full report on:

(i) the results of his efforts under this section; . . . *See* 61 Fed. Reg. 17342 (April 19, 1996) [hereinafter "1996 Guidelines"].

cial fishing operations likely to adversely affect sea turtles.[29] Under Section 609, shrimp harvested with technology that may adversely affect certain sea turtles could not be imported into the U.S. unless the President "certified to Congress by May 1, 1991, and annually thereafter, that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the U.S., or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles."[30] The U.S. issued guidelines in 1991[31] and 1993[32] for assessing the comparability of foreign regulatory programs with the U.S. program and the implementation of Section 609.[33] Following those guidelines, Section 609 was applied only to countries of the Carribean/West Atlantic.[34]

In December 1995, the U.S. Court of International Trade ("CIT") in *Earth Island Institute v. Christopher*[35] found the 1991 and 1993 guidelines illegal insofar as they limited the geographic scope of Section 609 to shrimp harvested in the wider Carribean/Western Atlantic area. The CIT directed the U.S. Department of State to prohibit, no later than May

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29. *See Shrimp Imports* Panel Report, *supra* note 8, at *4, ¶ 17.

30. *Id.*

31. To be considered comparable to the U.S. program, the foreign nations program required, among other things, a commitment to engage in a statistically reliable and verifiable scientific program to reduce the mortality of sea turtles associated with shrimp fishing. Foreign nations were given three years for the complete phase in of a comparable program. The guidelines also stated that the import restriction did not apply to aquaculture shrimp (produced by farming as opposed to being caught in the wild), whose harvesting does not adversely affect sea turtles. *See Shrimp Imports* Panel Report, *supra* note 8, at *4, ¶ 18. The complete version of the 1991 Guidelines can be found at 56 Fed. Reg. 1051 (Jan. 10, 1991).

32. The 1993 U.S. revised guidelines required affected nations to maintain their commitment to require TEDs on all commercial shrimp trawl vessels by May 1, 1994 in order to receive certification in 1993. The foreign nation must also be able to demonstrate the use of TEDs on a significant number of shrimp trawl vessels by May 1, 1993. To receive certification after 1993, affected nations were required to use TEDs on all their shrimp trawl vessels with a limited number of exemptions. The main exemption is for vessels whose nets are retrieved by manual means as opposed to mechanical means. These vessels are not required to use TEDs because the lack of mechanical retrieval systems restricts tow times to a short duration, thereby limiting the threats of incidental drowning of sea turtles. The 1993 guidelines eliminated the option of a mere commitment to engage in a scientific program to reduce the mortality of sea turtles due to shrimp trawling. *See Shrimp Imports* Panel Report, *supra* note 8, at *4, ¶ 19. The complete 1993 guidelines can be found at 58 Fed. Reg. 9015 (Feb. 18, 1993).

33. *See Shrimp Imports* Panel Report, *supra* note 8, at *4, ¶¶ 18-19.

34. The 1991 guidelines limited the scope of Section 609 to the wider Carribean/ Western Atlantic region, and more specifically to: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Columbia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana, and Brazil.

35. 19 Ct. Int'l Trade 1461, 913 F. Supp. 559 (CIT 1995).

1, 1996, the importation of shrimp or the products of shrimp wherever harvested in the wild with commercial fishing technology which may adversely affect those species of sea turtles governed by the regulations of the Secretary of Commerce.[36]

In order to comply with the U.S. CIT order, the Department of State issued new guidelines in April 1996.[37] The new guidelines extended the scope of Section 609 to shrimp harvested in all countries. Under the new guidelines, as of May 1, 1996, all shipments of shrimp or shrimp products into the U.S. were to be accompanied by a declaration, the "Shrimp Exporter's Declaration" form, attesting that the shrimp were harvested "either under conditions that do not adversely affect sea turtles or in waters subject to the jurisdiction of a nation already certified under Section 609."[38] According to the 1996 Guidelines:

> Shrimp or shrimp products harvested in conditions that do not affect sea turtles" 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 not require TEDs; (d) Species of shrimp, such as the pandlid species harvested in areas in which sea turtles do not occur.[39]

The 1996 Guidelines even determined the criteria for certifying a harvesting nation whose fishing environment "does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting"[40] as including: "(a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g. any nation that har-

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36. The Department of State requested a modification of the judgment which would allow a one-year extension for the worldwide enforcement of Section 609. The State Department argued, inter alia, that many of the major shrimp exporting nations would likely be unable to implement a comparable program by May 1, 1996. The U.S. CIT refused the requested extension and confirmed the May 1, 1996, deadline. *See* Earth Island Institute v. Christopher, 18 I.T.R.D. 1469, 922 F. Supp. 616 (CIT 1996). For a more detailed history of this line of cases see *infra* notes 168, 223 and 224.

37. *See* 1996 Guidelines, *supra* note 28.

38. *Shrimp Imports* Panel Report, *supra* note 8, at *5, ¶ 21.

39. 1996 Guidelines, *supra* note 28.

40. *Id.*, § 609 (b)(2)(C).

vests shrimp exclusively by artisanal means; (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur."[41] Further conditions to be taken into account in determining the comparability of foreign programs included "other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitats, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles."[42]

In October 1996, the U.S. CIT ruled that the embargo on shrimp and shrimp products enacted by Section 609 applied to all shrimp or shrimp products harvested in the wild by citizens or vessels of nations which have not been certified.[43] A later U.S. CIT decision clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported even if the country had not been certified under Section 609.[44] At that time, the U.S. CIT refused to postpone the worldwide enforcement of Section 609.[45]

A. *The Panel Decision*[46]

In a letter dated October 8, 1996, India, Malaysia, Pakistan and Thailand requested consultations with the United States[47] pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")[48] and Article XXII:1 of GATT.[49] The letters concerned the proposed U.S. ban on certain shrimp and shrimp

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41. *Shrimp Imports* Panel Report, *supra* note 8, at *5, ¶ 23 (quoting 1996 Guidelines, *supra* note 28).

42. *Shrimp Imports* Panel Report, *supra* note 8, at *6, ¶ 24 (quoting 1996 Guidelines, *supra* note 28).

43. *See* Earth Island Institute v. Christopher, 18 I.T.R.D. 2344, 942 F. Supp. 597 (CIT 1996). *See infra* notes 168, 223 and 224; and *supra* note 36.

44. *See* Earth Island Institute v. Christopher, 18 I.T.R.D. 2516, 948 F. Supp. 1062 (CIT 1996).

45. *See Earth Island Institute*, 948 F. Supp at 1070. For a full listing of countries certified as of January 1, 1998, *see Shrimp Imports* Panel Report, *supra* note 8, at *6, ¶ 26.

46. *See Shrimp Imports* Panel Report, *supra* note 8.

47. This letter, WTO Doc. WT/DS58/1, can be found on Westlaw's electronic database at 1996 WL 908914 (WTO).

48. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112, art. 4 (1994) [hereinafter "DSU"], Agreement Establishing the World Trade Organization, Annex II LEGAL INSTRUMENTS RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 112, art. 4 (1994).

49. *See* GATT, *supra* note 6, art. XXII:1.

products under Section 609 of U.S. Public Law 101-162[50] and the "Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations."[51] Consultations held on November 19, 1996, failed to reach a satisfactory solution. Upon the requests of Malaysia, Thailand, Pakistan and India,[52] the WTO Dispute Settlement Body ("DSB") established a panel to examine, under Article XXIII:2 of GATT and Article 6 of the DSU, the embargo implemented through the enactment of Section 609 of the 1996 Guidelines and the issuance of judicial decisions interpreting the law and its regulations.[53]

The United States argued that the ban on shrimp and shrimp products was proposed to protect against the incidental killing of sea turtles[54] during shrimp harvesting. All sea turtles that occur in U.S. waters are listed as endangered or threatened species under the Endangered Species Act of 1973 ("ESA"). The National Marine Fisheries Service ("NMFS") developed turtle excluder devices ("TEDs") through a program aimed at reducing the mortality of sea turtles in shrimp trawls.[55] A TED is a grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other large objects unin-

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50. Codified at 16 U.S.C. § 1537 (1996), *amending* the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*

51. See 1996 Guidelines, *supra* note 28.

52. The requests of each party can be found in Westlaw's electronic database at: Malaysia and Thailand, WTO Doc. WT/DS/58/6 (Jan. 19, 1997) *available in* 1997 WL 423602; Pakistan, WTO Doc. WT/DS/58/7 (Feb. 7, 1997) *available in* 1997 WL 424044; and India, WTO Doc. WT/DS/58/8 (Mar. 4, 1997) *available in* 1997 WL 371075.

53. For a more detailed account see *Shrimp Imports* Panel Report, *supra* note 8, at *1-*2, ¶¶ 1-10. Documentation of this meeting can be found at the World Trade Organization, WTO Doc. WT/DSB/M/31.

54. There are seven recognized species of sea turtles: the green turtle, loggerhead, flatback, hawksbill, leatherback, olive ridley, and Kemp's ridley. These species can be found in both subtropical and tropical areas. Sea turtles live at sea where they migrate between foraging and nesting grounds. Adult females nest in multi-year cycles, coming ashore to lay clutches of about 100 eggs in nests they dig on the beach. Few eggs survive to reach the age of reproduction. Sea turtles have been exploited for their meat, shells and eggs. Furthermore, they are indirectly affected by man's activities through incidental captures in fisheries, destruction of their habitats and pollution of the oceans. Presently, all species of sea turtles are included in Appendix I of the 1973 Convention on International Trade in Endangered Species ("CITES"). All species except for the Australian flatback are listed in Appendices I and II of the 1979 Convention on Migratory Species of Wild Animals ("CMS") and appear in the IUCN Red List as endangered or vulnerable. *See Shrimp Imports* Panel Report, *supra* note 8, at *3, ¶¶ 11-13.

55. *See Shrimp Imports* Panel Report, *supra* note 8, at *3, ¶¶ 15-16. For a visual demonstration of a Turtle Excluder Device see <http://www.earthisland.org/strp/ted.html> (visited Jan. 5, 1999).

tentionally caught out of the net.[56]

India, Malaysia, Pakistan and Thailand ("the complainants") asked the WTO Panel to find that Section 609 of U.S. Public Law 101-162 and its implementing measures: "a) were contrary to Articles XI:1 and XIII:1 of GATT 1994; b) were not covered by the exceptions under Article XX(b) and (g) of GATT 1994; c) nullified or impaired benefits accruing to complainants within the meaning of Article XXIII: 1(a) of GATT 1994."[57] Opposing those arguments, the U.S. requested that the panel find that Section 609 and its implementing measures fell within the scope of Article XX, paragraphs (b) and (g) of GATT 1994.[58]

During the proceedings, the Panel received two amicus briefs submitted by non-governmental organizations ("NGOs").[59] The first was submitted by the Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL"). The second was submitted by the World Wide Fund for Nature ("WWF"). The NGOs sent copies to the Panel and to the parties to the dispute. The complainants asked the Panel to disregard the content of the amicus briefs.[60] The United States stressed that the Panel could seek information from any relevant source under Article 13 of the DSU.[61] After consideration, the Panel decided:

> Accepting non-requested amicus briefs from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for

56. *See id.*, at *3, ¶ 15.

57. *Id.*, at *7, ¶ 27.

58. For the text of Article XX, ¶¶ (b) and (g) see *infra* note 74. These are the main environmental exceptions in GATT.

59. *See Shrimp Imports* Panel Report, *supra* note 8, at *69, ¶ 155.

60. *See id.*

61. The Panel noted that under Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. *See id.*

Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.[62]

The Panel first examined the complainant's claims regarding a violation of Article XI:1 GATT 1994.[63] Measures prohibited under Article XI:1 include outright quotas and quantitative restrictions made effective through import or export licenses. The Panel decided that the embargo applied by the U.S. to the importation of shrimp and shrimp products under Section 609 was identical to the prohibition considered in the *Tuna I* and *Tuna II* Panel Reports.[64] In both cases, the Panels found that the restriction was a violation of Article XI.[65] Furthermore, the Panel noted that the U.S. "does not dispute that with respect to countries not certified, Section 609 amounts to a restriction on the importation of shrimp within the meaning of Article XI:1 of GATT 1994."[66] The Panel considered that the evidence made available was sufficient to determine that the U.S. prohibition of shrimp imports from non-certified members violated Article XI:1.[67]

The complainants further claimed that the U.S. import prohibition violated Articles I:1[68] and XIII:1. The complainants argued that identical shrimp and shrimp products from different WTO Members was being treated differently by the U.S.[69] Shrimp harvested by use of TEDs were forbidden entry into the United States if harvested by a national of a

62. *Id.*

63. The full text of Article XI:1 of GATT 1994 states:Article XI - General Elimination of Quantitative Restrictions 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. *See supra* note 6, art. XI:1.

64. *See Tuna I* and *Tuna II* Panel Reports, *supra* note 7.

65. *See id.*

66. *Shrimp Imports* Panel Report, *supra* note 8, at *282, ¶ 13.

67. *See id.*, at *283, ¶ 16.

68. The full text of Article I:1 of GATT states:Article I General Most-Favoured-Nation Treatment 1. With respect to customs duties and charges of any kind imposed on or in connection with importation and exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, and 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 contracting parties. *See supra* note 6.

69. *See Shrimp Imports* Panel Report, *supra* note 8, at *284, ¶ 18.

non-certified country, but would be permitted to enter the U.S. if harvested by the same methods by a national of a certified country.[70] Moreover, the complainants pointed out that initially affected countries were given a phase-in period of three years, while newly affected members were generally given only four months notice to adopt a program which complied with U.S. requirements.[71] Due to the conclusions reached concerning violation under Article XI:1, the Panel found it unnecessary to review violations[72] under Article I:1 and Article XIII:1 of GATT 1994.[73]

The Panel moved to address the U.S. defense under Article XX[74] of GATT 1994. The complainants argued that Article XX(b) and (g) cannot be invoked to justify a measure which applies to animals not within the jurisdiction of the member enacting the measure.[75] The U.S. responded that Article XX(b) and (g) contain no jurisdictional limitations.[76] In considering the arguments of the parties, the Panel had to look at "whether Article XX(b) and (g) apply at all when a Member has taken a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s)."[77] In the *United States - Standards for Reformulated and Conventional Gasoline*[78] [hereinafter "*Reformulated Gasoline*"], the Appellate Body stated that

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70. *See id.*

71. *See id.*, at *284, ¶ 19.

72. The WTO Appellate Body on *U.S. - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* [hereinafter "*Wool Shirts*"] mentioned that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." WTO Appellate Body Report on *Wool Shirts*, WTO Doc. WT/DS33/AB/R (Apr. 25, 1997) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1997 WL 222239 (WTO) at *13.

73. *See Shrimp Imports* Panel Report, *supra* note 8, at *285, ¶ 23.

74. The Preamble and relevant parts of Article XX on general exceptions include:

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

(b) necessary to protect human, animal or plant life or health; . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . . . *See supra* note 6, art. XX.

75. *See Shrimp Imports* Panel Report, *supra* note 8, at *285, ¶ 24.

76. *See id.*

77. *Id.*, at *286, ¶ 26.

78. WTO Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1996 WL 227476 (W.T.O.), 35 I.L.M. 603 (1996) [hereinafter "*Reformulated Gasoline*"].

"WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements."[79]

Article 31(1) of the Vienna Convention on the Law of Treaties (1969) [hereinafter the "Vienna Convention"] provides that "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 objective purpose." The Panel reasoned that the terms of the treaty must be viewed not only in their ordinary meaning, but also in terms of the context and the object and purpose of GATT 1994 and the WTO agreement.[80] In the *Reformulated Gasoline* case, the Appellate Body stated that in order for Article XX to be used to justify a measure it must fall under one of the measures listed in paragraphs (a) to (j) under Article XX *and* it must also then satisfy the requirements of the opening paragraph or chapeau of Article XX.[81] The Panel on *United States Imports of Certain Automotive Spring Assemblies*[82] [hereinafter "*Auto Spring Assemblies*"] specified that "the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined."[83] In attempting to define "unjustifiable" under Article XX, the Panel reached the conclusion that the context of the chapeau of Article XX cannot be distinguished from that of Article XX as a whole.[84]

79. *Id.* at *30.

80. *See Shrimp Imports* Panel Report, *supra* note 8, at *286, ¶ 27.

81. *See* Appellate Body Report on *Reformulated Gasoline*, *supra* note 78, at *22. The Preamble to Article XX states: Subject to the requirement that such measures are not applied in a manner that would constitute a means arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures. *See supra* notes 6 and 74.

82. GATT Panel Report on *United States - Imports of Certain Automotive Spring Assemblies*, WTO Doc. L/5333 (June 12 1982) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/panel.htm>, *also available in* 1982 WL 204029 (GATT) [hereinafter "*Auto Spring Assemblies*"].

83. *Id.*, ¶ 56.

84. The *Auto Spring Assemblies* Panel looked to Article 31(2) of the Vienna Convention which provides that the context for the purpose of treaty interpretation comprises the text of the agreement, including its preamble and annexes. *See Shrimp Imports* Panel Report, *supra* note 8, at *288, ¶ 35. The text of the Preamble to Article XX requires that the measure not be applied in an unjustified discriminatory manner. *See supra* notes 6 and 74.

The practice of past Panels has been to interpret Article XX as a limited and narrow exception.[85] Any measure falling within these exceptions must give consideration to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[86] Thus, while 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 trade."[87] The GATT Agreement is committed to a multilateral trading system.[88] The panel pointed to the decision in 1994 in *Tuna II* where a similar issue was considered:

> If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.[89]

The United States argued that the Panel should have considered the many examples of import bans under various international agreements

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85. For the full discussion of a limited interpretation of Article XX see *Shrimp Imports* Panel Report, *supra* note 8, at *288, ¶¶ 36-39. *See also Tuna I* Panel Report, *supra* note 7, ¶ 5.20; and GATT Panel Report on *Canada - Administration of the Foreign Investment Review Act*, WTO Doc. L/5504 (July 25, 1983) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/panel.htm>, *also available in* 1983 WL 197514 (G.A.T.T.), ¶ 5.20 [hereinafter "*Investment Review Act*"].

86. *See Shrimp Imports* Panel Report, *supra* note 8, at *289, ¶ 39.

87. *Id.*, at *290, ¶ 42.

88. *See id.*, at *291, ¶¶ 43-45 and n.647.

89. *Tuna II* Panel Report, *supra* note 6, ¶ 5.26. Even though *Tuna II* was not adopted, the findings of the Appellate Body in its report on *Japan Taxes on Alcoholic Beverages* stated that unadopted panel reports have no legal status in the GATT or WTO system but a Panel can nevertheless find useful guidance in the reasoning of an unadopted panel report that it considers to be relevant. *See* WTO Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R (July 11, 1996) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1996 WL 910779 (WTO) [hereinafter "*Alcoholic Beverages*"].

that show that members may take actions to protect animals, whether they are located within or without their jurisdiction.[90] However, the Panel countered that GATT Agreements and multilateral environmental agreements (MEAs) are representative of efforts in the international community to pursue shared goals, with the intention of developing mutually supportive relationships between members with due respect afforded to all.[91] The U.S. pointed out that the 1992 Rio Declaration on Environment and Development [hereinafter "Rio Declaration"] recognized the right of States to design their own environmental policies on the basis of their own particular environmental and developmental situations.[92] The Panel noted that the Rio Declaration also stressed the need for international cooperation.[93]

Section 609 contained provisions calling for the U.S. Secretary of State to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles.[94] However, no evidence was presented to show that the U.S. actually undertook negotiations on an agreement with the complainants concerning for sea turtle conservation before the imposition of the import prohibition ordered by the U.S. CIT.[95] Even though the deadline for the imposition of import was May, 1, 1996, the U.S. did not propose negotiation of an agreement to any of the complainants until September 1996, after the conclusion of negotiations on the Inter American Convention for the Protection and Conservation of Sea Turtles.[96]

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90. *See Shrimp Imports* Panel Report, *supra* note 8, at *293, ¶ 50.

91. *See id.*, at *293, ¶ 50, n.657.

92. *See* Rio Declaration on Environment and Development, The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), Principle 2, June 3-14, 1992, Rio de Janeiro, Brazil (stating that "environmental measures addressing transboundary or global environmental problems should, as far as possible, be based in international consensus").

93. *See id.*

94. *See Shrimp Imports* Panel Report, *supra* note 8, at *296, ¶ 56.

95. *See id.* The Panel noted that this was similar to the situation considered in the *Gasoline* case when the Appellate Body noted that the U.S. had not even pursued the possibility of entering cooperative arrangements which would have alleviated the discrimination suffered by foreign refiners. In the *Reformulated Gasoline* case, the Appellate Body concluded that the measure was "unjustifiable discrimination" and a "disguised restriction on international trade." *See* Appellate Body Report on *Reformulated Gasoline*, *see supra* note 78, at *17.

96. Inter-American Convention for the Protection and Conservation of Sea Turtles, Sept. 5, 1996. The United States did not propose any negotiations with the complainants until after the deadline for the implementation of the import ban on May 1, 1996. Even then the efforts made consisted merely of an exchange of documents. *See Shrimp Imports* Panel Report, *supra* note 8, at *296, ¶ 56.

Concerning international obligations regarding the protection of sea turtles, both parties referred to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").[97] All turtle species covered in this dispute are listed under Appendix I of CITES, covering species threatened with extinction.[98] However, the subject of the import prohibition was shrimp, which was not an endangered species.[99] Therefore, the Panel found CITES could not be considered to impose on its members specific methods for catching, such as TEDs.[100] In conclusion the Panel stated, We consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied without any serious attempt to reach, beforehand, a negotiated solution. We therefore find that the U.S. measure at issue is not within the scope of measures permitted under the chapeau of Article XX.[101]

B. *Appellate Body Report*

On July 13, 1998, the U.S. notified the Dispute Settlement Body of its intention to appeal certain issues of law and certain interpretations developed by the Panel in its April 1998, decision.[102] The U.S. claimed that the Panel erred in disallowing acceptance of unsolicited submissions from NGOs.[103] According to the U.S., Article 13.2 of the DSU gave the Panel the discretionary authority to choose the sources of its information. The U.S. also argued that Section 609 was within the scope of Article XX and did not constitute "unjustifiable discrimination between countries where the same conditions prevail."[104] Furthermore, the U.S. claimed that the Panel's interpretation that Section 609 was a "threat to the multilateral trading system" was not mentioned in the text of GATT and had never been adopted by any previous Panel or Appellate Body Report.[105] Inquiry into effects on the trading system was uncalled for, and would add "an entirely new obligation under Article XX of GATT 1994."[106]

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97. *See Shrimp Imports* Panel Report, *supra* note 8, at *297, ¶ 58.

98. All marine turtles were listed on March 3, 1973, 993 U.N.T.S. 243, 12 I.L.M. 1985 (1973).

99. *See Shrimp Imports* Panel Report, *supra* note 8, at *297, ¶ 58.

100. *See id.*

101. *Id.*, at *298, ¶¶ 61-62.

102. This document, WTO Doc. WT/DS58/11, dated July 13, 1998 is available in Westlaw at 1998 WL 394607 (WTO).

103. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 8.

104. *Id.*, ¶ 10.

105. *See id.*

106. *Id.*, ¶ 13.

The issues to be addressed by the Appellate Body were:(a) whether the panel erred in finding that accepting non-requested information from nongovernmental sources would be incompatible with the provisions of the DSU as currently applied; and (b) whether the panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of GATT 1994.[107]

C. *Dispute Resolution Under GATT*

In the 1947 GATT agreement, the dispute settlement provision was Article XXIII.[108] Unfortunately, the panel process still contained two weaknesses. First, panel reports could only be adopted by consensus.[109] Second, the legal significance of panel reports was unclear.[110] At the Uruguay Round, the Punta del Este Declaration provided that "in order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process."[111] The new WTO established after the Uruguay Round provided for a new dispute resolution process.[112] Several important aspects of this process include: (1) the establishment of an Appellate Body;[113] (2) adoption of panel and appellate reports may be blocked by consensus only;[114] and (3) the losing party risks the implementation of trade sanctions if it does not implement the panel or appellate report within a reasonable time.[115]

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107. *Id.*, ¶ 98.

108. *See* GATT, *supra* note 6, art. XXIII. For further discussion *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 94 (1989); OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 73 (1987); and David M. Schwartz, *WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest*, 10 AM. U.J. INT'L L. & POL'Y 955, 958 (1995).

109. GATT members traditionally interpreted "consensus only" to mean that there could be no significant dissent concerning the panels report or it could not be adopted. *See generally* JOHN H. JACKSON, *The Legal Meaning of GATT Dispute Settlement Report: Some Reflections*, *in* 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 149, 154 (Niels Blokker, et al eds., 1994).

110. *See generally id.* at 156-60.

111. Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept. 20, 1986, 25 I.L.M. 1623 (1986).

112. *See* DSU, *supra* note 48.

113. *See id.*, art. 17.

114. *See id.*, arts. 16.4 and 17.14.

115. *See id.*, art. 22.1.

III. SUMMARY OF THE COURT'S REASONING

The Appellate Body noted that under Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the panel.[116] Access to the dispute settlement process is limited to WTO Members.[117] Even then, only WTO Members who have given notice of their interest in the dispute have a legal right to make submissions to the Panel.

The Appellate Body found that the *Shrimp Imports* Panel was within its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information.[118] The Appellate Body noted:It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.[119]

However, the Panel mistakenly equated "authority to seek information" with a prohibition on accepting information which had been submitted without being requested by a panel.[120] A Panel has the discretionary authority to accept or reject information and advice whether or not the information was requested by the Panel.[121] Therefore, the Appellate Body held that the Panel "erred in its legal interpretation that accepting

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116. Article 13 of the DSU states: 1) Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member, it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing that information. 2) Panels seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group are and its procedures are set forth in Appendix 4. *See* DSU, *supra* note 48.

117. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 101.

118. *See id.*, ¶¶ 101-108.

119. *Id.*, ¶ 104 (emphasis omitted). The Appellate Body noted further that "Under articles 12 and 13, taken together, the DSU accords to a Panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and control the process by which it informs itself of the relevant facts of the dispute and of the legal norms and principles applicable to such facts." *Id.*, ¶ 106. *See supra* note 116 for the text of Article 13 of the DSU.

120. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 108.

121. *See id.*

non-requested information from non-governmental sources is incompatible with the provisions of the DSU."[122]

The second issue the *Shrimp Imports* Appellate Body confronted was whether the Panel erred in finding that Section 609 of the 1996 Guidelines constituted unjustifiable discrimination between countries where the same conditions prevailed. According to the Appellate Body, the Panel did not follow all steps of the customary rules of interpretation of public international law as set forth by Article 3.2 of the DSU.[123] Noting previous Appellate Body decisions concerning treaty interpretation,[124] the Appellate Body stated that the Article 3.2 of the DSU had been interpreted to call for: [A]n examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[125]

In the present case, the Panel focused repeatedly on the design of the measure as opposed to focusing on the manner in which that measure

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122. *Id.*, ¶ 110.

123. *See id.*, ¶ 114.

124. *See e.g.*, Appellate Body Report on *Reformulated Gasoline*, *supra* note 78, at *17; Appellate Body Report on *Alcoholic Beverages*, *supra* note 89, at 10-12; WTO Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (Dec. 19, 1997), *available in* 1997 WL 804929 (WTO), ¶¶ 45-46 [hereinafter "*India Patent Protection*"]; WTO Appellate Body Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc. WT/DS56/AB/R (March 27, 1998) (visited May 22, 1999) <http://www/wto.org/wto/dispute/distab.htm>, *also available in* 1998 WL 175346 (WTO), ¶ 47 [hereinafter "*Argentina Footwear*"]; and WTO Appellate Body Report on *European Communities - Customs Classification of Certain Computer Equipment*, WTO Doc. WT/DS62/AB/R (June 5, 1998) (visited May 22, 1999) <http://www/wto.org/wto/dispute/distab.htm>, *also available in* 1998 WL 295540 (WTO), ¶ 85 [hereinafter "*EC Computer Equipment*"].

125. Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 114. The text of Article 31, the general rule of interpretation in the *Vienna Convention on the Law of Treaties* states, "A treaty shall be interpreted on 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 also* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 2nd ed. (Manchester University Press, 1984), at 130-31.

was applied.[126] The Panel's analysis was misguided because the Panel "disregarded the sequence of steps essential for carrying out such an analysis."[127] In the *Reformulated Gasoline* case, the Appellate Body stated that the proper method for extending the justifying protection of Article XX included: 1) the measure at issue must come under one or another of the particular exceptions, paragraphs (a) to (j) listed under Article XX; and 2) the measure must also satisfy the opening clauses of Article XX.[128] The *Shrimp Imports* Panel suggested that the sequence to be followed for this test did not matter.[129] The Appellate Body disagreed with this conclusion.[130] The test, as formulated by the Panel, created a broad standard and test which had no basis in the chapeau of Article XX or either of the exceptions claimed by the United States.[131] The Appellate Body found that the Panel's interpretive analysis of this standard constituted legal error and therefore reversed the Panel's decision.[132] Under mandates found in Article 17 of the DSU, the Appellate Body found, as in previous cases, "In certain appeals, . . . the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the Panel."[133]

In *Shrimp Imports*, the U.S. primarily invoked Article XX(g), claiming Article XX(b) only in the alternative. The Appellate Body held that, "in line with the principle of effectiveness in treaty interpretation,[134]

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126. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 115.

127. *Id.*, ¶ 117.

128. *See* Appellate Body Report on *Reformulated Gasoline*, *supra* note 78, at 22.

129. *See* Shrimp Imports Panel Report, *supra* note 8, at *286, ¶ 28.

130. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 119.

131. *See id.*, ¶ 121.

132. *See id.*, ¶ 122.

133. WTO Appellate Body Report on *European Communities - Measure Affecting the Importation of Certain Poultry Products*, WTO Doc. WT/DS69/AB/R (July 13, 1998) (visited May 22, 1999) <http://www/wto.org/wto/dispute/distab.htm>, *also available in* 1998 WL 388561 (WTO), ¶ 156 [hereinafter "*Poultry Products*"]. *See also* WTO Appellate Body Report on *Canada - Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (June 30, 1997) (visited May 22, 1999) <http://www/wto.org/wto/dispute/distab.htm>, *also available in* 1997 WL 398913 (WTO) at 23-24 [hereinafter "*Canadian Periodicals*"].

134. The Appellate Body referred to the following sources in its report: Appellate Body on *Reformulated Gasoline*, *supra* note 78, at *25; Appellate Body Report on *Alcoholic Beverages*, *supra* note 89, at *12; WTO Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc. WT/DS24/AB/R (Feb. 10, 1997) (visited May 22, 1999) <http://www/wto.org/wto/dispute/distab.htm>, *also available in* 1997 WL 426484 (WTO), at *16. *See also* Jennings and Watts eds. OPPENHEIM'S INTERNATIONAL LAW, 9th ed., vol. 1 (Longman's, 9th ed. 1992), at 1280-81; M.S. McDougal, H.D. Laswell and J. Miller. THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE

measures to conserve exhaustible natural resources,[135] whether living or non-living, may fall within Article XX(g)."[136] The Appellate Body found "sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."[137] The Appellate Body further found that, as required under Article XX(g), Section 609 was closely related to the purpose of conserving an exhaustible natural resource.[138] Since the Appellate Body found that Section 609 came within the terms of Article XX(g), it was not necessary to analyze the measure in terms of Article XX(b).[139]

The Appellate Body then turned to the Preamble of Article XX to see if Section 609 could be justified under the introductory clauses.[140] The U.S. argued that "(i)f a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception, rather than for protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception."[141] The Appellate Body disagreed with this reasoning.[142] A measure which was found to fall under the terms of Article XX(g) might not necessarily comply with the requirements of the chapeau.[143]

Three standards exist in the chapeau of Article XX: 1) arbitrary discrimination between countries where the same conditions prevail; 2) unjustifiable discrimination between countries where the same conditions prevail; and 3) a disguised restriction on international trade.[144] For the first two standards, three elements are required: 1) the application of the measure must result in discrimination; 2) the discrimination must be arbitrary or unjustifiable in character; and 3) this discrimination must occur in countries where the same conditions prevail.[145] The Preamble was de-

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184 (1994); I. Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 118 (Manchester Univ. Press, 2nd ed. 1984), 1984. For further sources see Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 131, n.116.

135. None of the parties disputed the exhaustability of sea turtles. As the Appellate Body stated, this would have been difficult to dispute since all seven of the recognized species of sea turtles are listed in Appendix 1 of CITES. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 132; and CITES, Article II.1.

136. Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 131.

137. *Id.*, ¶ 133.

138. For the Appellate Body's full discussion see Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶¶ 135-42.

139. *See id.*, ¶ 146.

140. For the text of the Preamble see *supra* note 74.

141. Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 148.

142. *See id.*, ¶ 149.

143. *See id.*

144. *Id.*, ¶ 150.

145. *Id.*

signed to prevent the abuse of the Article XX exceptions. In the *Reformulated Gasoline* case the Appellate Body stated, "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."[146] In the present case, the Appellate Body stated, "a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its rights to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members."[147] The exceptions listed under Article XX were "limited and conditional exceptions from the substantive obligations contained in the other provisions of the GATT 1994 . . . the ultimate availability of the exception is subject to the compliance by the invoking member with the requirements of the chapeau."[148] The Appellate Body referred to an application of the general principle of "good faith" known as the doctrine of "abus de droit."[149] This doctrine prohibited the abusive exercise of a state's rights and stated that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[150]

The 1996 Guidelines required other WTO Members to adopt regulatory measures which were essentially the same as measures applied to U.S. shrimp trawl vessels.[151] As the Appellate Body stated, "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal,

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146. Appellate Body Report on *Reformulated Gasoline*, *supra* note 78, at *22.

147. Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 156.

148. *Id.*, ¶ 157 (emphasis omitted).

149. *See id.*, ¶ 158.

150. *Id.*, ¶ 158. In footnote 156, the Appellate Body offers several sources for furthering reading of the doctrine of "abus de droit." In particular, they cite B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953):" . . . a reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. . . ."

151. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 163.

as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."[152] Furthermore, despite the U.S. Congress's recognition of the importance of securing international agreement on the protection and conservation of sea turtles under Section 609(a),[153] the record indicated no serious efforts by the United States to attempt negotiations before imposition of the import ban.[154] Moreover, the Appellate Body found that the different "phase-in" periods for different countries, in particular the shorter three to four months given the parties to this case, resulted in differences of treatment which were "unjustifiable discrimination" within the meaning of the Preámble of Article XX.[155]

None of the types of certification listed under Section 609(b)(2) had a predictable certification process that was followed by U.S. officials.[156] In its statement at the oral hearing, the U.S. admitted that:

> . . . [T]here is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission form the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.[157]

The Appellate Body concluded that the Section 609, while qualifying for provisional justification under Article XX(g), failed to meet the requirements of the chapeau of Article XX and thus could not be justified under Article XX of GATT 1994.[158]

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152. *Id.*, ¶ 164 (emphasis omitted).

153. *See* 1996 Guidelines, *supra* note 28.

154. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 166.

155. *See id.*, ¶ 176.

156. For further discussion of the administrative process of certification see *id.*, ¶¶ 177-84.

157. *Id.*, ¶ 180 (footnote omitted).

158. *See id.*, ¶¶ 184, 187.

To clarify the implications of its decision, the Appellate Body noted that their decision did *not* decide that the protection and preservation of the environment is of no significance to WTO Members.[159] The Appellate Body stated: "We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and they should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do. . . . although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX."[160]

IV. ANALYSIS

The announcement of the WTO Appellate Body's decision in *Shrimp Imports* drew angry comments from many U.S. environmentalist groups. The conflict over environmental protection and liberalized trade is not a new topic of contention.[161] While academians, governmental officials and policy makers tend to take sides for either liberalized trade or environmental protection, it could be argued that both liberalized trade and environmental protective measures are beneficial for human kind. *However*, to gain the benefits of both liberalized trade and environmental protection, these two types of policies/principles must be applied in recognition of their mutual ties and benefits to the common good. Just as

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159. *See id.*, ¶ 185.

160. *Id.*, ¶ 185-86.

161. For a general overview of the argument for liberalized trade see for example DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 81 (1817); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 8-17 (1989); Jagdish Bhagwati, *Trade and the Environment*: The False Conflict¶, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY (Durwood Zaelke, et al., eds. 1993). For an overview of the argument against liberalized trade and for environmental protection see generally Richard Revesz, *Rehabilitating Interstate Competition*, 67 N.Y.U. L. REV. 1210; Steve Charnowitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 Envt'l L. 475, 476-77 (1993); HERMAN E. DALY, Problems with Free Trade: Neoclassical and Steady-State Perspectives, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY 147-52, 155-57 (1993); Daniel Esty and Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENV. L. REV. 265 (1997).

trade policies should not be enacted without first considering environmental consequences, environmental policies should not be enacted without at least considering the consequences on trade policies of other countries. The recent *Shrimp Imports* decision offers another prime example of the failure of the U.S. to see the bigger picture.

A. *The Acceptance of Amicus Briefs*

The Earth Island Institute was quick to condemn the Appellate Body's decision.[162] Critics, however, have failed to notice what may turn out to be a most beneficial step forward in future dispute resolutions. The Appellate Body found accepting non-requested information from non-governmental sources compatible with Article 13[163] of the DSU.[164] This marked a significant step toward an increased role for interest groups in future dispute resolutions. In a day and age when developing countries are still struggling with feeding their citizens and promoting economic development, this may give NGOs and other interest groups the perfect role for assuring that environmental interests are not forgotten in trade agreements. During the 50th anniversary meeting of GATT in Geneva in May of 1998, President Clinton "called for the admissibility of such briefs to encourage greater transparency and accountability" within GATT.[165]

No formal rules currently exist for submission of amicus briefs by NGOs. No Panel has ever permitted direct submission of amicus briefs. Until now, NGOs have had to persuade a WTO Member to include its arguments in the member's submission in a dispute. That member had the choice of not adopting all of the NGO's arguments. In the *Shrimp Imports* dispute, the U.S. asked the Appellate Body to simply consider the expert opinions in the briefs. Such precedent could eventually lead to groups such as NGOs, commercial interest groups, corporations, etc. aggressively pressuring the U.S., or other members, to allow submission of their amicus briefs. While the *Shrimp Imports* Appellate Body implied that the Panel did not *have* to consider anything in the brief that was not expressly adopted by the WTO Member, it also opened the door to allow interest groups to submit amicus briefs directly to the WTO panel. Of course, the Panel accepts the amicus brief at its own discretion. The main issue still left was whether the WTO panel would be required to consider

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162. *See* Earth Island Institute's website at <http://www.earthisland.org> (visited Jan. 5, 1999).

163. For the text of Article 13 of the DSU *see supra* note 116.

164. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 110.

165. James Cameron and Stephen J. Orava, *WTO Opens Disputes to Private Voices*, NAT'L L.J., Dec. 7, 1998, at B5, *available in* Lexis (visited Jan. 22, 1999).

facts and legal arguments which had not first been approved by a WTO Member. This may need to be clarified through rule making since no formal rules currently exist for this type of situation. Another concern is the possible bombardment of WTO panelists by lobbyists of strong interest groups.[166] These problems could also possibly be addressed in a formal rule. While the Appellate Body's decision opened the door to future use of amicus briefs, it also left the Panel with discretionary authority to accept or reject information and advice.[167] The Appellate Body did *not* rule against the Panel's decision to not accept submissions if they were not directly solicited by the Panel, but rather found that the Panel's interpretation of "seek" was excessively formal.[168] The Panel should not have

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166. Some restraints will undoubtedly be required if WTO Panels begin to freely accept amicus briefs from interest groups. An NGO which has pursued the strictest enforcement of Section 609 is the Earth Island Institute. On September 17, 1998, a coalition of environmental groups including, the Sea Turtle Restoration Project of Earth Island Institute, the Sierra Club, and the Humane Society of the U.S., filed for a temporary restraining order in the U.S. Court of International Trade, asking for the enforcement of Section 609 and the withdrawal of weaker U.S. guidelines published after the initial panel report in the *Shrimp Imports* dispute. These weaker guidelines call for the use of a shipment by shipment standard for certification as opposed to the nation by nation standard issued in the 1996 guidelines. An excerpt of Public Notice 2876, published in the Federal Register and effective as of August 28, 1998, can be found at the Earth Island Institute's website for its Sea Turtle Restoration Project at <http://www.earthisland.org/strp/shipguidelines.html> (visited Jan. 5, 1999).

Earth Island offers an extensive website on its fight to save sea turtles. Such a dedicated fight is admirable since it is for a good cause, but also seemed to be one-sided while operating at full speed with blinkers to avoid seeing any side issues. The general address for the website is <http://www.earthisland.org>.

167. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 108.

168. *See id.*, ¶¶ 107-108. The Appellate Body noted that the *Shrimp Imports* Panel did two things in determining to not accept the unsolicited submission of amicus briefs, "[f]irst, the Panel declared a legal interpretation of certain provisions of the DSU: i.e., that excepting non-requested information from non-governmental sources would be, 'incompatible with the provisions of the DSU as currently applied.' Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties . . . two additional weeks to respond to the additional material." *Id.*, ¶ 100. The Panel dwelled on the fact that the only parties who have a legal right to make submissions to a WTO Panel are the parties to the dispute who must be WTO Members or WTO Members who have a substantial interest in the suit. *See id.*, ¶ 101. The Appellate Body determined that it was more appropriate to address this issue by examining what a Panel was authorized to *do* under the DSU. *See id.* In particular, Article 13 of the DSU governs the right to seek information. *See supra* note 114. Two recent Appellate Body decisions adopted right before the Panel's ruling in the *Shrimp Imports* dispute interpreted Article 13. In *EC Measures Af-*

rejected the amicus briefs because they were unsolicited. Rather, they could reject the amicus briefs because they had the discretionary power to do so.[169] The Appellate Body stated, "A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*"[170] The initial fear was that this ruling would lead to a barrage of amicus briefs from NGOs. Understandably so, it would be counterproductive to permit too many interested parties to submit amicus briefs. For that reason, the Appellate Body did not grant an absolute right to submit amicus briefs directly to the WTO Panel.

Nonetheless, this was at least recognition that amicus briefs could be accepted at the discretion of a dispute panel. Setting some limits on amicus brief submissions was the wiser choice. NGOs may offer the best opportunity to promote environmental interests, but more prominent and forceful NGOs may also tend to have extreme views which may not necessarily be representative of the best interests of global sustainable conservation. A perfect example is the Sea Turtle Restoration Project ("STRP") at Earth Island Institute[171] which might be considered the most vocal U.S. advocate for sea turtle conservation. While their motives are good, their strategies are less desirable. One of STRP's responses to the *Shrimp Imports* Appellate Body decision was a call for supporters to

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fecting Meat and Meat Products (Hormones), the Appellate Body observed that Article 13 "enable[s] panels to seek information and advice as they deem appropriate in a particular case," and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." WTO Appellate Body Report on *EC - Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R (Jan. 16, 1998) (visited Mar. 25, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1998 WL 25520 (WTO), ¶ 147 [hereinafter "*Meat Products*"]. In *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, the Appellate Body ruled that "[p]ursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. . . . Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all." Appellate Body Report on *Argentina Footwear*, *supra* note 124, ¶¶ 84-86.Article 12.1 of the DSU authorizes panels to follow or change the working procedures set forth in the Appendix 3 of the DSU, and to develop their own working procedures after consultation with parties to the dispute. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 105.

169. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 108.

170. *Id.* (emphasis in text).

171. For more information on STRP and Earth Island Institute, an extensive website is located at <http://www.earthisland.org> (visited Jan. 5, 1999).

write U.S. Trade Representative Charlene Barshefsky,[172] and President Clinton, urging them "to get the U.S. out of WTO."[173] Isolationism is definitely not a solution. Plans for saving the environment must be globally oriented and must consider the effects of those plans on all involved parties.

B. *Interpreting Article XX[174] of GATT: The Environmental Exceptions*

The GATT does not govern trade but rather governs trade restrictions in an attempt to globally liberalize trade. The majority of disputes that arise under GATT fall under the most-favored-nation (Article I), national treatment (Article III), and quantitative restriction (Article IX) standards found in GATT. A complaining state must convince a WTO Panel that a trade measure is discriminatory. Once a violation has been demonstrated, the responding party has the burden of proving that its actions do not violate GATT or can be found as an exception under another provision of GATT, such as Article XX. Article XX provides exceptions for members who can prove that the trade restriction was necessary for some overriding policy concern. While Article XX exceptions are commonly used, only one decision has come close to upholding an environmental law.[175] However, the recent *Shrimp Import* decision provided further direction as to what might pass approval under these environmental exceptions. Coupled with *Reformulated Gasoline*, the *Shrimp Imports* decision has clearly established for future panels the proper procedure to follow when applying Article XX to environmental trade measures.

Conflicts generally arise when a state with more stringent environmental standards enacts one of two types of trade measures. The first type are trade measures with trade restrictions designed to regulate the environmental quality within the territory of the high-level state.[176] The second type are trade measures which attempt to persuade another country to change policies within its own territory.[177] When reviewing an environmental trade measure ("ETM"), GATT reviews, not the effectiveness of the ETM, but rather how well the ETM accomplishes its

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172. *See* <http://www.earthisland.org/strp/wto.html> (visited Jan. 5, 1999).

173. *See* <http://www.earthisland.org/strp/wtointlaw.html> (visited Jan. 5, 1999).

174. For the full text of Article XX of GATT see *supra* note 74.

175. *See Auto Taxes* Panel Report, *supra* note 4.

176. *See generally* DANIEL A. FARBER AND ROBERT E. HUDEC, *GATT Legal Restraints on Domestic Environmental Regulations*, *in* 2 FAIR TRADE AND HARMONIZATION 59 (1996).

177. *See id.*

purpose.[178] Critics of GATT argue that an ETM can only be effective if it has at least some elements of severity.[179] One uncertain area under Article XX is extraterritoriality.[180] Can imports be restricted for differences in environmental policies across countries?

i. *Article XX(b)*

In the *Shrimp Import* decision, the U.S. only claimed Article XX(b) as an alternative exception in case Section 609 was found to not fall under Article XX(g). Since the Appellate Body found that Section 609 fell under Article XX(g), the Appellate Body did not review the U.S. argument for Article XX(b).[181] However, a general understanding of Article XX(b) is appropriate in reviewing the environmental exceptions. The two critical questions raised under Article XX(b) are: 1) what constitutes a "necessary" measure to protect human, animal, or plant life; and 2) where must these humans, animals, and plants be located? The panel decision in *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*[182] concluded that a trade restriction is only "necessary" if no other reasonably available measure exists, and that the alternative measure would not be less violative than the original measure.[183] Moreover, even if the measures available are equal in degree if severity, a WTO Member must use the measure which entails the least degree of inconsistency with GATT provisions.[184] In *Tuna II*, in a dispute over dolphin conservation involving essentially the same issues as the *Shrimp Imports* case, the panel ruled that an embargo could not protect the life or health of dolphins.[185] Furthermore, as a matter of policy, Article

178. *See* GATT, *supra* note 6, art. XX.

179. For general discussions on this issue *see* Mark Edward Foster, Note, *Trade and Environment: Making Room for Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393 (1998).

180. *See generally* Piritta Sorsa, *GATT and the Environment: Basic Issues and Some Developing Country Concerns*, *in* WORLD BANK DISCUSSION PAPERS: INTERNATIONAL TRADE AND THE ENVIRONMENT 309-10 (1992).

181. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 131.

182. GATT Panel Report on *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*, WTO Doc. WT/DS10/R (Oct. 5, 1990) (visited May 22, 1999) <http://www.wto.org/wto/dispute/panel.htm>, *also available in* 1990 WL 692205 (GATT) [hereinafter "*Thailand Cigarettes*"].

183. *See id.*, ¶ 74. *See also Tuna II* Panel Report, *supra* note 7, ¶ 5.39; and Appellate Body Report on *Alcoholic Beverages*, *supra* note 89.

184. *See* GATT Panel Report on *United States - Section 337 of the Tariff Act of 1930*, WTO Doc. L/6439 (Nov. 7 1989) (visited May 22, 1999) <http://www.wto.org/wto/dispute/distab.htm>, *also available in* 1989 WL 587604 (GATT), ¶ 5.26 [hereinafter "*Tariff Act*"].

185. *See Tuna II* Panel, *supra* note 7, ¶ 5.35 (limiting importing nation regulation to

XX(b) could not be interpreted to allow one member nation to force a change in the policies of another member nation.[186]

ii. *Article XX(g)*

For a trade measure to be accepted under Article XX(g), the measure must be related to the conservation of an "exhaustible natural resource" and be taken "in conjunction with restrictions on domestic production or consumption."[187] Steve Charnowitz has suggested that the term "exhaustible natural resources" may have been limited to nonrenewable raw materials.[188] After an overview of treaty interpretation, the *Shrimp Imports* Appellate Body found "measures to conserve exhaustible natural resources, *whether living or non-living*, may fall within Article XX(g)."[189]

The Appellate Body's decision in *Reformulated Gasoline* gave the first detailed clarification of how to interpret Article XX.[190] In that report, the Appellate Body noted that the Panel in *Reformulated Gasoline* mistakenly inquired as to whether the discriminatory treatment afforded by the measure was simply "related to" conservation.[191] Rather, the true inquiry should be whether the measure itself was "primarily aimed at" the conservation of a natural resource.[192] This in essence softens the requirements associated with Article XX(g). This classification had actually also been made previously in *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon.*[193] In *Shrimp Imports*, the Appellate Body found that the same mistakes in interpretation had been made by the *Shrimp Imports* Panel.[194] Partial blame should be placed on dispute panel members who are not elected officials and whose knowledge of past dispute resolutions may be sketchy. How familiar do these panelists have to

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regulation as products).

186. *See id.*, ¶ 5.38.

187. *See* GATT, *supra* note 6, art. XX(g). The full text of Article XX(g) can be found at *supra* note 74.

188. For a review of the history of the environmental exceptions see Charnovitz, *supra* note 4; and Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVT'L L.J. 299 (1994).

189. Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 131.

190. *See* Appellate Body on *Reformulated Gasoline*, *supra* note 78.

191. *See id.*, at *9-*13.

192. *See id. See also* GATT Panel Report on *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, WTO Doc. L/6268 (Nov. 20, 1987) (visited May 22, 1999) <http://www.wto.org/wto/dispute/panel.htm>, *also available in* 1987 WL 421961 (GATT), ¶¶ 4.5-4.7.

193. *See id.*, ¶ 4.6.

194. *See* Appellate Body Report on *Shrimp Imports*, *supra* note 1, ¶ 115.

be before they are permitted to preside over a dispute resolution? Decisions like *Reformulated Gasoline* and *Shrimp Imports* have at least established a more transparent, predictable dispute resolution process under the GATT.

The *Reformulated Gasoline* Appellate Body also overruled the language of previous panels that required that a measure not only "reflect a conservation purpose," but also "some positive conservation effect," by reasoning that it might take years before the effects of a measure could truly be observed.[195] These clarifications by the Appellate Body in *Reformulated Gasoline* had the effect of broadening the scope of measures that could possibly be considered under the Article XX exceptions.

Another major fault with Section 609 was the fact that the shrimp were banned due to the process by which they were caught.[196] In *Tuna I*, the Panel noted that an importing country may distinguish between actual products, but it *may not* distinguish between imported products not produced in conformity with the importing country's domestic policies from products which are produced in conformity with the importing country's domestic policies.[197] This identical issue raised in *Tuna I*, *Tuna II* and *Shrimp Imports* Panel decisions, concerned the "primarily aimed at" test under the notion that a prohibition would not be allowed if the product banned is not the product being conserved.[198]

Finally, even though the *Tuna I* Panel found that the measure could not be applied outside the jurisdiction of the member nation,[199] in *Tuna II*, the Panel found that Article XX(g) did not place any restrictions on the locations of the natural resource to be protected.[200]

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195. Appelate Body on *Reformulated Gasoline*, *supra* note 78, at *13.

196. *See* 1996 Guidelines, *supra* note 28.

197. *See Tuna I* Panel Report, *supra* note 7, ¶¶ 5.10-5.16. *See also Tuna II* Panel Report, *supra* note 7, ¶¶ 5.6-5.10; and Alan Isaac Zreczny, *The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement*, 1 BUFF. J. INT'L L. 79 (1994).

198. *See* Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolpins and Turtles*, 24 GEO. WASH. J. INT'L & ECON. 477 (1991) (arguing that a broad reading of Article XX(b) would allow an unlimited application of trade barriers).

199. *See Tuna I* Panel, *supra* note 7, ¶ 5.32.

200. *See id.*

iii. *Preamble to Article XX*[201]

Originally, the Preamble was intended to prevent protectionist or discriminatory use of Article XX. The Appellate Body in *Reformulated Gasoline* was the first GATT Panel to thoroughly review the Preamble. In its consideration of the introductory provisions, the Appellate Body stated:The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal rights, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, 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.[202]

As restated by the Appellate Body in *Shrimp Import*, the Appellate Body in *Reformulated Gasoline* noted that the Preamble prohibits the application of measures which constitute: (a) "arbitrary discrimination," (b) "unjustifiable discrimination," or (c) "disguised restriction" on international trade.[203]

In the *Shrimp Imports* decision, the most conspicuous flaw of Section 609 was its "intended and actual coercive effect on the specific policy decision made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect an economic embargo which requires all other exporting members . . . to adopt essentially the same policy as that applied to, and enforced on, United States domestic shrimp trawlers."[204] Any flexibility that existed in Section 609 was eliminated by the 1996 Guidelines, which required that WTO Members adopt essentially the same regulatory scheme as applied to the United States.[205] The 1996 Guidelines totally failed to take into consideration the different conditions found in the territories of WTO Members. The complainants argued that the cost to some fishermen of installing TEDs could be equivalent to a year's income. The U.S. argument embarrassingly lacked any consideration of the varying economic levels of citizens of WTO Members. Furthermore, the U.S. was not permitting imports of shrimp harvested by commercial trawlers with TEDs comparable to those required in the U.S., if those shrimp originated in waters of countries not

201. For the text of the Preamble to Article XX see *supra* note 74.

202. *See* Appellate Body on *Reformulated Gasoline*, *supra* note 78, at *15.

203. *Id.*

204. Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 161 (emphasis omitted).

205. *See* 1996 Guidelines, *supra* note 28.

certified under Section 609.[206]

In *Reformulated Gasoline*, the Appellate Body stated:[T]he United States had not pursued the possibility of entering into cooperative agreement with Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into the appropriate procedures in cooperation with the government of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.[207]

This theme of behavior should sound hauntingly familiar. In the *Shrimp Imports* decision, the Appellate Body found that the record indicated no serious efforts by the United States to attempt negotiations before imposition of the import ban.[208] A review of recent WTO decisions reveals a consistent pattern by the United States of not seeking international agreements before implementing trade measures.[209] Even the trade measure in contention in the *Shrimp Imports* case, Section 609(a) of the 1996 Guidelines, calls for the initiation of negotiations for the development of bilateral or multilateral agreements with other nations.[210]

C. *Does Might Make Right?*

Environmentalists and academians complain that no environmental trade measure has yet to be approved under the Article XX. Such a statement sounds bleaker than it is. Out of the total number of ETMs, how many are ever actually reviewed by a WTO dispute panel? The comparatively small number of WTO panel disputes leads to the conclusion that the number of ETMs ruled as discriminatory is small. To carry this reasoning a step further, might this not also lead to the conclusion that the complainants are actually dealing with unjustifiable discrimination? The *Shrimp Imports* Appellate Body acknowledged the good intentions of the U.S. but noted that Section 609, as implemented, was arbitrary and unjustifiable discrimination.[211] However, the Appellate Body seems to suggest that with modifications, such as eliminating discriminatory practices, Section 609 would pass the tests of the Preamble to Article XX.[212]

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206. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 165.

207. Appellate Body on *Reformulated Gasoline*, *supra* note 78, at *19.

208. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 166.

209. *See generally Tuna I* Panel Report, *supra* note 7; and *Tuna II* Panel Report, *supra* note 7.

210. *See* 1996 Guidelines, *supra* note 28.

211. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶¶ 184-86.

212. Remember that the Appellate Body found that Section 609 did qualify as an

The U.S. stance going into the *Tuna I, Tuna II* and *Shrimp Imports* disputes demonstrated a complete turn around from the position it initially held when creating dispute resolution under GATT. When discussing dispute settlement under GATT, there were two views concerning dispute resolution.[213] The first, the power-oriented model saw dispute resolution as a mere step in the negotiation process.[214] The power oriented model gave those with greater economic strength the upper hand, forcing smaller nations to negotiate at a disadvantage.[215] The second view of dispute resolution was the rule-oriented model, giving deference to GATT as a body of rules.[216] The rule-oriented approach was advocated by the U.S. The implementation of the DSU clarified the rule-oriented model which applies the dispute resolution rules equally to all members regardless of the economic power of those parties.

The scope of this paper could not possibly cover the numerous instances in which the United States has acted in a misguided fashion and failed to admit to it. In the present situation it is easy for the United States to claim to be only environmentally concerned for the conservation of sea turtles. After all the U.S. has suffered no real trade disadvantages. The loss of shrimp from the complaining countries was simply balanced by buying shrimp from other countries. This is not so for the complainants. In Malaysia alone, shrimp exports to the U.S. in 1995 were valued at U.S. $ 9.1 million.[217] In 1997, shrimp exports from Malaysia fell to U.S. $1.47 million.[218]

Section 609 of the 1996 Guidelines issued by the U.S. Congress offered no due process to the complainants. By order of the U.S. Congress, the complainants were given a ridiculously short four months to implement the use of TEDs compared to three years given to other countries.[219] The certification process under Section 609(b)(2) was not even

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Article XX(g) exception, but failed under the tests found in the Preamble of Article XX. *See* Appellate Body on *Shrimp Imports, supra* note 1, ¶¶ 141-42.

213. *See generally* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersman ed., 1997).

214. *See* PIERRE PESCATORE, HANDBOOK OF GATT DISPUTE SETTLEMENT 71 (1991).

215. *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 47-48 (1990).

216. *See* PESCATORE, *supra* note 214.

217. *See WTO Orders U.S. to Remove Ban on Asian Shrimp*, NEW STRAITS TIMES, Oct. 22, 1998, at 17, *available in* 1998 WL 13398656.

218. *See id.*

219. *See* Appellate Body on *Shrimp Imports, supra* note 1, ¶¶ 173-76. The Appellate Body noted, "Under the 1991 and 1993 Guidelines, fourteen countries in the wider Caribean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors

predictable.[220] A country applying for certification was given no formal opportunity to be heard, or to respond to any arguments made against it in the course of certification.[221] Furthermore, applicants were not informed as to whether or not certification was granted, nor offered a procedure for review or appeal from an application denial.[222]

In the *Shrimp Imports* dispute, the U.S. Congress passed the 1996 Guidelines after a series of rulings by the U.S. CIT in *Earth Island Institute v. Christopher*,[223] mandating that the government enforce Section 609 worldwide.[224] Several questions surface concerning this series of *Earth*

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could adjust to the requirement of the use of TEDs. With respect to all other countries exportingshrimp to the United States (including appellees, India, Malaysia, Pakistan, and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996. On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foraign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Carribean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs." *Id.*, ¶ 173 (footnote omitted).

220. *See generally id.*, ¶¶ 177- 85.

221. *See id.*, ¶ 180.

222. Countries which were granted certification are included in a list published in the Federal Register. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 180.

223. The first *Earth Island* decision concerning shrimp imports was handed down on December 29, 1995. *See* Earth Island Institute v. Christopher, 19 Ct. Int'l Trade 1461, 913 F. Supp. 559 (CIT 1995). The court allowed the U.S. government five months to attempt to implement worldwide Pub. L. 101-162, § 609. *See id.* at 580. The court granted the government a year extension. The court finding the response by defendants insufficient, accelerated entry of final judgment to allow defendants to appeal. *See* Earth Island Institute v. Christopher, 18 I.T.R.D. 1469, 922 F. Supp. 616 (CIT 1996). Defendants failed to make a timely appeal. Further, plaintiffs claimed that the government had so weakened the enforcement of the embargo so as to damage the goals of Section 609. *See generally* Department of State, Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17342 (Apr. 16, 1996); Department of State, Bureau of Oceans and Int'l Environmental and Scientific Affairs, Certification Pursuant to Section 609 of Public Law 101-162, 61 Fed. Reg. 24998 (May 17, 1996). In reply, the court ordered that the embargo be enforced as enacted by Congress in Section 609(b)(2). *See* summary of the U.S. CIT in Earth Island Institute v. Christopher, 18 I.T.R.D. 2516, 948 F. Supp. 1062, 1065 (Nov. 25, 1996). In a November 25, 1996, decision in the *Earth Island Institute* case, the U.S. CIT denied the government's request for stay pending appeal and reinstated its prior judgment. *See id.*

224. *See* Earth Island Institute v. Christopher, 18 I.T.R.D. 2516, 948 F. Supp. 1062 (1996). The Court of Appeals for the Federal Circuit vacated this ruling because the trial court lacked jurisdiction over the matter due to the environmental group's withdrawal of its motion to enforce. *See* Earth Island Institute v. Albright, 28 Envt'l L. Rep. 21,421, 147 F.3d 1352 (1998). In September 1998, several environmental groups including Earth Island Institute filed another suit concerning the enforcement of shrimp embargoes under

Island cases, including whether the U.S. CIT can force Congress to amend a law.

A similar series of cases grew around the tuna-dolphin controversy and the Marine Mammal Protection Act of 1972 ("MMPA").[225] The first was *Earth Island Institute v. Mosbacher*,[226] where plaintiffs, headed by the environmental activist group Earth Island Institute, sought a court order to enforce the primary embargo provisions of the MMPA. The U.S. government argued that the MMPA did not require action until findings of violations under MMPA had been made.[227] The court disagreed and ordered implementation of the embargo.[228] The National Marine Fisheries Service ("NMFS") completed its findings the next day and lifted the embargo.[229] Earth Island Institute challenged this action and the district court invalidated NMFS's "reconsideration regulation."[230] A second suit was brought to compel enforcement of the embargo provisions.[231] The government argued that there was no reason to require formal certification from a nation where there were no suspected violations.[232] The court found such discretion unwarranted and ordered certification against not only primary nations but also from *all* intermediary nations.[233] By the 1988 amendments to MMPA, the focus had shifted to enforcing conformity through the threat of embargo.[234] After the implementation of these amendments, no evidence in the legislative history shows that the U.S.

Section 609. *See* Earth Island Institute v. Daley, No. 98-09-02818, 1999 WL 224602 (CIT Apr. 2, 1999). In that case, the CIT held that the 1998 Revised Guidelines, which would permit the importation of TED-caught shrimp from uncertified nations, to be in violation of Section 609. *See id.* at *15. However, before entry of judgment, the court will await the defendant's annual report to Congress and the March 1999 Notice of Revisions. *See id. See also* March 1999 Notice of Revisions, 64 Fed. Reg. 14482 (1999). The 1998 Revised Guidelines can be found at 63 Fed. Reg. 46096 (1998).

225. Pub. L. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C.S. §§ 1361-1421(1994)).

226. 13 I.T.R.D. 1361, 929 F.2d 1449 (9th Cir. 1991), *aff'd* 746 F. Supp. 964 (N.D. Cal. 1990).

227. *See Earth Island Institute*, 929 F.2d at 1452.

228. *See id.* at 1453.

229. *See* Taking and Related Acts Incidental to Commercial Fishing Operations, 50 C.F.R. § 216.24 (e)(5)(vii) (1993). For further discussion of this case *see* LouAnna C. Perkins, *International Dolphin Conservation Under U.S. Law: Does Might Make Right?*, 1 OCEAN & COASTAL L.J. 213 (1995).

230. *See Earth Island Institute*, 929 F.2d at 1451-52.

231. *See* Earth Island Institute v. Mosbacher, 13 I.T.R.D. 2368, 785 F. Supp. 826 (N.D. Cal. 1992).

232. *See Earth Island Institute*, 785 F. Supp. at 830.

233. *See id.* at 832.

234. *See* Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(2)(A) (1988).

Congress ever considered the propriety of using its economic powers to enforce its own conservation goals. The resurfacing of the Earth Island Institute in the shrimp-sea turtle issue, essentially challenging the government in the same manner they did on the tuna-dolphin issue, rings a bell of warning over power of some NGOs. Even more thought provoking are the actions the Earth Island Institute forced the U.S. government to take in both the tuna-dolphin controversy and the shrimp-sea turtle controversy. The battle is not even over yet. An April 1999 decision by the CIT found the 1998 Revised Guidelines, which permits the importation of TED caught shrimp from uncertified nations, to be in violation of Section 609.[235] The court will wait for responses to the March 1999 Notice of Revisions[236] before entering judgment.[237]

Nonetheless, the U.S. Government is responsible for its own actions. In the *Shrimp Imports* decision, the Appellate Body acknowledged that the differing implementation periods applied by the U.S. for Section 609 resulted from the U.S. CIT decision.[238] Notwithstanding the actions of the U.S. CIT, the Appellate Body stated, as had the previous *Reformulated Gasoline* Appellate Body,[239] "[t]he United States, like all other members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary."[240]

D. *Environment vs. Trade: Seeking Solutions*

The existence of a conflict between environmental protection and liberalized trade is a misguided debate. In reality both environmental protection and liberalized trade are beneficial policies, inextricably interwoven in today's global economy. Unfortunately, trade principles can be easily enumerated while environmental standards are far less clear. The WTO has attempted to give environmental issues greater consideration through the creation of the WTO Committee of Trade and Environment ("CTE").[241] At the meeting to sign the Final Act Embodying the Results

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235. *See* 63 Fed. Reg. 46096 (1998).

236. 64 Fed. Reg. 14482 (1999).

237. *See* Earth Island Institute v. Daley, *supra* note 224, ¶ 15.

238. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 173.

239. *See* Appellate Body on *Reformulated Gasoline*, *supra* note 78, at *19.

240. *See* Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 173. For further information see for example, OPPENHEIMER'S INTERNATIONAL LAW, Vol. 1 545 (Jennings et al eds., 9th ed. 1992) and IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 450 (Clarendon Press, 5th ed. 1998).

241. The general purpose of CTE was to make recommendations on "the need for rules to enhance the positive interaction between trade and environment measures for the promotion of sustainable development." *See* Singapore Ministerial Declaration, Dec. 13, 1996, 36 I.L.M. 218 (1997). *See also infra* note 264.

of the Uruguay Round of Multilateral Trade Negotiations in Marrakesh on Aprll 14, 1994,[242] members adopted a Ministerial Decision that formally established CTE.[243] Unfortunately, at the recent Singapore Conference, CTE failed to establish any concrete rules or regulations, but the report may serve as a foundation for progress in the future.[244]

Numerous solutions to resolve the conflict have been suggested by both the academic and the legal community. This paper will consider only a few, since the list could potentially go far beyond the scope of this paper. There is no single solution, but rather a combination of solutions.

Sustainable development can not be achieved unless the abusers of natural resources pay. Market-based protections such as competitive sustainability may offer a partial solution. One of the tenets of competitive sustainability, which is recognized by both "free traders" and environmentalists, is the need to internalize production costs.[245] Domestic markets could require production permits, requiring fees for the privilege of polluting.[246] Setting up such a system internationally would be difficult without first establishing a multinational regulatory framework. Such a system has been brought up in discussions on global climate change.[247] Critics stress that market-based strategies tend to work well only with conventional environmental threats.[248]

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242. *See* GATT, *supra* note 6.

243. *See* Singapore Ministerial Declaration, *supra* note 241.

244. *See* World Trade Organization, Report of the Committee on Trade and Environment, WTO Doc. WT/CTE/W/40 (Nov. 7, 1996) (visited Jan. 5, 1999) <http://www.wto.org>. *See also* Steve Charnovitz, *Critical Guide to the WTO's Report on Trade and the Environment*, 14 ARIZ. J. INT'L. & COMP. L. 341 (1997); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L. 268 (1997).

245. *See* Robert F. Housman and Durwood J. Zaelke, *Trade, Environment and Sustainable Development: A Primer*, 15 HASTINGS INT'L. & COMP. L. REV. 535, 605-06 (1992). For a full discussion of competitive sustainability *see* Robert Housman and Durwood Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVT'L L. 545 (1993). *See also* Frank Ackerman, *Waste Management: Taxing the Trash Away*, ENVIRONMENT, June 1992, at 2; and Ursula Kettlewell, *The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter Pays Principle*, 3 COLO. J. INT'L. ENVT'L. POL'Y 429 (1992).

246. *See, e.g.*, Clean Air Act Amendments of 1990, 42 U.S.C. §7651(b) (1991) (electrical utilities pollution allowances). *See generally* Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 ENVT'L L. 2021 (1991).

247. *See, e.g*, Donald M. Goldberg, REDUCING GREENHOUSE GAS EMISSIONS: A COMBINED STARTEGY USING PERMITS, FEES AND COUNTRY COMMITMENTS 2 (Feb. 1992) (on file with the Center for International Environmental Law).

248. *See generally* Joel Mintz, *Economic Reform of Environmental Protection: A Brief Comment on a Recent Debate*, 15 HARV. ENVT'L. L. REV. 85 (1991); Robert Hous-

Daniel Esty suggested the creation of a Global Environmental Organization ("GEO") which would function alongside GATT, ruling on environmental issues.[249] For the GEO to be successful, a set of environmental principles must be created for environmental policy like the free market principles which exist for liberalized trade.[250] However, environmental issues tend to be less important to developing states, so it may be hard to convince low-level states to join. The International Chamber of Commerce ("ICC") developed a proposal to reduce conflict between environmental policy and trade policy. The ICC suggests that trade sanctions to enforce environmental objectives should be avoided.[251] For development of an environmental policy having a minimal effect on liberalized trade, the ICC proposal outlines eight policy guidelines. The guidelines include:reliance on market-oriented measures that encourage innovation; harmonization of national standards; transparency of environmental policies and regulations to ensure they do not become non- tarrif barriers; enforcement of standards and regulation in a non-discriminatory fashion, in accordance with GATT most-favoured-nation and national treatment obligations; establishment of standards based on sound science; and incorporation into international environmental agreements of methods for measuring compliance and enforcement.[252]

Academians and environmentalists still argue for the use of unilateral trade measures. Separating unilateral trade measures into two categories, Robert Hudec has suggested that unilateral enforcement of environmental policy through trade is possible.[253] The first type is the altrusitic trade measure which is designed to induce foreign nations or individuals to change their behavior in ways to improve the environment. The second type, the "level-playing-field" measures are designed to offset any competitive disadvantage a producer in a developed nation may suffer

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man and Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L. & COMP. L. REV. 535 (1992).

249. *See* DANIEL C. ESTY, GREENING THE GATT: TRADE ENVIRONMENT AND THE FUTURE 78-83 (1994).

250. *See id.*

251. *See International Chamber Seeks Rules on Link Between Environment and Trade*, 8 Int'l. Trade Rep. (BNA), at 1817 (1991).

252. *Id.* For further discussion see generally Charles Fletcher, Comment, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existng World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341 (1996).

253. *See id.* at 361 (citing Robert E. Hudec, GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices 1-2 (unpublished manuscript) (presented at a conference in Washington, D.C. titled "Domestic Policy Divergence in an integrated World Economy: Fairness Claims and the Gains from Trade" on Sept. 30 and Oct.1 1994) (copy on file with Charles R. Fletcher)).

versus producers in nations with low or nonexistent environmental standards.[254] Both MMPA and Section 609 are altruistic measures. The discriminatory nature of altruistic trade measures has already been demonstrated by the *Tuna I*, *Tuna II* and *Shrimp Imports* decisions. Even the "level-playing-field" measure seems more concerned with benefitting the more powerful states. These types of measures reek strongly of protectionism for the domestic industry of the powerful nation. Academians argue that without such measures high-pollution industries will move to nations with low environmental standards.[255] World Bank economists disagree with this assumption.[256] Industries move to take advantage of low labor costs and access to raw materials, not because of low environmental standards.[257]

E. *Big Brother*

Without argument, all areas of environmental conservation are required in order to maintain the Earth for future generations. Nonetheless, should that goal come at the cost of countries not on the same economic level or policy path as the U.S.? What was it that our forefathers indelibly inked into the Declaration of Independence?[258] They believed we were all created equal and had certain inalienable rights. Moreover, any government that failed to guarantee those rights should be abolished. Granted they were speaking of U.S. citizens, but how can we hold such a high standard for ourselves and at the same time attempt to force other less powerful countries to conform to our whims? Critics would probably argue that the Declaration of Independence was merely rhetorical and not substantive. Is the Declaration of Independence only a string of words arranged in a stylistic manner *merely* to influence its reader? In reality, the Declaration of Independence was not mere bombast, but rather served as the seeds through the U.S. Constitution for much of the substantive law in the United States. If U.S. citizens hold their own rights so high, can we, as a country, without guilty conscious, deny others of their rights?

An excellent book which quotes the Declaration of Independence is *1984* by George Orwell. Those overly critical of the WTO should reread that book. Following a path to save the environment from future destruction is unarguably a required path in this day and age. The problem is

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254. *See* Fletcher, *supra* note 249, at 2.

255. *See* Brian Copeland and M. Scott Taylor, *North-South Trade and the Environment*, 109 Q.J. ECON. 755, 757 (1994).

256. *See World Bank Economist Denies U.S. Policies on Pollution Prompt Firms to Move Overseas*, 15 Int'l Envt'l L. Rep. (BNA) (1992) at 104 (citing empirical evidence).

257. *See id.*

258. *See* DECLARATION OF INDEPENDENCE, United States, July 4, 1776.

that the United States does not rule the world, even if we are a superpower. Do we want to allow ourselves to become "Big Brother?"[259] For many WTO Members, the WTO offers one of the few international opportunities to bring forth disputes revolving around issues where they feel an injustice has been done.

The environment can be saved without oppressing other countries and peoples. There must be room for faith in human progress, and man's capacity to create a world of justice and peace. Numerous international documents and agreements, such as the 1992 Rio Declaration on Environment and Development,[260] the 1992 Convention on Biological Diversity,[261] the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals,[262] Agenda 21[263] and the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment[264] *discourage* the use of unilateral actions to protect the environ-

259. For a better understanding of the author's point, and a dose of reality see generally GEORGE ORWELL, 1984 (1950).

260. *See* Rio Declaration on Environment and Development, The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), June 3-14, 1992, Rio de Janeiro, Brazil. Specifically, the text of Principle 12 states: "Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." *Id.*

261. Article 5 of the 1992 Convention on Biological Diversity states: "each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biodiversity." Convention on Biological Diversity (June 4, 1993) S. Treaty Doc. No. 103-20, *available in* 1993 WL 796847 (Treaty), *6.

262. While not all parties in the *Shrimp Imports* dispute are parties to this Convention, the relevant sea turtles are listed in Annex I as "Endangered Migratory Species." The Preamble of this Convention provides: "The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the *concerted* action of all states within the national boundaries of which such species spend any part of their life cycle." (emphasis added).

263. Agenda 21 states that governments should "[s]eek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environmental standards and regulations." Agenda 21, June 14, 1992, ch. 2, § 2.22(i).

264. Part of the terms of reference for the Committee on Trade and Environment included: "the avoidance of protectionist trade measures, and adherence to effective multilateral disciplines to ensure responsiveness if the multilateral trading system to environmental objectives set forth in Agenda 21, and the Rio Declaration, in particular Principle 12; and surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of the effective implementation of the multilateral disciplines governing those measures." *See* Ministerial Decision on Trade and Environment, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 14, 1994, Marrakesh, Morocco. *See*

ment and *encourage* states to seek an international consensus to address such issues. The actions of the United States have not necessarily demonstrated a great concern for the conservation of sea turtles. The U.S. never raised concern over sea turtles at the recent CITES conferences, which would have offered greater possibilities for multilateral actions. The U.S. failed to sign the Convention on the Conservation of Migratory Species and the United Nations Convention on the Law of the Sea. The U.S. has not even ratified the Convention on Biological Diversity approved at Rio de Janeiro in 1992. All of these conventions were aimed at protecting sea turtles. The U.S. wants commitment from other states for conservation but is not willing to commit itself.

The Appellate Body on *Shrimp Imports* noted that a more appropriate solution, instead of the 1996 Guidelines, would have been a multilateral agreement similar to the Inter-American Convention[265] signed by the U.S., Brazil, Costa Rica, Nicaragua and Venezuela. The U.S. made no attempt to negotiate such an agreement with the complaining states. As further proof that the U.S. paid no attention to possible lessons learned, a 1996 casenote by then law student, Charles Fletcher, mentioned a theory derived from a discussion after a lecture at Florida State University.[266] The theory, in reference to the *Tuna II* decision, focused on an import certification requirement. The theory states: To achieve the goal of the MMPA—the elimination of fishing techniques that kill dolphins—the United States could require certification from tuna importers that the tuna was caught using "dolphin safe" methods. This approach would be an action within national jurisdiction which would enforce an environmental standard on individuals catching fish, for import into the United States, in international and foreign waters. . . . The certification requirement would not place an affirmative requirement on a foreign nation to alter national policies, as did the MMPA. Perhaps of more importance, however, is that the certification requirement is more narrowly tai-

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also Singapore Ministerial Declaration, *supra* note 235. Recently, on March 15, 1999, the World Trade Organization held its second High Level Symposium on Trade and Environment. *See* International Institute fro Sustainable Development Report on the WTO's High-Level Symposium on Trade and Environment (Mar. 15-16, 1999), Geneva, Switzerland, *available in* <http://www.wto.org> (visited May 30, 1999).

265. The Appellate Body noted, "The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and nonconsensual procedures of the import prohibition under Section 609." Appellate Body on *Shrimp Imports*, *supra* note 1, ¶ 171.

266. *See* Fletcher, *supra* note 249, at 355 (citing Professor Joel Trachman, Ball Chair Lecture at Florida State University College of Law (Feb. 22 1995) (notes on file with Charles Fletcher)).

lored to achieve its goal. No arbitrary distinctions would be made on the basis of national origin because the regulation would apply to all fishing vessels catching fish for sale in the United States. Arguably, this type of process could be used to enforce any production process method requirements, as long as a similar requirement is placed on like products whether imported or domestic.[267]

Sound familiar? Such an approach may have allowed Section 609 to fall within the exceptions to Article XX. After the *Shrimp Imports* Appellate ruling, the U.S. government issued a public notice for amended guidelines which would essentially switch the certification process to a shipment-by-shipment basis as opposed to a nation-by nation basis.[268] Critics will undoubtedly argue that certification on a shipment-by-shipment basis, as suggested above, would weaken the effectiveness of an environmental measure. However, Section 609 was certainly not the only option the United States had in its arsenal of possible methods to achieve conservation goals.[269] Conservation of natural resources will undoubtedly fail miserably if not done with at least an attempt at cooperative action.

V. CONCLUSION

Emerging in the U.S. is a growing disrespect for international law and international environmental commitments. Emphasized by the negative reaction to the *Shrimp Imports* decision from environmental groups, developing countries can only marvel at the arrogance of the U.S. There is little that many countries can do to overcome injustices done at the hands of the U.S.. For many developing countries, the WTO Dispute Panels are one of the few opportunities available to challenge discriminatory actions of more powerful nations. The citizens of the U.S., including academians, government employees, environmentalists, and those in the legal profession, have an ethical obligation, to the best of our ability, to assure that the U.S. does not follow a path that would lead to the oppres-

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267. *Id.*

268. This public notice can be found on the Sea Turtle Restoration Project ("STRP") website at <http://www.earthisland.org/strp/shipguidelines.html> (visited Jan. 5, 1999). The actual 1998 Revised Guidelines can be found at 63 Fed. Reg. 46096 (1998).

269. *See* Aadiya Mattoo and Petros C. Mavroidis, *Trade Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 338 (Ernst-Ulrich Petersmann ed., 1997).

sion of other states. The world and the environment can be saved through wise choices, made easier by the realization that environmental conservation and liberalized trade are two sides of the same path.

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