

RECENT DEVELOPMENT

THE WORLD TRADE ORGANIZATION AND ITS
INTERPRETATION OF THE ARTICLE XX EXCEPTIONS TO THE GENERAL
AGREEMENT ON TARIFFS AND TRADE, IN LIGHT OF RECENT
DEVELOPMENTS

Brandon L. Bowen*

TABLE OF CONTENTS

I. INTRODUCTION 182

II. INTERPRETATION OF ARTICLE XX OF THE GATT 183

A. Defining Article XX 183

B. Early Cases: Herring-Salmon and Thailand-Cigarette 185

C. Tuna-Dolphin I & II 186

D. The WTO and Article XX 190

III. WTO SPECIAL REPORT ON TRADE AND THE ENVIRONMENT 195

A. The Status of the Environment 195

B. Economics and Environmental Policy 198

C. The Regulatory Chill 199

IV. CONCLUSION 201

* J.D. 2001, The University of Georgia

I. INTRODUCTION

On November 30, 1999, the World Trade Organization (WTO) attempted to hold a summit in Seattle, Washington, that was intended to begin a Millennial Round of trade negotiations.¹ The WTO summit, however, was disrupted by tens of thousands of protestors.² Commentators have said that the demonstrations and marches in Seattle were reminiscent of the activism of the 1960s.³ The demonstrators, to whom *The Economist* referred as "militant dunces" represented diverse interests such as those of the Teamsters and the Sierra Club.⁴ In Ralph Nader's words, "[t]here's never been an event in American history that has brought together so many disparate groups."⁵

What brought so many protestors with divergent interests to Seattle to protest the WTO? A simple answer might be that they believe that the WTO's devotion to free trade places corporate profits ahead of sovereign interests, worker rights, and environmental viability.⁶ *The Nation* stated, "[t]he attempt to write a constitution for the global economy that protects property rights but tramples workers' rights and environmental and consumer protections is generating a growing and unrelenting popular opposition."⁷

For environmentalists, the cause célébré was the endangered sea turtle.⁸ In 1995, the WTO ruled against a trade sanction designed to prevent the extinction of the sea turtle after finding that the sanction would be unfair to foreign trade interests.⁹ The reasoning behind the decision is complex and unclear to many people, although this uncertainty has not prevented vociferous commentaries. As the WTO itself has stated, "[o]ne of the unfortunate features of the trade and environment debate is that at times it has generated more heat than light."¹⁰ The purpose of the following is not to question the validity of free trade, but to show that the roots of the trade versus environment dispute can be

¹ See Doug Henwood, *Free Trade, Fair Trade, Whose Trade? A Forum*, THE NATION, Dec. 6, 1999, at 11.

² See Kenneth Klee, *The Seige of Seattle*, NEWSWEEK, Dec. 13, 1999, at 30.

³ See Michael Elliott, *The New Radicals*, NEWSWEEK, Dec. 13, 1999, at 36.

⁴ *Clueless in Seattle*, THE ECONOMIST, Dec. 4, 1999, at 17.

⁵ Elliott, *supra* note 3, at 36.

⁶ See *id.* at 38.

⁷ *The People vs. the WTO*, THE NATION, Dec. 6, 1999, at 3.

⁸ See Elliott, *supra* note 3, at 36-37.

⁹ See WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (98-3899) (Oct. 12, 1998) [hereinafter *Shrimp-Sea Turtle Appellate Report*].

¹⁰ HAKAN NORDSTRÖM AND SCOTT VAUGHAN, *TRADE AND ENVIRONMENT 1* (World Trade Organization Special Studies 4, 1999).

found in the WTO's dispute resolution process and to consider how recent developments may affect that process.

II. INTERPRETATION OF ARTICLE XX OF THE GATT

A. Defining Article XX

The first General Agreement on Tariffs and Trade (GATT) came into effect in 1947, and the agreement exists in its current form as GATT 1994.¹¹ The purpose of Article XX of the GATT is to allow "countries to sidestep the normal trading rules if necessary to protect human, animal or plant life or health."¹² Article XX consists of a list of exemptions preceded by a defining and limiting chapeau.¹³ For purposes of clarity, relevant subsections of Article XX are reproduced in an abridged form below:

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

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

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this agreement . . . ;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.¹⁴

The list of exceptions in the original GATT agreement was submitted by the United States to be included in the unsuccessful International Trade Organiza-

¹¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹² NORDSTRÖM AND VAUGHAN, *supra* note 10, at 9.

¹³ 'Chapeau,' defined as a top hat is the term generally used to refer to the introductory provision of Article XX. See WEBSTERS NEW COLLEGIATE DICTIONARY 184 (g. & C. Merriam Co. 1980).

¹⁴ GATT, *supra* note 11, at art. XX.

tion Charter (ITO).¹⁵ Some nations expressed fear that the exceptions, especially those premised on environmental protection, would be used unfairly.¹⁶ If there were no precautions, the exemptions could allow for regulations that were facially conservationist but were enacted to protect domestic markets and producers. Developed countries, with their more powerful and self-sufficient economies, would theoretically be able to manipulate third world markets and industries.¹⁷ To avoid possible manipulation, the chapeau was added to the ITO charter and subsequently incorporated into Article XX of the GATT, directly above the list of exceptions.¹⁸ The chapeau has been a source of great contention and, so far, has been interpreted to defeat all regulations that have relied upon an Article XX exception as a justification.

The key phrase of the chapeau is "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."¹⁹ A plain reading of this phrase would indicate that the chapeau only applies a reasonableness and good faith requirement on nations implementing trade regulations for purposes permitted under the Article XX exceptions. The term, 'arbitrary' is defined as based on a whim and is generally used to refer to a decision based on preference alone, or without a stated reason.²⁰ 'Unjustifiable' has a similar meaning and implies the performance of a balancing test between the benefit sought and the burden incurred.²¹ Instead of weighing the benefit to the environment against the burden on the plaintiff, the Dispute Settlement Board (DSB), the entity charged with hearing trade disputes, weighs the benefit to the defending nation against the burden placed on the multilateral trading system.²² That interpretation shifts the balance, placing a greater burden on the defending nation and the environment.

The terms 'arbitrary' and 'unjustified' are attached to the clause "where similar conditions prevail,"²³ which should indicate nations that produce similar

¹⁵ See Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1134 (1999).

¹⁶ See *id.* at 1135.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ GATT, *supra* note 11, at art. XX.

²⁰ See WEBSTERS NEW COLLEGIATE DICTIONARY, *supra* note 13, at 57.

²¹ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2502 (1966).

²² See *Shrimp-Sea Turtle Appellate Report*, *supra* note 9.

²³ GATT, *supra* note 11, at art. XX.

products or produce under similar conditions. Unfortunately, the Article XX chapeau has been given a much more strict interpretation that has so far proven insurmountable.

B. Early Cases: Herring-Salmon and Thailand-Cigarette

The first case to invoke Article XX for environmental protection was a challenge to a Canadian regulation that restricted the export of certain fish.²⁴ The United States claimed that the regulation was intended to protect the Canadian fishing industry. Canada, however, defended the regulation under Article XX(g) as part of a long-standing policy of protecting native fish stocks.²⁵

The DSB found that the salmon and herring stocks were an exhaustible natural resource, but that the challenged regulation was not directly aimed at protecting the fishery and was, therefore, an illegal unilateral trade sanction. In reaching this conclusion, the panel interpreted the phrases "relating to" and "in conjunction with" in Article XX(g) to mean "primarily aimed at."²⁶ This reading of the GATT is inconsistent with a plain reading of the words of the agreement and significantly reduces the coverage of Article XX(g) to regulations that are solely intended to conserve the resource.

A subsequent case turning on an Article XX exception involved a U.S. challenge to a Thai regulation requiring importers of cigarettes to obtain a permit from the government before importing.²⁷ The United States, at the behest of the American cigarette industry, claimed that the regulation was effectively a ban on imports because at the time of the suit, no permits had been granted for ten years.²⁸ Thailand defended the regulation on Article XX(b) grounds as "necessary to protect human, animal or plant life or health."²⁹ Thailand claimed, with the support of the World Health Organization, that the purpose of the regulation was to protect its citizens from addiction to cigarettes and more specifically, from the chemical additives in American cigarettes.³⁰

²⁴ Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. L/6268-35 S/98 [hereinafter *Herring-Salmon*].

²⁵ See Ala'i, *supra* note 15, at 1139.

²⁶ See *id.* at 1140.

²⁷ Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. DS10/R-37S/200 [hereinafter *Thailand-Cigarette*].

²⁸ See Ala'i, *supra* note 15, at 1141.

²⁹ GATT, *supra* note 11, at art. XX(b).

³⁰ See Ala'i, *supra* note 15, at 1142 n.54.

The DSB ruled against the Thai regulation after adopting a "least-GATT-inconsistent" interpretation of "necessary" in Article XX(b).³¹ Again, the dispute resolution panel looked outside of the GATT to interpret an Article XX provision. It is notable that the GATT exempts regulations 'necessary to protect human health'; it does not exempt regulations 'necessary to protect human health' and 'least-GATT-inconsistent.'³² Unilateral actions, by their very nature, are inconsistent with the GATT, and this is precisely why the Article XX provisions are called 'exceptions.' The DSB's interpretation has the effect of frustrating the purpose of the exceptions.

C. *Tuna-Dolphin I & II*

The first GATT disputes over an environmental protection trade regulation that garnered the attention of the general public were the *Tuna-Dolphin* cases. In these cases, Mexico and intermediary importer nations challenged the United States' Marine Mammal Protection Act (MMPA). The act prohibited the importation of tuna caught using purse-seine nets, which have a high incidental kill rate for dolphins, an endangered species.³³ Dolphins frequently swim directly above schools of tuna, and fishermen, knowing that the tuna sought will be below, surround dolphins with purse-seine nets.³⁴ After finding that there was no other technological alternative to prevent dolphin kills, the United States banned the use of purse-seine nets (effective on American fisherman) and the importation of tuna caught with them (effective on foreign fishermen).³⁵

The first *Tuna-Dolphin* case (*Tuna I*) was instituted by Mexico against the United States on the direct importation ban.³⁶ The United States defended the regulation on Article XX(b) and (g) grounds. Considering previous decisions by the DSB, the United States argued that the regulation was necessary because there was no other alternative and that the regulation was primarily aimed at protection of the dolphins, an exhaustible natural resource.³⁷ In regard to exception (b), the panel found that the United States had not sought multilateral

³¹ See *id.* at 1144.

³² See GATT, *supra* note 11, at art. XX(b).

³³ See Ala'i, *supra* note 15, at 1145.

³⁴ See *id.*

³⁵ See *id.*

³⁶ United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. 39S/155 (39th Supp.) (1993) [hereinafter *Tuna I*].

³⁷ See Ala'i, *supra* note 15, at 1147.

agreements to protect the dolphins.³⁸ According to the DSB, until international negotiations were attempted and had failed, trade restrictions could not be found to be necessary.³⁹ This is a further extension of the interpretation of 'necessary' that the DSB developed in the *Thailand-Cigarette* case. Under the DSB interpretation, in order to be necessary, the regulation must be "least-GATT-inconsistent." In order to be least-GATT-inconsistent, the regulating nation must have "exhausted all other options reasonably available to it to pursue its . . . objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements."⁴⁰ The definition presents another substantial hurdle, one that is nowhere to be found in the GATT and one that must be surmounted by a nation wanting to protect the environment in order to survive DSB scrutiny.

In considering exception (g), the panel found that since the allowable incidental kill rate was based on the dolphin bycatch of American fisherman,⁴¹ which the panel considered to be too unpredictable, the regulation could not be primarily aimed at the conservation of a natural resource.⁴² Using the American bycatch rate as a measuring stick by which all importers must be measured may be arbitrary and thus, possibly invalid under the chapeau. However, the DSB ruled that the regulation was invalid under Article XX(g), which only requires that the regulation be related to the conservation of natural resources and be made effective in conjunction with domestic restrictions.⁴³

A few years later, several nations brought suit against the intermediary nation import provision of the MMPA.⁴⁴ The intermediary nation import regulation required nations that exported tuna procured from other nations to the United States to certify that the imported tuna was not caught with purse-seine nets.⁴⁵ In considering the U.S. Article XX(g) defense, the DSB outlined the method for determining whether or not a regulation was valid.

First, the DSB must determine whether the regulation was intended to conserve exhaustible natural resources.⁴⁶ Second, the regulation must be

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ Tuna I, *supra* note 36, at para. 5.28, n.76.

⁴¹ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 82 (explaining that foreign fishermen were not allowed to import tuna when their bycatch exceeded the American bycatch for the same period by more than a factor of 1.25).

⁴² See Ala'i, *supra* note 15, at 1148.

⁴³ See Tuna I, *supra* note 36, at 175.

⁴⁴ See GATT Dispute Settlement Panel Report on United States-Restrictions on Imports of Tuna, June 1994, 33 I.L.M. 839 (1994) [hereinafter Tuna II].

⁴⁵ See Ala'i, *supra* note 15, at 1149.

⁴⁶ See Tuna II, 33 I.L.M. at 891.

related to conservation and implemented in conjunction with similar domestic regulations.⁴⁷ Finally, pursuant to the Article XX chapeau, the regulation must not be arbitrary or unjustifiable.⁴⁸ This method is a bottom-up reading, requiring first that the regulation be scrutinized under the specific clauses of the exception and then under the chapeau.

The DSB found that the first test was met, but the second was not met since the MMPA was not "related to" (construed as "primarily aimed at") the conservation of dolphins.⁴⁹ They reached this conclusion because the MMPA was primarily aimed at changing the policies of other countries in regard to the harvest of tuna, rather than at protecting the dolphins themselves.⁵⁰ That interpretation raises this question: If the method of catching tuna is the factor that is killing the endangered dolphins, how does one protect dolphins without changing the method of catching the tuna?

A key decision of the DSB in both of these cases was that the MMPA regulated processes, not products, and therefore was not justifiable under the Article XX exceptions.⁵¹ The DSB's theory is based upon Article XXX of the GATT, which requires member nations to give foreign products national treatment.⁵² In other words, foreign products must be treated in the same manner as domestic products.⁵³ The United States argued that the national treatment requirement was fulfilled because foreign dolphin-safe tuna was treated in the same manner as domestic dolphin-safe tuna, and foreign purse-seine caught tuna was treated like domestic purse-seine caught tuna.⁵⁴

The DSB found that there was no difference in the tuna itself, whether or not it was caught with a purse-seine net. Therefore, there was no justification for the embargo against purse-seine caught tuna.⁵⁵ The ruling makes it impossible for a nation to effect environmentally detrimental production processes through unilateral actions. Such a product-process distinction effectively abrogates the Article XX exceptions for environmental protection. After all, it is far more common that the process, rather than the product, is

⁴⁷ See *id.* at 893.

⁴⁸ See *id.* at 1151 n.97.

⁴⁹ *Id.* at 1151-52.

⁵⁰ See *id.* at 1151.

⁵¹ See Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 101 (1999).

⁵² See GATT, *supra* note 11, at art. XXX.

⁵³ See Miller & Croston, *supra* note 51, at 101.

⁵⁴ See *id.*

⁵⁵ See *id.*

environmentally detrimental.⁵⁶ The DSB's interpretation is contrary to the purpose of Article XX, a list of exceptions to the GATT. The chapeau explicitly states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" comporting with the listing exceptions.⁵⁷ The product-process distinction violates the express wording of the GATT.

Furthermore, the product-process distinction is also proven invalid by the wording of another Article XX exception. Article XX(e) specifically permits embargoes of products produced by prison labor.⁵⁸ The exception is an explicit allowance of a unilateral sanction based on the process, not the product. The result may be attributable to the concept that the product is tainted by the production method and thus, is a different product, no matter how physically identical the product is to a product produced in a more acceptable manner.

Those in favor of the *Tuna-Dolphin* decision felt that regulations aimed at environmental conservation "could potentially undermine the multilateral trading system."⁵⁹ The panel itself stated that policies like the MMPA are contrary to the objectives of the GATT.⁶⁰ Others opposed to the decision felt that "legitimate environmental concerns were . . . sacrificed on the altar of free trade by trade bureaucrats beyond the reach of democratic control."⁶¹ The WTO's study, *Trade and Environment*, states that "the growing public anti-trade sentiment that followed the tuna-dolphin ruling was a difficult setback for the GATT, which at the time was trying to conclude the largest and most complex trade negotiations ever—the Uruguay Round."⁶² The controversy surrounding the ruling led to the reconvening of the Group on Environmental Measures and International Trade; however, it was limited to studying the validity of existing trade regulations in multilateral environmental agreements.⁶³

The Group on Environmental Measures and International Trade entered a two-year study that culminated in a report that "formed the backbone of the Decision on Trade and Environment, which was added to the Uruguay Round Agreement."⁶⁴ The report summarized the current GATT view on environmen-

⁵⁶ See *id.* at 123.

⁵⁷ GATT, *supra* note 11, at art. XX.

⁵⁸ See GATT, *supra* note 11, at art. XX(e).

⁵⁹ NORDSTRÖM AND VAUGHAN, *supra* note 10, at 10.

⁶⁰ See Ala'i, *supra* note 15, at 1153.

⁶¹ NORDSTRÖM AND VAUGHAN, *supra* note 10, at 10.

⁶² *Id.* at 10.

⁶³ See *id.*

⁶⁴ *Id.*

tal policies that affect international trade.⁶⁵ First, the report stated that GATT review was limited to the trade aspects of environmental policies.⁶⁶ Second, the report argued that there should be no contradiction between free trade and environmental policies; however, if problems do occur, they should be resolved in a manner that does not undermine the international trading system.⁶⁷ Finally, the group found that the GATT and a non-discriminatory trading system could lead to environmental protection by stimulating income growth.⁶⁸

The findings indicate that, while the importance of environmental protection is recognized, the environmental policy will be considered subservient to trade when environmental policies clash with the international trading system. Such a result conflicts with the GATT, which includes Article XX to indicate expressly that, when trade regulations are enacted for a valid purpose, whether it be morality, public health, or conservation of natural resources, they should not be struck down because they burden free trade.

D. The WTO and Article XX

The World Trade Organization (WTO) was formed in 1995 to administer the GATT.⁶⁹ The first Article XX conflict brought before the WTO dispute settlement body was the *Reformulated Gasoline* case.⁷⁰ There, Brazil and Venezuela challenged the U.S. Environmental Protection Agency's Regulation of Fuels and Fuel Additives-Standards for Reformulated and Conventional Gasoline [hereinafter "gasoline rule"], promulgated pursuant to the 1990 Amendments to the Clean Air Act, which required different baseline establishment methods for foreign importers of gasoline than those used by domestic refiners.⁷¹ The challengers argued that the gasoline rule discriminated against them in violation of the core provisions of the GATT.⁷² The United States argued that the gasoline rule was justifiable under Article XX because it promoted lower emissions, cleaner air, and public health.⁷³

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 10.

⁶⁸ See *id.*

⁶⁹ See Ala'i, *supra* note 15, at 1131.

⁷⁰ See WTO Dispute Panel Report on United States-Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, WTO Doc. WT/DS2/R, paras. 6.20-6.43 [hereinafter *Reformulated Gas Panel Report*].

⁷¹ See Ala'i, *supra* note 15, at 1155.

⁷² See *id.* at 1156.

⁷³ See *id.*

The DSB ruled against the United States and followed an interpretation of the Article XX subsections similar to that used in earlier cases.⁷⁴ Regarding an Article XX(b) defense, the DSB stated that the regulation was not least-GATT-inconsistent.⁷⁵ The DSB ruled against the United States' Article XX(g) claim because the regulation was not primarily aimed at the conservation of a natural resource.⁷⁶

On appeal, the WTO Appellate Body reversed the lower court's finding that the regulation was not a valid exception.⁷⁷ The Appellate Body stated that there was nothing in the GATT that indicated that the phrases "related to" and "in conjunction with" should be interpreted to mean "primarily aimed at."⁷⁸ The ruling is a significant departure from prior panel rulings. The Appellate Body applied methods of interpretation set out in the Vienna Convention, requiring a good faith, plain language reading of treaties.⁷⁹

Applying this plain reading interpretation of Article XX, the Appellate Body found that the gasoline rule was applied in conjunction with restrictions on domestic production. In doing so, the Appellate Body found that Article XX(g) required "even-handedness," not identical treatment, between domestic and foreign refiners.⁸⁰ Therefore, the regulation was a valid Article XX(g) exception.

The other shoe fell when the Appellate Body proceeded to analyze the regulation under the Article XX chapeau. This was the first time that a trade sanction premised on environmental protection survived initial scrutiny to be tested under the chapeau, and the court applied a test similar to the bottom up method devised in *Tuna II*. The Appellate Body announced a two-tiered test for interpreting Article XX: "first, provisional justification by reason of characterization of the measure under [the exception subparagraph]; second, further appraisal of the same measure under introductory clauses of Article XX."⁸¹

⁷⁴ See *id.*

⁷⁵ See *id.* at 1157.

⁷⁶ See Ala'i, *supra* note 15, at 1157 n.131 (discussing the lower courts rejection of the Article XX(g) exception).

⁷⁷ WTO Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, April 26, 1996, WT/DS2/AB/R (96-1597) [hereinafter *Reformulated Gas Appellate Report*].

⁷⁸ See Ala'i, *supra* note 15, at 1158.

⁷⁹ See *id.* at 1154 (quoting Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331).

⁸⁰ See Ala'i, *supra* note 15, at 1159.

⁸¹ *Shrimp-Sea Turtle Appellate Report*, *supra* note 9, at 33.

The panel stated that the chapeau should be interpreted wholly separate from the exception subparagraph after the regulation had met the requirements of that subparagraph.⁸² The panel concluded that since the burden of determining individual baseline documentation for foreign refiners was not so great as to justify different treatment of domestic and foreign refiners, the gasoline rule exhibited unjustifiable discrimination and was a disguised restriction on international trade.⁸³ Thus, although the regulation was found to be valid under Article XX(g), it did not survive scrutiny under the Article XX chapeau.

The most recent case in which a challenged party has invoked the Article XX exception for a regulation promulgated for environmental purposes is the *Shrimp-Sea Turtle* decision. In that case, several Asian nations⁸⁴ challenged a United States regulation that prohibited imports of shrimp that were caught in a manner that threatened endangered sea turtles. Incidental kills of sea turtles could be significantly reduced by the use of Turtle Excluder Devices (TEDs), which provide an escape hatch in the net for ensnared turtles without reducing the net's ability to catch shrimp.⁸⁵ The American regulation was formulated in compliance with its Endangered Species Act⁸⁶ and required that nations, whose fishermen operated in waters where sea turtles and shrimp co-exist be certified as using TEDs or adopt a similarly effective method before exporting into the United States.⁸⁷

The DSB panel found that it was unnecessary to consider United States claims that the regulation was justified under Article XX(b) and (g) because, considering the chapeau first, unilateral trade measures are inconsistent with the core provisions of GATT and the maintenance of the multilateral trading system.

[In] light of the context of the term 'unjustifiable' and the object and purpose of the WTO Agreement [to eliminate unilateral trade barriers], the US measure at issue constitutes unjustifiable discrimination between countries where the same

⁸² See Ala'i, *supra* note 15, at 1159.

⁸³ See *id.* at 1161.

⁸⁴ See *Shrimp-Sea Turtle Appellate Report*, *supra* note 9, at 15 (noting that the Malaysian brief to the appellate board argued that the regulations requiring TEDs should not apply to them because the endangered sea turtles only survive in Malaysian waters in "negligible numbers").

⁸⁵ See Miller & Croston, *supra* note 51, at 91-92.

⁸⁶ Endangered Species Act of 1973 § 609, 16 U.S.C. §§ 1531, 1537 (1989).

⁸⁷ See *Shrimp-Sea Turtle Appellate Report*, *supra* note 9, at 4.

conditions prevail and thus is not within the scope of measures permitted under Article XX.⁸⁸

This decision was overturned on appeal because it would have effectively written Article XX out of existence.⁸⁹ The appellate body found that this method of interpretation “finds no basis in the text of the chapeau.”⁹⁰ The appellate panel also stated:

Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO agreement; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX.⁹¹

The appellate court continued to state that:

conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character.⁹²

On appeal, the United States argued that the regulation fell under the Article XX(g) exception.⁹³ After determining that the subparagraph must be considered before the chapeau, the appellate body found that the challenged

⁸⁸ *Id.* at 96.

⁸⁹ *See id.* at 107.

⁹⁰ *Id.* at 106.

⁹¹ *Id.* at 101.

⁹² *Id.* at 106.

⁹³ *See Shrimp-Sea Turtle Appellate Report, supra* note 9, at 25 (noting that the U.S. stated that both subsections (b) and (g) applied, but decided that subsection (g) was most pertinent; thus, the U.S. only argued subsection (b) as an alternative if subsection (g) was rejected, which it was not).

regulation did fall under the Article XX(g) exception.⁹⁴ The regulation related to the conservation of sea turtles, which are exhaustible natural resources. In so ruling, the appellate panel found that the term 'natural resource' was not limited to non-living commodities.⁹⁵

In considering the next phrase of Article XX(g), "if such measures are made effective in conjunction with restrictions on domestic production or consumption,"⁹⁶ the appellate panel applied the even-handedness of the application test formulated by the *Reformulated Gasoline* panel.⁹⁷ The appellate panel noted that in this case, the regulation not only applied to domestic fishermen as well as foreign fishermen, but also that domestic fishermen faced civil and criminal penalties for violations.⁹⁸ Thus, the regulation was found to comply with all aspects of Article XX(g).⁹⁹

The appellate panel then turned to the second portion of the two-tiered test, which looks at whether the regulation violated the chapeau. The panel found that though the regulation itself was not facially in violation of the chapeau, its implementation by the U.S. Department of State unfairly discriminated against foreign fishermen.¹⁰⁰ In the wake of the ruling, the United States did not remove the regulation, but rather it restructured the implementation process to remove any chance of discrimination.¹⁰¹ So far, the new implementation plan has not been challenged.¹⁰² Some environmentalists criticized the panel decision, but the ruling actually may represent a turn around in the interpretation of Article XX. A caveat to that statement is the extensive discussion the appellate panel devoted to the importance of the multilateral trading system.

The panel cited agreements that argue against unilateral environmental protection actions, such as the following statement from the Rio Declaration on Environment and Development:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary

⁹⁴ See *id.* at 129.

⁹⁵ See *id.* at 115.

⁹⁶ GATT, *supra* note 11, at art. XX(g).

⁹⁷ See *Shrimp-Sea Turtle*, *supra* note 9, at 129.

⁹⁸ See *id.* at 130.

⁹⁹ See *id.* at 131.

¹⁰⁰ See *id.* at 151.

¹⁰¹ See Gregory Shaffer, *International Decision*, 93 AM. J. INT'L L. 507, 514 (1999).

¹⁰² See *id.*

or global environmental problems should, as far as possible, be based on international consensus.¹⁰³

The panel stressed the importance of exhausting all other measures to reach a multilateral agreement before implementing a unilateral declaration. The panel found that although the regulation at issue dictated that the responsible agency seek multilateral agreements to save the sea turtles, the agency had failed to thoroughly fulfill this responsibility.¹⁰⁴

In light of the decision, it is still questionable as to what lengths a nation must go before it can justifiably enact a unilateral trade sanction without unfairly discriminating against the multilateral trading system. Into this realm of uncertainty, the WTO published a *Special Study on Trade and the Environment*,¹⁰⁵ which may have the effect of frustrating the progress that has been made towards accepting unilateral trade sanctions.

III. WTO SPECIAL REPORT ON TRADE AND THE ENVIRONMENT

On October 14, 1999, the WTO released an extensive report on the effects of trade on the environment.¹⁰⁶ Issued shortly before the WTO summit meeting in Seattle, the report was intended to counter arguments that free trade threatens the environment. Although the report does not expressly discuss the interpretation of Article XX or the dispute resolution panel, a central motif of the report is that the key to successful interplay between trade and the environment is "to strengthen the mechanisms and institutions for multilateral environmental cooperation . . ."¹⁰⁷

A. *The Status of the Environment*

In the report, the WTO admits that trade has had a negative effect on the environment: "The growing economy has been accompanied by environmental degradation, including deforestation, losses in bio-diversity, global warming, air pollution, depletion of the ozone layer, overfishing and so on."¹⁰⁸ The report also admits the validity of the Tragedy of the Commons theory, which

¹⁰³ See *Shrimp-Sea Turtle Appellate Report*, *supra* note 9, at 168, n.65 (quoting Principle 12 of the Rio Declaration on Environment and Development).

¹⁰⁴ See *id.* at 168.

¹⁰⁵ NORDSTRÖM AND VAUGHAN, *supra* note 10, at 7.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1.

holds that as long as there is no exclusive control or possession of a commodity, it will be overused and abused by those who can profit from it while externalizing the costs.¹⁰⁹

The report lists some current environmental trends. Global energy use has increased by 70 percent since 1971 and is expected to continue at a rate of 2 percent per year for the next fifteen years, which will raise greenhouse gases an expected 50 percent.¹¹⁰ The ozone level is expected to take fifty years to return to a normal level.¹¹¹ Acid rain is increasing in developing countries.¹¹² Excess nitrogen is overwhelming the global nitrogen cycle, with ill effects including reduced soil fertility.¹¹³ Deforestation is rampant; between 1960 and 1990, 20 percent of the world's tropical forests were cleared.¹¹⁴ Pollution and deforestation threaten 58 percent of the world's coral reefs and 34 percent of all fish species.¹¹⁵ In the next thirty years, two thirds of the nations could face major water shortages.¹¹⁶

The report places the blame for these environmental trends at the door of market and policy failures.¹¹⁷ Market failures occur when the costs or effects of environmental degradation are externalized away from the responsible party.¹¹⁸ It is an example of a policy failure when governments enact regulations that either fail to correct the market cases, or in some cases, exacerbate the situation.¹¹⁹ Where market and policy failures exist, free trade can dramatically increase the negative consequences to the environment.¹²⁰

The WTO admits that economic integration under the GATT has "diminished the regulatory power of individual nations."¹²¹ Nevertheless, the WTO argues that the increasing environmental degradation resulting from GATT restrictions on unilateral actions only underscores the importance of the

¹⁰⁹ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing in depth the Tragedy of the Commons theory, especially as it relates to population growth).

¹¹⁰ NORDSTRÖM AND VAUGHAN, *supra* note 10, at 2 (citing WORLD RESOURCES 1998-1999, A GUIDE TO THE GLOBAL ENVIRONMENT, collaborative report by the World Resource Institute, the United Nations Environmental Program, the United Nations Development Program, and the World Bank (1998)).

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 2.

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *Id.* at 1.

multilateral agreement process. In fact, that argument is "the key message of the study."¹²²

The report describes trade barriers as "poor environmental policies."¹²³ It states that:

Environmental problems are best addressed at the source, whether they involve polluting production processes or undefined property rights over natural resources. What is more, tackling the problems by targeting some indirect linkage, such as imports or exports, may divert attention from the underlying problems. In some cases, putative trade remedies may even aggravate the problems.¹²⁴

In so concluding, the report relies on case studies of chemical intensive agriculture, deforestation, global warming, acid rain, and overfishing. In each situation, the WTO reaches the conclusion that the problems should be solved by the removal of inefficient policies such as subsidies and the implementation of multilateral agreements. The WTO calls multilateral agreements the first-best method of environmental protection and states that "whenever we sidestep the first-best principles of environmental policy . . . the benefits not only become [more] difficult to predict, but we also impose unnecessary costs on the society."¹²⁵

The WTO admits that in the past, trade measures have been "a useful mechanism for encouraging participation in and enforcement of multilateral environmental agreements in some instances, and for attempting to modify the behaviour of foreign governments in others."¹²⁶ However, the report continues, "the use of trade measures in this way is fraught with risks for the multilateral trading system, unless trade policy is used in this manner on the basis of prior commitments and agreements among governments as to their obligations in the field of environmental policy."¹²⁷

The report's sentiments are reminiscent of the opinion of the lower court in the *Shrimp-Sea Turtle* case, where that court ruled that unilateral trade measures undermined the multilateral trading system and thus, were never

¹²² NORDSTRÖM AND VAUGHAN, *supra* note 10, at 1.

¹²³ *Id.* at 3.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

justifiable under the Article XX chapeau.¹²⁸ The report's stance on this issue undermines the appellate body's ruling in that case and raises the question of how future WTO dispute resolution panels will rule on Article XX trade measures.

B. Economics and Environmental Policy

The WTO's justification for striving for free trade is that it will unambiguously raise wealth throughout the world.¹²⁹ In developing countries, low-income levels can lead to a lack of concern over environmental issues. The report states,

Countries that live on the margin may simply not be able to afford to set aside resources for pollution abatement, nor may they think that they should sacrifice their growth prospects to help solve global pollution problems that in large part have been caused by the consuming lifestyle of richer countries.¹³⁰

To prove this theory, the study relies heavily on the Environmental Kuznets Curve, which holds that a graph showing income on the x-axis, and the level of environmental degradation on the y-axis would resemble an inverted 'U' shape.¹³¹ In other words, when a country is poor, there is little pollution because they lack capital necessary to fund polluting industry. As the level of income increases, so does the degree of environmental degradation not only because there is more capital for polluting industry, but also because of either a lack of concern about environmental quality or a lack of capital to invest in abatement technology, or both.¹³²

At some point, as the level of income continues to increase, the level of damage to the environment slows and then begins to decrease.¹³³ This is due to increased capital to apply to abatement costs and a conscious decision to place higher value on environmental quality.¹³⁴ It is important to realize, however, that the point where environmental degradation begins to decrease

¹²⁸ *Shrimp-Sea Turtle Appellate Report*, *supra* note 9, at 96.

¹²⁹ *See id.* at 2.

¹³⁰ *Id.* at 6.

¹³¹ *See* NORDSTRÖM AND VAUGHAN, *supra* note 10, at 11.

¹³² *See id.* at 49.

¹³³ *See id.*

¹³⁴ *See id.* at 54.

on the curve will not come without the conscious application of environmental policies.¹³⁵

Furthermore, the report suggests that newer studies indicate that the inverted 'U' shape may actually be closer to an 'N' shape.¹³⁶ In other words, as the amount of capital continues to increase, it creates a state of overcapitalism, such that the amount of environmental degradation will again increase. An obvious example of the new theory is the current popularity of sport utility vehicles in the United States. Although these vehicles are much less fuel efficient than most personal automobiles, the cost of gas is not high enough to balance against overcapitalization. Though large trucks produce much higher emissions than most cars, the cost of pollution is externalized and so does not serve as an adequate deterrent to their use. The report suggests that the 'N' shape may, in time, lead to an 'M' shape, whereby the level of pollution again decreases, but there is no support for this argument yet.¹³⁷ The report essentially dispels the validity of the Environmental Kuznets theory when it states, "what may appear as a relationship between income and pollution may have little to do with income *per se*."¹³⁸

This point is highlighted by evidence that different environmental indicators do not uniformly follow the expected curve.¹³⁹ The report found that each indicator followed a seemingly random pattern as income increased.¹⁴⁰ Availability of clean water and urban sanitation was found to uniformly increase with income, but at the same time, so did a generation of municipal waste and CO₂ emissions.¹⁴¹ The upshot is that environmental quality does not come from increased trade alone, but from increased education and access to the political system, as well as other innumerable factors.¹⁴² This finding disproves the argument that free trade will unambiguously raise welfare and pay for the environmental degradation that it produces.

C. *The Regulatory Chill*

The report confronts the theory that free trade leads a race to the bottom as well as the opposing theory that free trade could lead a race to the top. It

¹³⁵ See *id.* at 7.

¹³⁶ See *id.* at 53.

¹³⁷ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 54.

¹³⁸ *Id.* at 50.

¹³⁹ See *id.* at 54.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.* at 50.

concludes that although there is no real race in either direction, there is a definite problem of regulatory chill.¹⁴³ Opponents to free trade claim that without unilateral controls, there is a race to the bottom.¹⁴⁴ This theory holds that without effective sovereign control, companies will move to locations where they can externalize their costs to the greatest extent possible in order to maximize profits.¹⁴⁵ Strict free trade proponents sometimes claim that markets driven by consumers concerned with environmentally conscious products, combined with local 'not in my backyard' attitudes, will actually force companies to decrease pollution to the greatest extent possible, creating a race to the top.¹⁴⁶ The report cites evidence that indicates that, in reality, pollution abatement costs are generally such a small part of operating costs (between 1 and 5 percent) that they are not sufficient to drive a race to the top or the bottom alone.¹⁴⁷

The report does find sufficient evidence that when trade barriers cannot be used to equalize competition from foreign countries with different environmental protection values, governments may be politically driven into regulatory chills in order to maintain competitiveness.¹⁴⁸ "Industries often appeal to competitiveness concerns when lobbying against environmental regulations, and sometimes with some success."¹⁴⁹ As evidence of this, the report cites a successful attempt by the British coating industry to defeat legislation that would have forced them to reduce emissions of volatile organic compounds, "a major contributor to city smog and respiratory health problems," because the cost of complying with the reduced emissions limitations would make the industry uncompetitive in the international market.¹⁵⁰

Similarly, the European Commission proposed a tax on carbon dioxide emissions, conditioned on its major trading partners enacting similar taxes to equalize competition. Industrial lobbyists in the United States, Australia, and Japan killed the initiative.¹⁵¹ This serves as an example of the inefficiency of multilateral agreements when broad-based support for the issue does not exist. The EU could have erected import taxes to raise the costs to foreign importers of goods manufactured by methods that produced CO₂ and thereby leveled the

¹⁴³ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 35-36.

¹⁴⁴ See *id.* at 41.

¹⁴⁵ See *id.* at 42.

¹⁴⁶ See *id.* at 44.

¹⁴⁷ See *id.* at 40.

¹⁴⁸ See *id.* at 46.

¹⁴⁹ NORDSTRÖM AND VAUGHAN, *supra* note 10, at 45.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

playing field for fair competition, but this, assuredly, would have been a violation of the GATT under the WTO's interpretation.

The report itself proves that bars on unilateral sanctions lead to reduced environmental regulation. Nations, especially smaller ones that are less self-sufficient and more reliant on international trade, can not afford to institute environmental regulations when doing so will compromise their ability to compete in the world market. The problem is even more exaggerated when the issues involve the international environment instead of the domestic environment. The Tragedy of the Commons shows that nations will not voluntarily protect the global environment when doing so will require them to bear a burden out of proportion with their fair share.

IV. CONCLUSION

In the early Article XX cases, the DSB developed strict interpretations of Article XX that reserved little role for unilateral actions in global environmental protection. In recent years, however, the Appellate Body has taken a stance more consistent with the plain wording of the GATT. The Appellate Body also articulated a two-tiered test, requiring scrutiny, first, under the specific exception and then, under the chapeau. This method of review can effectively ensure that regulations are proper in purpose and fair in execution. The *Shrimp-Sea Turtle* case, as much as it has been reviled by environmentalists, represents a departure from the earlier DSB rulings. The Appellate Body finally recognized that while unilateral actions are not consistent with the general goals of the GATT, they were legitimate when premised on the purposes stated in Article XX and when administered fairly.¹⁵²

The WTO report on trade and the environment may indicate backsliding on this issue. The report concludes that unilateral trade sanctions are always second-best methods of protecting the environment and should be used rarely, if at all.¹⁵³ The report's conclusion is surprising because it admits several points that undermine its reasoning.

First, the report cites substantial evidence that shows that the global environment is facing numerous threats, which free trade is not only not correcting, but is in fact exacerbating. Secondly, the evidence on the Environmental Kuznets Curve indicates that, contrary to the claims of the WTO, there is no direct correlation between rising income and environmental quality. Finally, the evidence shows that regulatory chill is a real problem

¹⁵² See *Shrimp-Sea Turtle Appellate Report*, *supra* note 9.

¹⁵³ See NORDSTRÖM AND VAUGHAN, *supra* note 10, at 3.

because nations are reluctant to institute environmental regulations to protect the domestic environment or to enter environmental agreements to protect the global environment without being able to utilize unilateral actions to equalize competition.

It remains to be seen whether this anti-unilateral action stance will influence the Appellate Body's interpretation of Article XX, but it is hard to see how it will not. By showing great disfavor, the WTO may influence the DSB to strengthen the scrutiny it applies to unilateral actions and revert from the progress made in the *Shrimp-Sea Turtle* case towards recognizing unilateral trade actions as efficient and valuable tools for the protection of the global environment.