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Are Tuna and Dolphins the Same? A Rule of Reason Approach to Resolve the Trade and Environment Conflict

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A RULE OF REASON APPROACH TO RESOLVE
THE TRADE AND ENVIRONMENT CONFLICT

Anantha Raghavan K. Paruthipattu
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by

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Dedicated to my parents
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>1</td>
</tr>
<tr>
<td>II</td>
<td>13</td>
</tr>
<tr>
<td>III</td>
<td>48</td>
</tr>
<tr>
<td>IV</td>
<td>82</td>
</tr>
<tr>
<td>V</td>
<td>97</td>
</tr>
</tbody>
</table>

INTRODUCTION

THE TUNA-DOLPHIN CASE AND THE GATT/WTO JURISPRUDENCE

LESSONS FROM THE UNITED STATES AND THE EUROPEAN UNION: A RULE OF REASON APPROACH

THE UNITED STATES' SHRIMP BAN:

AN ANALYSIS

CONCLUSION

BIBLIOGRAPHY
CHAPTER I

INTRODUCTION

"Under present international trade law, a can of tuna is a can of tuna -- regardless of whether thousands of dolphins were killed in the process of catching that tuna."\footnote{1}

Tuna and dolphins have come to symbolize the policy struggle between trade and the environment.\footnote{2} Both are primary values in an ecologically and economically interdependent world.\footnote{3} Unleashing trade without fetters is as detrimental as guarding the environment at the expense of trade and development. It is necessary to reconcile any differences between the two. Sustainable development is the theme for the future.\footnote{4}

\footnote{1} William J. Snape III & Naomi B. Lefkovitz, Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?" 27 CORNELL INT'L L. J. 777, 786 (1994). Such an "alarmist" view may not be totally founded. See e.g., Thomas J. Schoenbaum, Free International Trade and Protection of the Environment: Irreconcilable Conflict?, 86 AM. J. INT'L L. 700, 726 (1992). "Contrary to the alarmist claims of some environmentalists, there is no inherent conflict between international trade as it has evolved under the aegis of the GATT and protection of environmental quality. The GATT recognizes and contains policy instruments that can be used to protect domestic and global natural resources; the GATT and environmental protection are largely compatible." Id. See also DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 53 (1994)[hereinafter ESTY]. "The GATT is not as misguided as some environmentalists would have the public believe." Id.

\footnote{2} See Snape & Lefkovitz, supra note 1, at 778. ESTY, supra note 1, at 29. Though NAFTA drew attention to the trade and environment conflict, it was the tuna-dolphin dispute that "turned interest into fury." Id.

\footnote{3} See ESTY, supra note 1, at 17-23.

\footnote{4} The Brundtland Report of the World Commission on Environment and Development is believed to have coined the term "sustainable development" which defined it as "(a) development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within two concepts:
(b) the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and
(c) the ideal of limitations imposed by the state of technology and social organizations on the environment's ability to meet present and future needs." Phillippe Sands, International Law in the Field of Sustainable Development: Emerging Legal Principles, in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 58 (Winfried Lang ed., 1995)[hereinafter "SUSTAINABLE DEVELOPMENT"].
Until a few decades ago, policy makers of both trade and environment concentrated their efforts within their respective areas.\(^5\) Trade became institutionalized under the "umbrella" of the General Agreement on Tariffs and Trade ("GATT");\(^6\) and now under the World Trade Organization (WTO)\(^7\) and has consistently developed. In contrast, the environment has had a weak growth in part due to lack of comprehensive institutional entity such as the GATT.\(^9\) Its growth is sporadic and sparse. Indeed, the relationship between the

The term "Sustainable Development" has been incorporated in numerous international treaties; for e.g., the Preamble to the WTO states: "Recognizing that their [members'] relations in the field of trade and economic endeavor should be conducted with a view to the raising of standards of living, ensuring full employment, and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the worlds' resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means of doing so." Agreement Establishing the World Trade Organization, April 14, 1994, reprinted in JOHN H. JACKSON ET AL., SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 3 (3d. ed., 1995)[hereinafter SUPPLEMENT]. The above principle was affirmed in Principle 12 of the Rio Declaration on Environment and Development, Adopted June 14, 1992, at the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF. 151/5/Rev.1., reprinted in 31 I.L.M. 874, 878 (1992).

\(^5\) ESTY, supra note 1, at 9.


\(^7\) As a result of the Uruguay Round of trade negotiations, the GATT became the World Trade Organization (WTO) on January 1, 1995. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 14, 1994, 33 I.L.M. 1145 (1994).

\(^8\) The GATT 1947 was amended and modified through the Uruguay Round Negotiations. Now the Marrakesh Agreement Establishing the World Trade Organization, incorporates the GATT 1994. In addition, "fifteen Agreements are annexed to GATT 1994, the most important being the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Agriculture, and the Agreement on Services." Thomas J. Schoenbaum, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 AM. J. INT'L L. 268, 271, n. 22 (1997).

\(^9\) See ESTY, supra note 1, at 77. The environment was given a strong impetus by the United Nations Stockholm Conference on the Human Environment, in 1972, when the United Nations Environment Programme (UNEP) was established. Also, the 1992 U.N. Conference on Environment and Development in Rio de Janiero established "a new phase in international environmental law in which environmental and economic issues" were joined. INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 5 (Anthony D' Amato et al. eds., 1996)[hereinafter ANTHOLOGY].
environment and trade was rarely seen. Generally, it was seen only as many times are there Multilateral Environmental Agreements (MEAs) which contain trade restrictions.\textsuperscript{10} The lighting rod that changed all this came with what is now a notoriously familiar Tuna-dolphin dispute.\textsuperscript{11} In early 1990, the United States, based on its domestic law, had banned the import of tuna and tuna products from Mexico and other countries that were fishing in a manner that caused damage to the dolphins in the Eastern Tropical Pacific Ocean. Mexico challenged the ban before the GATT. A GATT Panel ruled against the United States and held that the tuna ban is inconsistent with the GATT.\textsuperscript{12} The GATT became the subject of attack from rather an "unexpected front"\textsuperscript{13} -- the environmental community. The ruling enraged the environmental community and sent them into a fury, confirming its worst fears.\textsuperscript{14} Indeed.


\textsuperscript{11} The United States' tuna ban was challenged twice before the GATT. The first challenge was in 1991. See United States -- Restrictions on Imports of Tuna, 30 I.L.M. 1598 (1992)[hereinafter \textit{First Tuna Panel}]. This decision was not adopted by the GATT Council or the Contracting Parties. The second challenge was in 1994. See United States -- Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994)[hereinafter \textit{Second Tuna Panel}].

\textsuperscript{12} See chapter II, \textit{infra}.

\textsuperscript{13} Schoenbaum, \textit{supra} note 1, at 700.

\textsuperscript{14} For a general description of the criticisms of environmentalists against, in particular the \textit{First tuna Panel} decision, see ESTY, \textit{supra} note 1, at 35-59; see also Schoenbaum, \textit{supra} note 1, at 700-704.
the environmentalists had a "catalogue of grievances" against free trade.\textsuperscript{15} At a general level, the "policy discord" between the two has been excellently captured in the following passage:

Some environmentalists see protection of the environment as an absolute imperative. Once it is destroyed, it cannot be replaced. The future of the planet is at stake. Free trade is only a relative value, a means to an end, and thus free traders are only pragmatists with no absolute ideals. The protection of the environment, on the other hand, is an absolute ideal, perhaps the ultimate ideal since without it we will be unable to live.

Some trade specialists see free trade (or the best approximation of free trade that can be achieved in the real world) as the only way to maintain a healthy global economy and support economic development. Protectionism led to the Great Depression of the 1930s and World War II. There is no political security without economic security and no economic security without a free and competitive world market. Environmentalists may have good intentions, but they are naive and do not understand the real needs of most of the world today.\textsuperscript{16}

A. Basic GATT Rules

As the centerpiece of the trade system, the GATT is a "curious institution" born with birth defects;\textsuperscript{17} and, has yet survived the passage of time. It is a multilateral framework of rules designed to promote free and fair trade,\textsuperscript{18} by eliminating all forms of barriers to trade and, by imposing a set of obligations. Now under the WTO, the "GATT 1994 not only

\textsuperscript{15} See generally A Catalogue of Grievances, \textit{The Economist}, Feb. 27, 1993. Environmentalists claimed that GATT: (1) promotes free trade which leads to economic growth, but damages the environment; (2) prevents use of higher environmental standards; (3) does not allow PPMs; (4) does not allow "eco" subsidies; (5) encourages a "race to the bottom"; (6) prevents bans of DPGs; (7) does not allow the use of extraterritorial use of environmental standards; (8) does not automatically validate international environmental agreements; (9) does not allow participation of environmentalists in dispute resolution. \textit{Id.} See also Charles Haag, \textit{Legitimizing "Environmental" Legislation under the GATT in Light of the CAFE Panel Report: More Fuel for Protectionists?} 57 U. Pitt. L. Rev. 79 (1995).

\textsuperscript{16} Robert A. Reinstein, \textit{Trade and Environment: The Case for and Against Unilateral Actions}, in SUSTAINABLE DEVELOPMENT, supra note 4, at 231. These statements of course reflect the diametrical positions of the trade and environment schools.

\textsuperscript{17} JOHN H. JACKSON, \textit{Restructuring The GATT System} 1 (1990).

\textsuperscript{18} For an excellent analysis of the GATT, see JACKSON, supra note 6.
establishes the normative structure for trade" but it also "seeks to further the goal of free international trade."

A GATT member has three primary obligations. First, the most-favored nation or "foreign parity" principle is found in Article I. The "foreign parity" requires that each member State accord "unconditional" treatment to like products originating from, or destined to, other members.

Second, GATT imposes the "national treatment obligation" or "inland parity" by prohibiting discrimination between domestically produced goods and imported goods broadly in all respects. This prohibits a member state from imposing regulations or taxes in a way "so as to afford protection to domestic protection" or subject the imported products either "directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." Again in Article I, paragraph 4, it states that imported products "shall be accorded no less favorable treatment than that accorded to like products of national origin" in all respects.

Third, GATT prohibits the use of quotas or other quantitative restrictions on the export or import of goods. However, some exceptions are provided in paragraph 1 namely (a) export restrictions on foodstuffs or other products to relieve critical shortages "essential" to the contracting party; (b) import or export prohibitions necessary to the application of

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19 Schoenbaum, supra note 8, at 271.

20 Art. I, GATT BISD. See Jackson, supra note 6, at 249-272.

21 See Jackson, supra note 6, at 273-303.

22 Art. I, para. 1, GATT.

23 Art. I, para. 3, GATT.

24 Art. I, para. 4, GATT.

25 Art. XI, GATT.

26 Art. XI(2)(a), GATT.
standards or regulations for the classification of commodities;\(^{27}\) and (c) "import restrictions on any agricultural or fisheries product that are necessary to the enforcement of certain governmental measures."\(^{28}\) Broadly, the above "three pillars" constitute the framework with which the international trade policies are governed.

B. Environmental Exceptions Under the GATT: How "Green" Are They?

The environmental exceptions that are relevant for our discussion are found in Article XX of the GATT. It provides in pertinent part:

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

(a) necessary to protect public morals;
(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. ...\(^{29}\)

In its interpretation of the above provision, and in particular, Article XX(b) and (g), the tuna-dolphin controversy has raised several policy questions which need to be answered. At the broadest level, the issue centers around the use of trade measures for environmental purposes. The problem arises because in the garb of environmental concerns, protectionist barriers are raised.\(^{30}\) How to separate the "wheat from the chaff" -- the genuine ones from

\(^{27}\) Art. XI 2(b), GATT.

\(^{28}\) Art. XI 2(c), GATT.

\(^{29}\) Art. XX, GATT.

\(^{30}\) See Haag, supra note 15, at 80.
the disguised trade restrictions -- is a troubling issue. The further question is whether countries could unilaterally determine environmental standards. The use of unilateral measures causes considerable controversy.\textsuperscript{31} Likewise, should countries be allowed to protect the environment beyond their own borders, or the shared environment, or be limited to its jurisdiction?\textsuperscript{32} It is known that products may be produced by either "clean" or "dirty" production modes. Is it proper for the countries to refuse to allow products that have been produced by "dirty" production technologies, the "dirtiness", or rather the cleanliness, being determined by the regulating country's standard.\textsuperscript{33}

C. A Search For Solutions

In attempts to answer these questions and reconcile the differences raised by the tuna-dolphin dispute, a large body of literature has emerged.\textsuperscript{34} Even though the tuna-dolphin controversy itself has ended, the debate continues. If it was the tuna ban for the protection of dolphins one time, it is the shrimp ban for sea-turtles now; it could be salmon and sharks


\textsuperscript{32} See generally Reinstein, \textit{supra} note 16, at 223. See also Laura Campbell's Comment on Reinstein's views. \textit{Id.} at 233.

\textsuperscript{33} See generally Candice Stevens, \textit{Trade and the Environment:The PPMs Debate} in \textit{SUSTAINABLE DEVELOPMENT}, \textit{supra} note 4, at 239. See also Thomas J. Schoenbaum's Comment on the views expressed by Candice Stevens. \textit{Id.} at 249.

yet another time.\textsuperscript{35} A "continuing search for reconciliation" is made.\textsuperscript{36} Some commentators believe that GATT is not suited to address environmental concerns;\textsuperscript{37} they advocate the formation of a new institution such as the Global Environmental Organization (GEO); or a World Environmental Organization (WEIO);\textsuperscript{38} or General Agreement on the Environment (GATE).\textsuperscript{39} Some others believe that reconciliation is possible within the GATT framework: they suggest "institutional cures" like an amendment,\textsuperscript{40} or a waiver incorporating environmental concerns.\textsuperscript{41} Without doubt, these approaches deserve merit and need to be pursued. Regrettably, they are not practicable. Negotiations between parties of a multilateral agreement is a tedious and cumbersome process. And amendment or waiver of the GATT requires the political will of atleast two-thirds of its members. This is not feasible.\textsuperscript{42} The

\begin{enumerate}
\item See Schoenbaum, \textit{supra} note 8.
\item Jeffrey L. Dunhoff, \textit{Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes} 15 \textit{Mich. J. INTL L.} 1043, 1071 (1994). Dunhoff argues that the GATT "has no mandate to advance environmental interests. Where conflict exists, GATT practice invariably subordinates environmental interests to trade interests." \textit{Id.}
\item ESTY, \textit{supra} note 1, at 230-31.
\item Indeed the GATT Panels have indicated their preference for an amendment process. See \textit{e.g.}, First Tuna Panel, \textit{supra} note 11, para. 6.3. "If the Contracting Parties were to decide to permit trade measures of this type (such as the US tuna embargo) in particular circumstances, it would therefore be preferable for them to do so not by interpreting article XX, but by amending or supplementing" the GATT. \textit{Id.} Likewise, other commentators have suggested an amendment approach. See Janet McDonald, \textit{Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order}, 23 \textit{ENVTL L.} 397,402 (1994)(argues that there is an urgent need of amendment or supplementation of GATT to allow environmental concerns without violating GATT).
\item Douglas Jake Caldwell, \textit{International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution}, 18 MD. J. INTL & TRADE 173, 187-197 (1994). "In the current international climate, the GATT waiver represents the most practical method of securing immediately the legitimate environmental protection goals of the international environmental agreements." \textit{Id.}
\item See Dunhoff, \textit{supra} note 37, at 1066-71. Dunhoff examines each of the "institutional cures": amending the GATT, utilizing the GATT waiver provision and negotiating a separate "environmental code"
non-feasibility of such approaches is illustrated by the failure to include the term "environment" in Article XX.\textsuperscript{43} It is troubling to notice that from the date of formation of the GATT till today, there is no "general agreement on the environment."\textsuperscript{44}

Recognizing that harmonization is an important means to reconcile trade and environment issues, the WTO member States created the Committee on Trade and Environment (CTE).\textsuperscript{45} The "positive" harmonization efforts are welcome. The Committee's agenda is promising.\textsuperscript{47} Regrettably, its action is slow.\textsuperscript{48} If the march of law at

and concludes that "none of the . . . proposed cures are satisfactory." \textit{id.}

\textsuperscript{43} See \textit{id.} at 1067. "[I]n 1991, the Negotiating Group on GATT Articles rejected a suggestion that would have added the phrase "the environment" to Article XX(b)." \textit{id.}

\textsuperscript{44} Schoenbaum, \textit{supra} note 8, at 270.

\textsuperscript{45} In the Marrakesh Conference meeting on April 14, 1994, the GATT Contracting Parties adopted a Ministerial Decision formally establishing the Committee on Trade and Environment (CTE). Trade and Environment, GATT Ministerial Decision of 14 Apr. 1994, 33 I.L.M. 1267 (1994).

\textsuperscript{46} See generally Jennifer Schultz, \textit{The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform}, 89 AM. J. INT'L L. 423, 438(1995). "[C]reation of the Committee on Trade and the Environment under the WTO was a welcome relief to environmentalists". \textit{id.}

\textsuperscript{47} The terms of reference of Committee on Trade and Environment (CTE) reads in part:
(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
(b) to make appropriate recommendation on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and nondiscriminatory nature of the system, as in regards, in particular:
- the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
- the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure the responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
- the surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.


\textsuperscript{48} Since its inception, the CTE has had four meetings: February 16, 1995; April 6, 1995; June 21, 1995. The Singapore Conference was on December 13, 1996. See Kelly Jude Hunt, \textit{International Environmental Agreements in Conflict with GATT—Greening GATT after the Uruguay Round Agreement}, 30 INT'L LAW 163, 180-81 (1996). Schoenbaum, \textit{supra} note 8, at 269. Referring to the Singapore Conference, Schoenbaum points out that it "does little to inspire confidence that the CTE will be able to formulate concrete
the legislative level does not proceed at the expected pace. "negative harmonization" can fill some gaps. A "realistic" approach would be to use a "panel-created" doctrine that balances the interests of trade and environment.49

This thesis argues that the "panel-created" doctrine should be a rule of reason approach.50 The success of such an approach is very evident from the experience of the European Court of Justice and the United States Supreme Court.51 In both jurisdictions, the level of protection to the environment desired were not explicitly maintained. Both have developed legal bases to overcome the perceived 'inadequacies' of the law and have made attempts to reconcile the two policy commitments; in particular, the European Court of Justice has been creative in the 'negative harmonization' process.52

In chapter II, an analysis of the tuna-dolphin decisions is made. It will be shown that the tuna-ban panels have interpreted the Article XX exceptions narrowly. This has created an imbalance between trade and the environment rendering the reconciliation of the two goals rather difficult. However, in a related development, the United States appealed the WTO Panel Report on the Reformulated Gasoline case decision. In its decision on May 20, 1996, the Appellate Body rejected some conclusions of the Panel Report of the Reformulated Gasoline case with respect to Article XX(g) and Article XX of the GATT as Schoenbaum points out that it "does little to inspire confidence that the CTE will be able to formulate concrete recommendations for reconciling the important issues at stake." ld.


50 ld.

51 See chapter III, infra.

52 PAUL CRAIG & GRAINNE DE BURCA, EC LAW: TEXT, CASES, AND MATERIALS, 586 (1995). "Harmonization is essentially negative and deregulatory in the sense that the result is that national rules are held not to apply. This can be contrasted with 'positive harmonization' which results from the promulgation of ... legislative measures, stipulating which rules can apply across the ...[country] as a whole." ld.

a whole.\textsuperscript{54} To be sure, the Appellate Body decision is a turning point in the GATT jurisprudence. A change in the landscape has occurred and the decision could be expected to close the gap that exists between trade and the environment. Chapter II also addresses how this decision impacts the resolution of the trade and environment conflicts.

In chapter III, the jurisprudence of the United States and the European Union is examined. It is shown that they have created a rule of reason approach to balance the contending goals of trade and the environment. However, the study reveals that the language of the European Union Treaty provisions and the GATT are similar. Further, the issues that the European Court confronted while interpreting the key provisions are identical to the issues faced by the GATT. Consequently, the approach of the European Court is examined closely. This examination shows how the rule of reason approach has helped the European Court to bring a balance between free flow of commerce and protection of the environment.

As mentioned above, this thesis proposes that the WTO Dispute Settlement Body adopt the rule of reason approach to resolve trade and environment issues. Interestingly, an excellent opportunity to put to test the rule of reason doctrine exists already. Recently, effective May 1, 1996, the United States has slapped a ban on the import of shrimp from India and other Asian countries on the ground that shrimp is being harvested in a manner detrimental to marine sea-turtles.\textsuperscript{55} Predictably, the affected countries have complained before the World Trade Organization (WTO).\textsuperscript{56} To date, the dispute is undecided.


\textsuperscript{55} On May 1, 1996, the United States banned shrimp imports from countries which harvested shrimp without the Turtle Excluder Devices (TEDs) and caused danger to the sea-turtles. Earlier, the United States had imposed shrimp imports on a "shipment-by-shipment" basis. However, on a lawsuit filed by the Earth Island Institute, (Earth Island Institute v. Christopher, 13 ITR 73, 1/17/96),the Court of International Trade ruled that the US ban on shrimp imports should apply worldwide. BNA INT’L TRADE DAILY , Jun. 25, 1997. The major shrimp exporters are Thailand, India, China, Bangladesh, and Honduras. BNA INT’L TRADE REP., May 8, 1996.

\textsuperscript{56} On February 25, 1997, a WTO Panel was established to examine the complaint filed by India, and several other Asia countries. The Panel is yet to decide the dispute. See Overview of the State-of-play of WTO
Chapter IV addresses the issues raised by the above US shrimp embargo. An attempt is made to see how the WTO Panel would examine the embargo under the current GATT analysis. In this regard, the impact of the Appellate Body's decision in the *US Standards* case is also taken into consideration. Further, the embargo is analyzed under the suggested rule of reason analysis. By this case study, an effort is made to highlight the similarities and differences in analyses between the current GATT analysis and the suggested rule of reason analysis. Finally, chapter V concludes the thesis.

CHAPTER II

THE TUNA-DOLPHIN CASE AND THE GATT/WTO JURISPRUDENCE

A. Background

In the Eastern Tropical Pacific Ocean (ETP), a "unique ecological relationship" between tuna and dolphins has been long observed. ¹ The commercial fishing industry exploited this "relationship" by locating dolphins and encircling them with purse-seine nets to catch the tuna underneath,² resulting in high accidental death or "taking" of dolphins. Under the Marine Mammal Protection Act³ (MMPA) which prohibits such "incidental taking,"⁴ the United States imposed a ban on Mexican tuna and tuna products harvested using the purse-seine nets. The MMPA sought to implement its policy through two limbs. First, the United States controlled and reduced the "incidental" killing of dolphins by its domestic fishing industry.⁵ Second, the MMPA had stipulated that in order to access the U.S. markets


² Id. at 1598, para 2.2.


⁴ Taking includes "harassment, hunting, capture, killing or attempt thereof." See id.

⁵ See Section 101(a)(2) of the MMPA, which limited the "incidental" killing of dolphins to 20,500 dolphins per year, out of which only 250 may belong to the coastal dolphin species("Stenella Attenuata") and 2750 may be Eastern Spinner dolphin species (Stenella Longirostris"). In this regard, Mexico argued that
for the tuna and tuna products, foreign tuna producers fishing in the ETP region must have dolphin-safe standards comparable to that of the United States. In addition to the embargo against Mexico, the import ban was applied as against other "intermediary" countries that imported tuna from the "primary" embargoed countries. This tuna import ban became the subject of challenge before the GATT in 1991 and 1994.

B. The Tuna-ban Panel Reports

In late 1991, Mexico challenged the United States' ban before the GATT. Mexico argued that the import ban was a quantitative restriction contrary to Article XI of the GATT. It argued that by banning tuna from a specific geographic area, namely the ETP, the United States violated Article XIII which condemns discrimination based on a specific geographic area. Furthermore, Mexico alleged that United States also violated the national treatment obligation. Claiming that domestic tuna and imported tuna are 'like' products, Mexico

the species of dolphins explicitly mentioned by the MMPA were neither considered threatened or extinct under the CITES. First Tuna Panel, supra note 1, at 1599, para. 2.4.

6 See MMPA, supra note 3. Section 101(a)(2)(B) of the MMPA provides that "importation of yellowfin is prohibited unless the Secretary of Commerce finds that (i) the government of the harvesting country has a program regulating taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by United States vessels. " Id. To meet the comparable standard, countries were required to show that their dolphin-take was "not in excess of 1.25 times the average incidental taking rate of the United States vessels operating in the ETP during the same period." Id.

7 In March, 1992, the European Economic Community (now European Union) joined by the Kingdom of Netherlands challenged the "intermediary embargo" as violative of GATT obligations. Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (June 1994)[hereinafter Second tuna panel].

8 First Tuna Panel, supra note 1, at 1616, para. 5.8.

9 Id. at 1602, para. 3.14.

10 Id. at 1603, para. 3.16.
argued that the United States measures under the MMPA, whose stated legislative purpose was to protect dolphins, does not affect tuna as a product; consequently, the Mexican tuna-ban was a violation of the GATT obligation to accord Mexican tuna "no less favorable treatment" than the US tuna.\textsuperscript{11} In the United States' view, the tuna ban was not a quantitative restriction, but were laws and regulations covered under Article III of the GATT, since the MMPA measures were enforced at the time or point of importation. Further, the United States argued that the "no less favorable treatment" argument is not valid by underscoring the fact that foreign tuna producers had an additional margin of 25 percent over that of the United States producers.\textsuperscript{12} On the contrary, foreign tuna producers were treated more favorably than their domestic counterparts under the MMPA measures.\textsuperscript{13} However, the Panel found that since Article III applies to products, the MMPA measures which does not cover the product tuna as such, but the process by which it is harvested, would not fall under Article III. The Panel concluded that the direct import prohibition of tuna and tuna products violated the Article XI obligations of the United States.\textsuperscript{14}

Though the GATT Panels touched many aspects of the GATT provisions, for the purpose of this analysis, their findings with regard to the environmental exceptions under Article XX are important. To determine the GATT-consistency of a measure at issue under Article XX, the GATT Panels typically subject the challenged measure to a three step analysis. First,

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\textsuperscript{11} Id.

\textsuperscript{12} Id. at 1602-3, paras.3.18 - 3.20.

\textsuperscript{13} Id. at 1603, para. 3.20.

\textsuperscript{14} Id. at 1618, para. 5.18.
the Panel makes a conservation policy analysis. In particular, the conservation of an environmental target outside the regulating state is not excepted. Second, the Panel examines if the measures satisfy the requirements under Article XX (b) and (g) requirements; and third, it looks to see if the measure satisfies the preambular conditions of Article XX.

1. What are "necessary" Measures

It is established that Article XX(b) can justify a measure that seeks to protect the human, animal or plant life or health within the borders of the regulating State. Whether measures that seek to protect targets beyond the regulating States' territories would fall within the meaning of "necessary" was one of the basic questions raised by the tuna-dolphin dispute. The GATT Panel noted that the text of Article XX(b) does not explicitly answer the question whether a contracting party could take measures "necessary" to protect the environment outside its jurisdiction. Consequently, the Panel resorted to a historical analysis, a purpose analysis and an analysis of the interpretive consequences urged by the parties on the GATT as a whole.

In its historical analysis, the Panel noticed that Article XX(b) in its present form read similar to Article 32(b) of the Draft Charter of the International Trade Organization(ITO). In the process of its revision, a proviso was added by the New York Draft to the ITO charter, which read: "For the purpose of protecting human, animal or plant life or health, if

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15 See e.g., Panel Report on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted 7 November 1990, BISD 37S/200[hereinafter Thai Cigarettes case](where Thailand justified its regulation under the Article XX exceptions. The GATT Panel rejected the claims of Thailand on other grounds).

16 First Tuna Panel, supra note 1, at 1619, para. 5.24.
corresponding domestic safeguards under similar conditions exist in the importing country. If the measures were intended to be applied domestically, requiring parties to impose domestic restrictions would seem superfluous. Accordingly, the added proviso was dropped by the drafters as "unnecessary." From this the Panel inferred that Article XX(b) exception was to be applied within one's jurisdiction. Further, in its 'purpose' analysis, the Panel noted that all challenged measures are subject to the conditions against misuse. It pointed out that the purpose of the exceptions was to allow contracting parties to pursue their overriding public policy goals. Similar to Article XX(b), Article XX(d) uses the term

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17 Id. at para. 5.26.

18 Id.

19 Id. at 1620, para 5.26. The Panel noticed that before Article XX(b) came to be read in its present form, the exception read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country." Id. at 1619, para. 5.26. This proposal was introduced in the New York Draft to the ITO Charter. Id. Earlier, the United States in the Draft Charter of the ITO read: "Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures; ... (b) necessary to protect human, animal or plant life or health." Id. For a criticism of the Panel's analysis and conclusion that trade measures are restricted to domestic application, see Belinda Anderson, Unilateral Trade Measures and Environmental Protection Policy, 66 Temp. L. Rev. 751 (1993). Anderson relies on the Article 4 of the Convention on Suppression of Import and Export Prohibitions, which is similar in wording to Art. XX of the GATT. During its debate, the United States had referred to the jurisdictional scope of some of its laws in existence at that point in time. She points out that nevertheless, the Convention participants did not narrow the exception. Thus, a "reasonable conclusion" could be drawn that the participants shared the view of the United States; consequently, extra-territorial conservation efforts should be legitimately excepted. Id. at 758-60. But see John H. Jackson, World Trade Rules and Environmental Policies: Interdependent Goals or Irreconcilable Conflict? 49 Wash. & Lee L. Rev. 1221, 1241 (1992)(preparatory documents of treaties constitute a secondary means of treaty interpretation; thus its reliance is circumscribed). Moreover, Anderson relies on a historical "omission" to reach her conclusion. Anderson, supra, 758-60. Indeed, this was done by the tuna-ban Panel in its analysis. See First Tuna Panel, supra note 1.

20 First Tuna Panel, supra note 1, at 1692, para. 5.27. See also Thai Cigarettes case, supra note 15. Thailand had restricted imports of cigarettes and subject it to internal taxes. With regard to Article XX (g), even though the Panel accepted that "smoking constituted a serious risk to human health and that consequently measures to reduce the consumption of cigarettes fell within the scope of article XX(g)," id. at 222-23, para.
"necessary." Previous GATT Panels had ruled under the Article XX(d) context that a measure becomes "necessary," if alternative and inconsistent measures that could be reasonably employed were not available.\(^1\) Indeed, if such a measure is "not reasonably available" then, a country should employ the least GATT inconsistent alternative.\(^2\) However, since trade-restrictive measures risk inconsistency with GATT obligations, such inconsistent measure are allowed only to the extent they are unavoidable.\(^3\) Then the Panel made a "consequences" test of Article XX(b). While Mexico urged a narrow interpretation, the United States pressed for a broad interpretation. The consequences of the United States' approach, the Panel viewed, would lead to unilateralism where each contracting party could "unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights"\(^4\) under the GATT. Further, the Panel reiterated that since the United States measures could not, by themselves, achieve their intended effect, but depended on the changes in policies of other countries, they are not "necessary" measures. Furthermore, assuming \emph{arguendo}, that Article XX(b) applied outside the jurisdiction of the United States, the Panel pointed out that the "necessary" conditions would not be satisfied unless the United States had "exhausted all options reasonably

\(^{72}\) the Panel held that other less restrictive measures were available and consequently, it did not satisfy the "necessary" criterion under Article XX(b). \emph{Id.}

\(^{21}\) \emph{Second Tuna Panel}, supra note 7, at 896.

\(^{22}\) \emph{Id.} at 896, para. 5.34, \emph{citing} Report of the Panel on United States - Section 337 of the Tariff Act of 1930, adopted 7 November 1989, L/6439, 36S/345, 392, para. 5.26 [hereinafter \emph{Section 337} case]. \emph{See also Thai Cigarettes} case, \emph{supra} note 15.

\(^{23}\) \emph{Second Tuna Panel}, supra note 7, at 896.

\(^{24}\) \emph{First Tuna Panel}, \emph{supra} note 1, at 1620, para. 5.27.
available to it." Accordingly, the Panel concluded that the United States' measures were inconsistent under Article XX(b) of the GATT.

2. Article XX(g)

Unlike Article XX(b) which clearly specifies the targets for conservation namely human, animal or plant life or health, Article XX(g) covers "exhaustible natural resources." This is the starting point for any Article XX(g) analysis. This has two purposes. First, whether the target chosen by the regulating party is worthy of conservation efforts is questioned. Once this is fixed, the second purpose is to ensure that the conservation efforts do not deviate from the target. Thus if some product A is the target of conservation, the regulating party may not use measures regulating product B for its conservation strategy. It must necessarily focus on the product that is sought to be conserved.

Generally, the GATT Panels have agreed on the targets of conservation chosen by the regulating countries. However, the GATT Panels have insisted that a contracting party cannot seek to protect resources that are beyond their borders. In the tuna-ban case, the United States insisted that Article XX(g) has application outside domestic borders. The tuna-ban Panels gave a negative answer. In their analysis, the Panels immediately conceded that dolphins are "exhaustible natural resources." Unlike Article XX(b) which uses the term

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25 *Id.*

26 See e.g., *Thai Cigarettes* case, *supra* note 15; *First Tuna Panel*, *supra* note 1; *Second Tuna Panel*, *supra* note 7; *Reformulated Gasoline* case, *infra.*

27 See e.g., *Thai Cigarettes* case, *supra* note 15.

28 *Second Tuna Panel*, *supra* note 7, at 890, para. 5.11.
"necessary," Article XX(g) poses interpretative problems of the terms "relating to" and "in conjunction with domestic production or consumption."

3. **Meaning of the Terms 'relating to' and 'in conjunction with'**

   Previous Panels had concluded that "relating to" and "in conjunction with" should be taken to mean "primarily aimed" at the conservation of the resource and its restrictions on consumption or production within the invoking country. Further, the tuna-ban Panel also noted that previous Panels have devised the "purpose" and "effects" test to determine the "primarily aimed at" requirement. In other words, not only should a measure have the "purpose" of conserving an exhaustible natural resource, but also capable of producing the desired effect of conservation. Admittedly, the purpose of the United States measure was dolphin protection. However, its measures banned any tuna, regardless of whether they were caught using "dolphin-safe" fishing techniques or not. Moreover, a measure whose effectiveness depended on whether the exporting country changed its policies or practices is ineffective. Such ineffective measures could not possibly further the "purpose" of the conservation. Accordingly, the GATT Panel concluded that the United States measures does not satisfy the "relating to" test. Thus if dolphins are the conservation target, a measure

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30 *Second Tuna Panel, supra* note 7, at 892.

31 *Id.* at 893.
regulating tuna is not acceptable. Put another way, banning import of tuna and tuna products is not "primarily aimed at" conservation of dolphins. Allowing trade restrictions on any product non-related to the target of conservation could lead to unilateralism and lead to protectionism of one's domestic industries.

4. The Jurisdiction of the Target

Without doubt, dolphins are conservable. However, the location of the dolphins becomes an arguable issue. Can a regulating State protect dolphins that exist anywhere in the world or is it restricted to protecting the species within its own jurisdiction? The EEC (now European Union) and the Netherlands claimed that on an "object and purpose" interpretation of Article XX(g), the natural resource could not be located outside the jurisdiction of the regulating country. The United States urged a literal reading of Article XX(g), arguing that it places no limitation on the jurisdiction or location of the "exhaustible natural resource" to be conserved. Indeed, the Panel agreed with the United States' interpretation that Article XX(g) does not indicate as to the location of the natural resource. The Panel observed that other than placing explicit preambular limitations on the use of Article XX(g), its text does not specify the "nature and precise scope" of the exception. The Panel reasoned that on an examination of other paragraphs under Article XX, in particular Article XX(e) relating to prison labor, it could not be said that "extra-territorial" measures are "proscribed in an absolute manner." The "preparatory works", on which the first tuna-ban Panel had relied in part to conclude that Article XX(g) applied to resources within one's

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32 Id. at 891, para. 5.14.

33 Id.
jurisdiction had far less appeal to the second tuna-ban Panel. Thus, it concluded that it "could see no valid reason to support the conclusion" that Article XX(g) applies only to policies related to the conservation of exhaustible natural resources located within the territory of regulating party. 34

It may also be pointed out that in its historical analysis of Article XX(b), the tuna-ban Panels noted that the term "domestic safeguards under similar conditions exist in the importing country" in Article 32(b) of the Draft ITO Charter was omitted by it drafters as "unnecessary." In its final form, Article XX(b) concerns conservation efforts. Put in context, "domestic safeguards" means some sort of restrictions on its domestic production or consumption which is similar to the language used in Article XX(g) which says "made effective in conjunction with domestic production or consumption." If from the fact that the term was deliberately omitted as "unnecessary", the Panel inferred non-extra-jurisdictional application of Article XX(b), conversely, the "non-omission" of the above phrase in Article XX(g) could be viewed as a provision that Article XX(g) was intended to apply extra-jurisdictionally.

Nevertheless, the tuna-ban Panels have rested their jurisdictional issue on the effectiveness of the measure: the presumption being that a measure is most effective when the target of conservation is within the regulating state's borders. It observed:

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests Article XX(g) was intended to permit contracting parties to

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34 Id. at 892, para. 5.20.
take trade measures primarily rendering effective restrictions on production or consumption within their jurisdiction.\textsuperscript{35}

Recalling an earlier panel's finding, which observed that

The purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources\textsuperscript{36}

the tuna-ban Panel emphasized that an interpretation that would allow measures taken to force other countries to change their policies would affect the "balance of rights," in particular, the right of "access to markets" and would seriously impair the GATT framework.

Since both the Panels found that the United States measures did not satisfy the "essential conditions" under Article XX(b) and (g), it was unnecessary for them to examine the preambular restrictions. Nevertheless, the United States claimed that since the preamble to Article XX mentions that "nothing in this [GATT] Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures," Article XX constitutes a separate justification in itself.\textsuperscript{37} The Panel however, following an earlier GATT Panel\textsuperscript{38} concluded that "Article XX is a limited and conditional exception from obligations

\textsuperscript{35} First Tuna Panel, supra note 1, at 1621.

\textsuperscript{36} Unprocessed herring case, supra note 29, at 114, para. 4.6.

\textsuperscript{37} First Tuna Panel, supra note 1, at 1605.

\textsuperscript{38} Section 337 case, supra note 22, at 385, para. 5.9.
under other provisions of the General Agreement, and not a positive rule establishing obligations in itself."^39

C. The CAFE Dispute

In 1994, a GATT Panel^40 examined another United States' regulation called the Corporate Average Fuel Economy Standard (CAFE)^41 and the Gas Guzzler Tax^42. The CAFE standard had a "general fleet averaging" and "separate foreign fleet averaging" scheme. The Gas Guzzler tax was applied on the sales of individual cars that did not meet the required fuel efficiency. The former required automobile manufacturers to meet certain levels of overall fuel efficiency of 27.5 miles per gallon for their entire fleet, while the latter required that the manufacturers show that domestic and imported cars meet the fuel efficiency separately, even if they satisfied "general average." The Gas Guzzler tax was upheld as it was found non-discriminatory between foreign and domestic cars. In contrast, the CAFE standard did not pass the scrutiny of Article III. The CAFE standard required the application of tuna-ban analysis. In order to examine if Article XX would excuse the CAFE standards, the Panel applied the "three step" formula. The Panel noted that while "general average" scheme could be justified, the "separate foreign fleet" averaging was not

^39 First Tuna Panel, supra note 1, at 1619, para. 5.22.


^43 CAFE Report, supra note 40, at 1452.

^44 See id. at 1456-57.
compatible with Article XX(g). As both the standards--the "general average" and the "separate foreign fleet" averaging were "inextricably linked." the Panel held that one may not be excused while allowing other. More importantly, representing a clean departure from the tuna-ban Panels, the CAFE Panel observed that in applying the "primarily aimed at" standard for Article XX(g) which would have to render effective the measures.\(^45\) the "efficiency" of the measure was not crucial for Article XX(g) analysis.\(^46\)

D. The Reformulated Gasoline Case

It would seem that Venezuela and Brazil took the above "efficiency" argument a little further in their complaint against the United States in the Reformulated Gasoline case.\(^47\) The Panel held that the Gasoline Rule, which established two baseline requirements for refiners, blenders and importers of gasoline--individual baseline for domestic producers and a tougher 'statutory' baseline for foreign producers--were inconsistent under the General Agreement. Notably, the United States justified the Gasoline Rule under the General Exceptions, namely Article XX (b) and (g).

\(^{45}\) See id.

\(^{46}\) Id. at 1456.

\(^{47}\) Report of the Panel in United States - Standards for Reformulated and Conventional Gasoline (Treatment of Imported Gasoline and Like Products of National Origin) 35 I.L.M. 274 (1996)[hereinafter the Reformulated Gasoline case]. Under the Clean Air Act of 1990, the United States passed a regulation titled "Regulation of Fuels and Fuel Additives--Standards for Reformulated and Conventional Gasoline", commonly known as the "Gasoline Rule" whose purpose was to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. The 'Gasoline Rule' was challenged by Venezuela and Brazil before a WTO Dispute Settlement Body (DSB). The Panel ruled against the United States. The United States challenged the WTO Panel Report before the Appellate Body of the WTO. Venezuela and Brazil therein argued that the measure must have "some positive conservation effort," to hold that a measure is primarily related to the object of the measure. Report of the Appellate Body in United States -- Standards for Reformulated and Conventional Gasoline 35 I.L.M. 603, 623 (1996)[hereinafter the Gasoline Standards case]; see infra notes 120 to 134 and accompanying text.
Like the tuna-ban Panels, this Panel also applied a three-step analysis. However, that this Panel's approach was flawed from the beginning is evident from the inappropriate questions it posed itself. Thus, in order to examine the Gasoline Rule under Article XX(b), the Panel framed the question which clearly ignored the "necessity of the environmental objectives" and instead focused on the "inconsistent measures" already held invalid under the Panel's Article III analysis.\textsuperscript{48} Referring to previous Panels which had interpreted the meaning of the term "necessary,"\textsuperscript{49} the Reformulated Gasoline Panel applied the same interpretation and proceeded to examine whether United States could achieve the same policy goals by less inconsistent alternatives. The United States stressed that it explored other alternatives and, that such alternatives were not "feasible."\textsuperscript{50} However, the Panel rejected the United States' arguments since it found that the same policy objectives could be achieved without discriminating between domestic and foreign gasoline and ruled that the United States had failed to satisfy the test under Article XX(b).\textsuperscript{51}

With regard to Article XX(g), Venezuela claimed that "clean air" is not an exhaustible natural resource falling within Article XX(g), because it is a "condition" of air

\textsuperscript{48} Reformulated Gasoline case, supra note 47, at 296. The same flaw occurred in Article XX(g) analysis which was pointed by the Appellate Body in the United States Standards case. See notes 120 to 127 and the accompanying text.

\textsuperscript{49} Section 337 case, supra note 22, at para. 5.26; see also, Thai Cigarettes case, supra note 15, at para. 75.

\textsuperscript{50} Id. The United States maintained that "individual baseline" facility could not be extended to foreign producers "because of (1) the impossibility of determining the refinery of origin for each imported shipment; (2) the difficulty for the United States to exercise an enforcement jurisdiction with respect to a foreign refinery, since the Gasoline Rule required criminal and civil sanctions in order to be effective." Id.

\textsuperscript{51} Id. at 298.
that depend on its cleanliness. Rejecting this distinction, the Panel held that clean air is an exhaustible natural resource. The Panel proceeded further to examine whether the Gasoline Rule satisfied the requirements of “relating to” and “in conjunction with” of Article XX(g). In a brief analysis, the Panel found that the Gasoline Rule did not satisfy the Article XX(g) requirements. In its words:

The Panel saw no direct connection between less favorable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favorable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule.

E. Implications of GATT Panel Rulings

1. Scope of Article XX

The GATT Panels and in particular the tuna-ban Panels, by their interpretation, have rephrased the Article XX(b) and (g) exceptions. Thus, in effect, Article XX(b) and (g) may be re-written as

"... [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of [any GATT-consistent] measures:

(b) necessary [that are reasonably available to it, or in the alternative, measures that are least trade-restrictive] to protect human, animal or plant life or health [within its jurisdiction];

52 Id. at 299.

53 Id. at 300.
(g) relating to ["primarily aimed at"] the conservation of exhaustible natural resources if such measures are [aimed at primarily rendering effective such measures] in conjunction with restriction on domestic production or consumption.

Such a narrow interpretation of the exceptions clause of the GATT has been widely criticized. Nevertheless, the Tuna-ban Panels may not be criticized for expressing “slippery slope” concerns in their analysis. This has two dimensions. One is the application of the measures outside the regulating party’s jurisdiction; the other is the restrictions based on the processes by which products are produced. Without doubt, these are legitimate concerns. The first tuna-ban Panel took a narrow view with respect to both Articles XX (b) and (g), while the second Panel relaxed the jurisdictional criterion. However, the Panels have erected a rather strict test for Article XX(b) which likely will thwart any genuine environmentally inspired measures. As such, even after the second tuna-ban Panel decision, the application of an environmental measure outside a country’s borders for the protection of global commons is suspect.

Further, the tuna-ban Panel’s interpretation of the term “necessary” which is taken to mean “least-restrictive”\(^5\) is considered problematic. As Professor Schoenbaum notes,\(^5\) there are several problems with this interpretation. First, the term “necessary” is part of a purpose clause whose object includes protection of living things. The “least-restrictive”

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\(^5\) See Jackson, *supra* note 19, at 1240. Professor Jackson does not find the interpretation of the term "necessary" as "least-restrictive" troubling. He points out that though this interpretation "impose[s] some restraint" on the regulating nations, "it is considered important to prevent article XX from becoming a large loop hole." *Id.* The "slippery slope" concerns were alluded to by the tuna-ban Panels also.

interpretation wrongly places emphasis on measures, rather than on the protection of living things. Second, it is unsupported by the framer's intent. Third, the Panels have wrongly utilized the term “necessary” to interpret Article XX(g) as well. Fourth, it has made it unnecessary for the Panels to go to the third prong of their test. Fifth, it gives very little deference to sovereignty issues. One way to resolve this difficulty is to follow a rule of reason approach and thereby “lower the threshold” of entry to satisfy the test under Article XX(g).

2. The Issue of Process and Production Methods (PPMs)

The tuna-dolphin controversy raised another contemporary issue - the issue of whether trade restrictions can be imposed on products depending on the way they are produced. The tuna-ban Panels' decision were not a surprise in view of a earlier Panel decision in the Belgian Family Allowances case. The GATT has consistently outlawed the measures that were based on PPMs. Indeed, there are many reasons to argue against the use of PPMs.

56 Id.

57 GATT Panel Report, BISD, 1952. (A Belgian law levied a charge on foreign goods from a country whose system of family allowances did not meet Belgian requirements. On challenge, a GATT Panel ruled that discrimination on the basis of how products are produced is not permitted). For a discussion of this case, see John H. Jackson, World Trade And The Law Of GATT 585-86 (1969).

58 For example, see Schoenbaum, Comment on the Paper by Candice Stevens, in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 249 (Winfried Lang ed., 1995)[hereinafter SUSTAINABLE DEVELOPMENT]. Schoenbaum refers to at least three reasons: first, "the principle of comparative advantage upon which trade is based posits that nations should be able to derive benefits from their factor endowments"; second, it would lead to unilateral actions and chaos in world trade; third global harmonization is impracticable and unwise economically. Id. See also Stevens, supra, at 239. Stevens identifies three primary reasons for not allowing PPMs: economic, political and environmental. Id.
PPMs may be either *product-related PPMs* or *non-product related PPMs*.59 Damage to the environment may be caused by both of them. In the product-related PPMs, the production method changes the characteristics of the product which pollutes or degrades the environment when it is consumed or used. This imposes *consumption externalities*.60 On the other hand, non-product related PPMs imposes *production externalities* and causes environmental degradation in the producing country and/or in other countries.61

The trade rules provide a comprehensive framework covering measures which restrict trade on products. From the GATT perspective, the significant criteria for applying trade rules is tied to the "*product". Any distinction that is based on the product itself-- that is embodied in it and has as its final characteristics-- is permissible. Such a distinction is strongly rooted in the GATT and not surprisingly so since it is "legal instrument primarily concerned with products."62 Thus, a key interpretive term -- the "*like product" is found in substantive provisions like Article I, III:2, III:4 and other provisions. Even though the term appears sixteen times in the GATT, the term was not susceptible to precise definition but


60 *Id.* at 8.

61 *Id.* Stevens identifies four types of environmental problems that may be caused by the non-product related PPMs. They are: Transboundary pollution; migratory species and shared living resources; global environmental concerns; and, local environmental concerns. *Id.*

62 JACkSON, supra note 57, at 259.

63 See 1970 *WORKING PARTY REPORT ON BORDER TAX ADJUSTMENTS 1/3464*, adopted on 2 December 1970, BISD 185/97, 102, para. 18 [hereinafter *WORKING PARTY REPORT*].
was left to be decided on a case-by-case basis.\(^{64}\) Several GATT Panels have grappled with the issue. However, the criteria by which a product is a like or unlike product is limited to the physical characteristics of the product and does not include the processes.\(^{65}\) Attempts by some Member States to include measures based on non-product distinctions have generally been rejected.\(^{66}\)

In addition to the GATT, two other agreements deal specifically with product PPMs: the Technical Barriers to Trade\(^{67}\) (TBT) or the Standards Code, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).\(^{68}\) While the SPS Agreement deals with additives, contaminants, toxins and disease-carrying organisms in food, beverages and feedstuffs, the Standards Code covers all other products.\(^{69}\) Both these agreements have incorporated conditions against misuse. Broadly, for a measure to be satisfied under the SPS Agreement, the measure should be "necessary,"\(^{70}\) under which six requirements have been

\(^{64}\) Id.

\(^{65}\) See WORKING PARTY REPORT, supra note 63. See also "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages" BISD 34S/83, 115, para. 5.6 (adopted on 10 November 1987).

\(^{66}\) See Reformulated Gasoline case, supra note 47, at 294. On the question whether imported and domestic gasoline were like products under Article III:4, the United States tried to persuade that the "situation of the producers" should be taken into account. The Reformulated Gasoline Panel rejected this line of reasoning. Id.


\(^{68}\) Agreement on the Application of Sanitary and Phytosanitary Measures, reprinted in DOCUMENTS SUPPLEMENT, supra note 67, at 121 [hereinafter SPS Agreement].

\(^{69}\) Schoenbaum, supra note 55, at 284.

\(^{70}\) SPS Agreements, supra note 68, Art. 2:1, 2:2.
First, the measures must "not be more trade-restrictive than required to achieve their appropriate level of . . . protection." Second, any measure shall be applied "only to the extent necessary" to protect human, animal or plant life and health. Third, a measure must be based on "scientific principles" and "sufficient scientific evidence." Fourth, the SPS Agreement urges parties to base their measures on a risk assessment process "taking into account" available scientific evidence and economic factors, including the objective of minimizing negative trade effects. Fifth, the SPS Agreement repeats the requirements of the chapeau of Article XX, that the measure must not be "arbitrarily or unjustifiably discriminate between members" and must not be a "disguised restriction on international trade." Sixth, there is an obligation at least to consider adopting international SPS standards in the interests of achieving harmonization. However, a member State has discretion to set higher standards. Likewise, the Standards Code allows measures that do not create "unnecessary obstacles to international trade" and those that are not "more restrictive than necessary." Indeed, the TBT Agreement uses the term "processes and production

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71 Schoenbaum, supra note 55, at 285.

72 SPS Agreements, supra note 68, Art. 5:6.

73 Id. at Art. 2:2.

74 Id.

75 Id. at Art. 5.

76 Id. at Art. 2:3.

77 Id. at Art. 3.

78 Standards Code, supra note 67, at Art. 2:2.
methods." Thus, it is seen that an elaborate framework has been created for product-related PPM measures. Moreover, both these Agreements do not apply extraterritorially. Absence of any reference to non-product related PPM measures might be taken as reflecting the strong policy commitment of the GATT members not to allow such measures.

In general, non-product PPMs should be proscribed. Given the potential for abuse of the PPMs--for protectionist and non-environmental factors--it is not hard to imagine it would be an "invitation to chaos in world trade." Different countries have different endowments and differences in productions and processes methods form an integral part of comparative advantage. Some view the differences in environmental standards as a matter of competitiveness and suggest remedies. Indeed, one principle which has considerable

79 Stevens, supra note 58, at 241.

80 Chakarian, supra note 59, at 115.

81 Schoenbaum, supra note 58, at 251.

82 JACKSON, supra note 57, at 741. "Article XX . . . contain a series of exceptions that may be the most troublesome and most subject to abuse of all GATT exceptions." Id.

83 Typically, environmental measures are motivated in part due to concerns that producers in countries with lower environmental standards get a competitive advantage over producers in countries that have higher environmental standards. The shrimp ban is an illustration where the United States shrimp industry expressed competitiveness concerns. See chapter IV infra. In order to level the playing field, the use of PPMs is not an appropriate method, and sure enough not GATT consistent. One approach might be to look "within" and remove the regulatory and legal inefficiencies in the regulating state. See Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 YALE L. J. 2039, 2049 (1993). To combat competitiveness concerns, rather than use unilateral measures, Stewart advocates that the United States "should seek to reduce the excessive costs and burdens imposed by its exceptionally rigid, legalistic system of environmental law and administration." Id.
agreement among the scholars -- Polluter Pays Principle\textsuperscript{84} -- could address these concerns appropriately. Furthermore, environmentalists would point out the non-product related PPMs are targeted against environmentally unsustainable or dirty production means. Here, two problems may be encountered. First, the target of protection chosen might reflect a value judgment of the regulating country.\textsuperscript{85} This clearly raises sovereignty issues as it raises for some others, issues that are "fundamentally about democracy."\textsuperscript{86} Second, the possibility of banning products unrelated to the target "product." Protagonists would bring an

\textsuperscript{84} The Polluter Pays Principle "refers to the requirement that the costs of pollution should be borne by the person or persons responsible for causing the pollution and the consequential costs." Phillippe Sands, \textit{supra} note 58, at 66. Representing the international acceptance of the principle, Principle 16 of the Rio Declaration states: "National authorities should endeavor to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." Rio Declaration on Environment and Development, Adopted June 14, 1992, at the United Nations Conference on Environment and Development, Rio de Janiero, UN Doc. A/CONF. 151/5 Rev.1., \textit{reprinted in} 31 I.L.M. 874, 879 (1992); \textit{see} ESTY, \textit{supra} note 1, at 176; Schoenbaum, \textit{supra} note 55, at 295-98. Pointing out that this is "one economic principle that both ardent environmentalists and committed free traders can agree on", Professor Schoenbaum argues that the WTO should adopt this Principle. \textit{Id.} at 296. \textit{See also} Steve Charnovitz, \textit{Free Trade, Fair Trade, Green Trade: Defogging the Debate}, 27 \textit{CORNELL INT'L} L. J. 459, 505 (1994).

\textsuperscript{85} \textit{See} Charles T. Haag, Comment, \textit{Legitimizing "Environmental" Legislation Under the GATT in Light of the CAFE Panel Report: More Fuel for Protectionists?} 57 U. \textit{PITT. L. REV.} 57, 90 (1995). "For example, environmentalists in the United States may feel that a South American country's manufacturing practice, which kills frogs, should be stopped. . . . Should environmentalists in one country be allowed under the GATT to restrict trade with the South American country in this example based on a concern for frogs? GATT Panels examining analogous situations have said no." \textit{Id} (footnotes omitted).

\textsuperscript{86} William J. Snape & Naomi B. Lefkovitz, \textit{Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process"?}, 27 \textit{CORNELL INT'L} L. J. 777, 781 (1994). "[T]he debate over PPMs and much of the trade/environment relationship is fundamentally about democracy. Who decides when and why trade restrictions based on PPMs are appropriate? Citizens of a country speaking through their legislature? Or an international trade organization, directly accountable only to member governments and career bureaucrats?" \textit{Id.} Indeed, these are fundamental questions; questions that beg the answer.
"effectiveness" argument. However, under the existing rules, it is hard to distinguish between good PPMs from bad ones. Consequently, its use must be limited. However, some principled exceptions may be allowed for the protection of truly "global commons." One way is to adopt measures pursuant to MEAs. This has been indicated by the tuna-ban Panels, but has not been clearly articulated.

In defense of the PPMs, it may be argued that the GATT text does not support any limitation for the use of PPM measures. In the analysis of "like product," Professor Jackson points out that the GATT has used different phrases instead of one term such as the "like product." Terms including "like commodity," "like merchandise," "like or competitive products," "like or directly competitive products," "directly competitive or substitutable product" are used in different articles of the GATT. The interpretation should be

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87 Stevens, supra note 59, at 17. Stevens points out that the "effectiveness of PPM-based trade measures will depend on, among other things, 1) the relative market power of the country or countries taking the measure, 2) the type of trade instrument, and 3) the policy package or combination of measures." Id.

88 Schoenbaum, supra note 55, at 291.

89 Art. VI, para. 7, GATT.

90 Art. VII, para. 2, GATT.

91 Art. XIX, para. 1, GATT.

92 Art. XIX, para. 1, GATT.

93 Art. III:2, GATT.
harmonized with the purpose of the article in which the term appears. The WTO Appellate Body took the same view in the *Japan Shochu* case.

Thus, if the purpose of the article is more or less determinative of the "likeness" of the product; and, if the term "like product" has been used sixteen times in the document when the framers intended to specify that any regulation or taxes apply only to products, it is worth noting the absence of the term "like product" in Article XX. In contrast, for example, Article XI also uses the word "measures" when it extends its application to "other measures . . . instituted or maintained on the importation or exportation . . . of *any product.*" Thus, the measures under Article XI are limited to "products". Arguably, measures may be construed as a broader criteria that encompasses trade restrictions even though such measures are not strictly product related. If such was the intention, the drafters could have brought in the concept of product and specifically limited Article XX measures only to products. Put differently, if the text of Article XX does not seem to limit the measures solely to products, it may arguably extend to non-products, that is processes as well. The limitations imposed are stated in the conditions against misuse. However, as pointed out above, the use

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94 Jackson, supra note 57, at 263.

95 Japan - Taxes on Alcoholic Beverages, Appellate Body Report, WTO Doc. AB - 1996-2 (Oct. 4 1996) [hereinafter *Japan Shochu* case]. The concept of "like product" was given a meaning that added flexibility for interpretation of same. As the Panel noted, the "likeness" of the product is comparable to "the accordion that stretches and squeezes in different places as different provisions of the WTO agreement are applied." *Id.* at 20.

96 Emphasis added.

97 See e.g., Japan-Trade in Semi-Conductors, May 4, 1988, GATT BISD 116 (35th Supp. 1989). The Panel interpreted the term "measures" to "refer not only to laws and regulations, but also, more broadly, even to nonmandatory government involvement." Schoenbaum, supra note 54, at 273. Canada-Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT BISD 140 (30th Supp. 1984)(interpreting Article XI "measures" as one excluding "internal requirements" that fall under Article III).
of PPMs ought to be limited to domestic environments. Its use in foreign environments is problematic.

Rather than pursue the PPMs, member States must seriously pursue alternative approaches. There are no dearth of alternatives. Solutions suggested include: "(1) international environmental agreements, (2) environmental management systems, (3) eco-labelling, (4) the "polluter pays" principle and, (5) investment standards." 98

3. Unilateral Trade Measures as a Conservation Policy

Closely tied with the issue of PPMs is the issue of whether unilateral measures can be allowed. It was seen that both tuna-ban Panels have rejected use of unilateral measures by the United States. Though some commentators have attempted to define what is "unilateral action" 99 and distinguish it from "extra-territorial jurisdiction" 100 action, it is not relevant for the purpose of our analysis. Indeed, the tuna-ban and subsequent Panels have used the term "extra-jurisdictional" as opposed to "extra-territorial" which is considered

98 Schoenbaum, supra note 55, at 291.

99 "Unilateral action" means a nation state's use of its administrative and enforcement agencies to secure a policy goal set by its domestic political process." Anderson, supra note 19, at 754. In contrast, when two or more nations coordinate the "use of their administrative and enforcement agencies to secure a policy goal set in an international forum" it is a "multilateral action." Id. However, Anderson agrees that the "nation state that unilaterally imposes trade measures for extra-territorial environmental protection is the "unilateral actor." Id.

100 Anderson, supra note 19, at 755. "When a nation state exercises its legislative, adjudicative, or enforcement authority beyond its borders, either over its citizens of other countries or over its own nationals, it exercises "extraterritorial jurisdiction." Of course, any trade regulation affects trade partners and, thus, has extraterritorial ramifications. However, the important distinction is that exercises of extraterritorial jurisdiction command or compel results beyond nation state's borders, but trade measures merely induce or influence results beyond its borders." Id.
"salutary." A measure that is predicated on the policy of a single actor in a bilateral/multilateral issue and seeking to change other actors' policy in line with its own is not well taken. Even in the era of compromised sovereignty, unilateral actions must be remain proscribed. In as much as it is effective, unfortunately, unilateral actions can be used variously depending on the perceptions of the user. It can be pressed forward by interest groups which want freer trade and open markets, or by interest groups which seek to protect their domestic industries. It could be used for environmental concerns. Some commentators view the issue as not whether unilateral actions should be allowed, but rather

101 Schoenbaum, supra note 55, at 280. "[T]he Tuna/Dolphin II panel distinguished between extraterritorial and extrajurisdictional application of article XX." Id. Professor Schoenbaum believes that "extra-territorial" measures are allowable under the norms of international law, but not "extra-jurisdictional" measures; and thus, the Panel's conclusion is "essentially correct." Id. For a contrary view, see Steve Charnovitz, The Environment vs. Trade Rules: Defogging the Debate, 23 ENVTL. L. 475, 496-97 (1993). "[T]he panel did not offer any definition of an extrajurisdictional offense, even though the panel apparently invented this term." Moreover, the Panel's argument based on 1988 GATT Panel rather than on historical evidence is unpersuasive. Id.

102 Douglas J. Caldwell & David A. Wirth, Trade and the Environment: Equilibrium or Imbalance? 17 MICH. J. INT'L L. 563 (1996). "If past is any guide, unilateral measures are far more likely to inspire GATT/WTO dispute settlement challenges than multilateral environmental protection efforts . . . and no national measure taken pursuant to a multilateral environmental agreement has ever been challenged in the GATT/WTO." Id. at 574 (footnotes omitted).

103 Id. at 574. "[W]hat one perceives as unilateralism can well be interpreted as leadership by another."

104 The use of "section 301" of the United States trade law is a good example. It has been used frequently against "other countries in order to influence their policies and/or practices." Reinstein, supra note 58, at 223.

105 See generally Gerald Brooks, Environmental Economics and International Trade: An Adaptive Approach, 5 GEO. INT'L ENVTL. L. REV. 277 (1993). "Section 301 . . . is the . . . most useful [instrument] for advancing environmental objectives and competitiveness concerns." Id. at 303. Brooks agrees that "section 301 are unilateral measures that may be subject to challenges under the GATT. However, unless defeated by a GATT determination", section 301 may be pursued. Id. Such an approach would undermine and weaken the system. Besides, the approach ignores numerous other issues such as 'sovereignty', equity and the like.
under what circumstances should they be allowed. The key problem lies in determining the good from the bad. Its frequent use reflects the existence of a power-oriented system rather than a rule-oriented regime and erodes the credibility of the system and weakens it in the long run.

However, unilateralism is not without its virtues. Even commentators who strongly advocate a balanced approach to the trade/environment conflict agree that if other alternatives do not work as expected, then as a last resort, member states could use "creative unilateralism" or "creative illegality." Indeed, at the very least, a measure should not be


107 See JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 49-54 (1994); Schoenbaum, Free International Trade and Protection of the Environment: Irreconcilable Conflict? 86 AM. J. INT'L L. 700, 723 (1992). "[I]f unilateral trade restriction were permitted for environmental reasons, they could also be used to combat all manner of national socioeconomic policies. Permitting such actions would reduce international trade to a power-based regime." Id.

108 See McDonald, supra note 29, at 468-69.

109 JACKSON, supra note 107, at 51. Professor Jackson acknowledges that unilateral actions could be useful in situations where the "international 'rule' is patently unfair or bad policy" or "because the current international rule-making process is faulty" or when "reform of the rule is badly needed, but the international and national institutional system for some reason makes the reform impossible." Id. at 51. One case where this worked is the US's departure from the "currency par value system of the IMF" which eventually lead to the "floating exchange rates" advocated for decades by leading economists." Id. However, Professor Jackson rightfully acknowledges that allowing such "stimulating improvements" of a docile system undermines the system and leaves it weakened. Id. See also ESTY, supra note 1, at 144. "The intrinsic difficulty of multilateral decision making and the lack of existing institutional structures for effective international environmental policymaking . . . makes unilateral action a necessary, if unfortunate, policy option in some circumstances." Id.

110 Schoenbaum, supra note 55, at 299. Professor Schoenbaum points out "at least two theoretical justifications for "creative" unilateral action." First is the "doctrine of opposability" which helps "clarify grey areas" and serves as a catalyst and "an important part of the international law "legislative" process." Second,
dismissed merely because it is unilaterally pursued. Regrettably however, unilateral actions have typically been the prerogative of developed countries because the strength and effectiveness of trade restrictions rests largely on the economic and market power. The targets of such unilateral action are usually the developing countries. Besides raising the north-south issues, it also raises issues of equity between trading partners. In the context of the current debate, perhaps the most troubling factor is the unilateral determination of production standards to be adopted or used by exporting countries. The tuna-dolphin and the turtle-shrimp disputes are illustrative. Protagonists of free trade would argue that production methods form part of the comparative advantage of countries. Nevertheless, environmentalists have a valid argument in that they insist not on a particular method of production; rather they urge production methods that are environmentally sustainable. In practice however, the unilateral actor compels the use of similar production technologies by other countries. Further, the "urgency" of the targeted problem is presumed.

unilateral act may be justified as a "countermeasure." Id.

111 McDonald, supra note 29, at 468-69.

112 Stevens, supra note 59, at 17.


114 For e.g., see Jackson, supra note 19, at 1244.

115 For example, in the shrimp ban dispute, see chapter IV, infra, the United States expects all shrimp harvesting nations to use Turtle Excluder Devices (TEDs). The TEDs are used by the US shrimp fishing industry.

116 See Anderson, supra note 19, at 753. "[T]he urgency of global ecological problems has compelled the international community to recognize that unilateral action in the form of trade measure is preferable to global paralysis." In most cases, the urgency of the problem is presumed. This should be avoided by letting the regulating country to prove that there is urgency. For example, reliance on international agreements such
To be sure, the better approach to persuade countries to adopt environment sustainability is trade "carrots" rather than trade "sticks." Forcing developing countries that do not have the technological capabilities or the resources to adopt environmental production standards comparable to that of the developed countries creates tension in the system and does more harm than good. Moreover, such unilateral "sticks" are viewed as "eco-imperialism" and merely draw at best an unenthusiastic response and dampened implementation.

F. The Gasoline Standards Case

Under the GATT 1994, a forum to which the decisions of the Panels may be challenged was created in the Appellate Body, the benefit of which was seen when the United States appealed the Reformulated Gasoline case to the WTO Appellate Body. The United States limited its challenge to two of the Panel's findings. First, the holding with as the CITES which categorizes the endangered or threatened species, could validate measures.


119 Jackson, supra note 19, at 1241. The term "eco-imperialism" represents the concern that "powerful and wealthy countries will impose their own views regarding environmental or other social or welfare standards on other parts of the world, even where such views may not be entirely appropriate." Id.

120 The Gasoline Standards case, supra note 47. The introduction of a Appellate Body review has been praised as perhaps the "most significant step toward the creation of an international legal tribunal on trade." Thomas J. Dillon, Jr., The World Trade Organization: A New Legal Order for World Trade? 16 MICH. J. INT'L 349, 379 (1995).

121 See notes 47 to 53 and accompanying text for a discussion of the Reformulated Gasoline case.
respect to Article XX(g) and second, the Panel’s interpretation of Article XX as a whole. Notably, the finding under Article XX(b) was not challenged.

1. **Article XX(g) Analysis**

   The Appellate Body began its analysis with the test under the phrase “relating to” to the conservation of exhaustible natural resources. After finding that the test applied was correct, the Appellate Body took particular exception to the erroneous application of the test and the reasoning employed by the Panel. Instead of testing the measure at issue, the Panel erroneously tested the legal conclusion arrived at under the “inland parity” analysis. This results in turning Article XX inside out.\(^{122}\) Moreover, the Panel also erred in misapplying the “necessary” standard applicable under Article XX(b) to Article XX(g).

   In holding that the Baseline Establishment Rule (part of the larger Gasoline Rule) fell within the meaning of the term “relating to,”\(^{123}\) the Appellate Body pointed out that the measure must be taken as a whole and analyzed. In other words, the “means” used by the measure must relate to the “objective” of the measure. If such a relationship exists, then the measure would satisfy the test of “relating to.”\(^{124}\)

   The Appellate Body then proceeded to test the measure with the other requirement of Article XX(g)—“made effective in conjunction with” requirement, which the Reformulated Gasoline Panel had found unnecessary to investigate since the United States measure failed the “relating to” test. Venezuela and Brazil claimed that “made effective” has been interpreted to mean “primarily aimed at” making the domestic consumption or

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\(^{122}\) The *Gasoline Standards* case, *supra* note 47, at 602.

\(^{123}\) *Id.* at 623.

\(^{124}\) *Id.*
production effective. Further, it argued that in order to be “properly regarded as ‘primarily aimed at’ the conservation of natural resources, the baseline establishment rules must not only “reflect a conservation purpose” but also be shown to have had “some positive conservation effect.””\textsuperscript{125} Rejecting this line of reasoning, the Appellate Body held that ‘made effective’ refers to the measures being “operative, as “in force” or as having “come into effect.””\textsuperscript{126} Likewise, “in conjunction with” should be read as “together with” or “jointly with.” Thus viewed, the second part of Article XX(g) does not require a post prandial analysis. Rather, it is a “requirement of \textit{even-handedness} in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”\textsuperscript{127}

\section*{2. The Chapeau Analysis}

Having found that the Baseline Rule satisfied Article XX(g), the Appellate Body then set out to analyze the requirements under the preamble to Article XX, referred to as Chapeau. In this regard, the Appellate Body stated that in order to fall under Article XX:

\begin{quote}
[T]he measure at issue must not only come under one or another of the particular exceptions--paragraph (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed in the opening clauses of Article XX. The analysis is, in other words, two-tiered; first, provisional justification by reason of characterization of the measure under Article XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.\textsuperscript{128}
\end{quote}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at 625.

\textsuperscript{128} \textit{Id.} at 626.
More importantly, the Appellate Body held that the Article XX chapeau provisions must be tested on its own standards and not on the standards set out in the substantive provisions of the General Agreement. In its view, "such a recourse would also confuse the question whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of article XX as to whether that inconsistency was nevertheless justified."

The Appellate Body then proceeded to examine the adequacy of alternatives. It realized that more than one alternative was available to the United States which were non-discriminatory. The Appellate Body was unpersuaded by the reasons put forth by the United States as to why other alternatives were not favored over the measure at issue. In this regard, the Appellate Body agreed with the Panel's finding. Finally, the Appellate Body concluded that the Gasoline Rule was an "unjustifiable discrimination" and a "disguised restriction" on trade.

It is now clear that the chapeau has its own standards. Consequently, the content and scope of the chapeau becomes important. As the chapeau stipulates, a measure at issue should not constitute

(a) arbitrary discrimination, where same conditions prevail; or

(b) unjustifiable discrimination; or

(c) disguised restriction.

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129 Id.

130 Id.

131 Id. at 629.

132 Id. at 633.
In an effort to clarify as to how the above standards may operate, the Appellate Body wondered whether those standards have "different fields of application." With regard to the first standard, i.e., "arbitrary discrimination between countries where the same conditions prevail," the Appellate Body asked itself if the phrase referred only to conditions in exporting countries, or both exporting and importing countries, or only between exporting countries inter se. This question was left unanswered. However, the Appellate Body pointed out that the exceptions listed under Article XX relate not just to the “inland parity” and “foreign parity” but to all the obligations under the General Agreement. Such an interpretation is made possible by the wording “nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .” Lastly, the Appellate Body ruled that “arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that “disguised restriction” includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.”

G. A New Road Ahead

The Appellate Body’s decision in the Reformulated Gasoline case will have a significant impact on the policy debate between trade and the environment. Indeed, it has pointed out many anomalies in the Panel’s decision which led to a wrong conclusion. First, it cleared the confusion by pointing out that the "inland parity” and “foreign parity” standards

133 Id.
134 Id. at 629.
and the Article XX exceptions are distinct and may not be mixed. This has led to some erroneous application of Article XX standards. Also representing a clear departure from the tuna-ban analysis, the Appellate Body has interpreted Article XX(g) and introduced a standard that is more lenient than the existing tuna-ban standards. The earlier Panels not only followed the "primarily aimed at" test for both "relating to" and the second part of Article XX(g), but also wrongly applied the "necessary" test to Article XX(g). Thus viewed, "primarily aimed at" meant that the conservation efforts should be made effective by limitations on domestic consumption or production. This posed a hurdle hard to clear. The Appellate Body rejected that standard and has injected a more relaxed standard.

Furthermore, the Appellate Body has clarified that Article XX requires a two-tier approach. It has also specified the order to be followed. Indeed, as Professor Schoenbaum notes, the "chapeau" has been discovered with a vengeance.\(^{135}\) While this gives new meaning to the Article XX exceptions, however, the Appellate Body has not clearly articulated the proposition that Article XX General Exceptions should constitute a separate framework of analysis.\(^{136}\) This can only be inferred from the decision.

It was seen that the treatment of environmental measures under the Appellate Body analysis has departed considerably from the tuna-dolphin decisions. Nevertheless, in the absence of a "general agreement" on environment, the WTO Panels could continue to "given effect to the purposes and objects" of the General Agreement,\(^{137}\) on a "case-by-case

\(^{135}\) Schoenbaum, supra note 55, at 274.


\(^{137}\) The Gasoline Standards case, supra note 47, at 622.
basis. Moreover, even though there is every reason to believe that the World Trade Organization can accommodate trade and environmental issues, harmonization efforts are slow. To facilitate such an integration, a proper "standard of review" must be framed. The Appellate Body Review provides such an opportunity. Unlike the adhoc panels, the Appellate Body "judges" are chosen for a period of two to four year terms. The seven member Appellate Body is comprised of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." They can "determine questions of law and legal interpretation"; thus, they have the unique opportunity to be creative and foster integration of trade and the environment by rightly placing environmental concerns on par with trade concerns.

Having demonstrated the need for, or the lack of, a standard of review that would more readily reconcile trade and environment conflicts, the next chapter focuses on the jurisprudence of the European Court of Justice and the Supreme Court of the United States. The chapter will examine the case law of both jurisdictions with a view to identify the principles and find out how conflicts between the two policy goals are resolved. It will be seen that both the systems have developed a clear and deliberate balancing of the two goals. Finally, an analysis is made to explore if we could adopt the salient principles of the rule of reason approach to add to and enhance the ability of the WTO to address and reconcile environment and trade issues.

138 Id.

139 Art. 17, para. 3, UNDERSTANDING ON RULES AND PROCEDURE GOVERNING THE SETTLEMENT OF DISPUTES, in Jackson, supra note 67, at 366.
CHAPTER III
LESSONS FROM THE UNITED STATES AND THE EUROPEAN UNION:
A RULE OF REASON APPROACH

A. Introduction

The rule of reason is a well recognized concept under the antitrust jurisprudence of the United States.\(^1\) The Sherman Antitrust Act proscribes agreements that restrain competition. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal."\(^2\) Read literally, section 1 condemns "every contract" that restrains trade. And testing for the legality of the contract under the 'per se' rule was a categorical condemnation of any contract that restrained trade, resulting in practical difficulties. Even though the Courts found that per se rules are "easily applied and easily understood" and "judicially efficient," it was "rigid and formalistic" resulting in invalidating both good and bad practices.\(^3\) The rule of reason, which was formulated in the

\(^1\) ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 69-98 (1989).


\(^3\) Id.

beginning of the twentieth century, introduced "judicial flexibility" that was needed to advance the goals of antitrust law. The rule of reason analysis required courts "to balance the potential pro-competitive benefits of the challenged practice against the competitive harms that may result from the challenged practice." Though the doctrine has taken several formulations through the years, for the purpose of this analysis, it will suffice to note that the overriding theme of the rule of reason is the need to balance the contending goals. The rule of reason concept in antitrust law lends itself easily to the resolution of conflict between trade and environment. Antitrust law characterized as the 'magna carta' of economic liberty, stands for free and fair competition, like the GATT/WTO which has identical aims at a

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5 One of the early rule of reason cases is Standard Oil Co. v. United States, 221 U.S. 1 (1911). Subsequently, in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, (1918), Justice Brandeis, who is credited for articulating the Rule of Reason analysis, observed that "the legality of an agreement or regulation cannot be determined by so simple a test [such as the per se rule] . . . Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Id.


7 Id. at n.4.

8 See Peter W. Bellas, Comment, NCAA v. Board of Regents: Supreme Court Intercepts Per Se Rule and Rule of Reason, 39 U. MIAMI L. REV. 529, 540 (1985). Traditionally, the rule of reason requires a "market power" analysis. To apply the rule of reason, several factors are analyzed. The analysis includes factors such as "the circumstances peculiar to the defendant's business, the condition before and after the restraint was imposed, the nature and purpose of the restraint, and the competitive effect of the restraint" are considered." Piraino, supra note 4, at 1761. The European Court of Justice however took a very limited approach. It took the rule of reason as a doctrine that fundamentally involves a balancing of benefits against harm. For a further discussion of the European Court's treatment of the rule of reason, see infra.

9 United States v. Topco Associates, 405 U.S. 596 (1972)("Antitrust laws in general, and the [United States] Sherman Act in particular, are the Magna Carta of free enterprise").
global level. It will be seen that the GATT/WTO, which is a "rule-oriented" regime, deserves the much needed flexibility the rule of reason affords.\textsuperscript{10}

Indeed, the GATT/WTO Panels have used the rule of reason approach, albeit in a non-structured way.\textsuperscript{11} In comparison with section 1 of the Sherman Act and a rule of reason analysis. Article XX exceptions in the GATT/WTO may very well provide a framework for such an analysis. In the tuna-ban analysis, the GATT Panels' examination of the United States' regulations and the legislative object and scope of it is a clear application of the rule of reason approach. However, as mentioned above, the application of the rule of reason analysis must be made in a structured way.

As Professor Schoenbaum notes, there is a paucity of GATT determinations under the rule of reason rubric.\textsuperscript{12} In this regard, it may be instructive to look into how the United States and the European Union have dealt with the issues of trade and environment conflict. Despite "vital contextual and institutional differences," the United States and the European Union share a common feature: division of governmental powers between central and local/state authorities.\textsuperscript{13} Notably, the two systems have relied on their courts to advance their

\textsuperscript{10}See generally Bellas, \textit{supra} note 8.

\textsuperscript{11}See Janet McDonald, \textit{Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order}, 23 ENVTL. L. 397, 434 (1993).


goals. The principles evolved by the "highly respected" legal institutions of the United States and the European Union may provide a useful framework for our analysis.

The United States is a classic example of a federal entity with an integrated market based on free trade between the States of the federation. Similarly, the European Union consists of a group of States representing a single market based on free trade across national borders. Though there are some differences, the approaches to the trade and environment conflict are identical in that both have acknowledged the importance of environmental concerns and have ensured a high level of protection of the environment even if it results in disruption of free trade. In that process, both the Courts have adopted a conceptual framework within which to decide the issues. Such an approach is lacking under the GATT/WTO dispute resolution system. At its best, it is in the process of development. It needs to be strengthened.

B. The Rule of Reason Approach of the European Union

1. The Free Movement of Goods Principle

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14 But see Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 27 CORNELL INT'L L. J. 459, 482 (1994). Charnovitz cautions that the adjudicative approach of the United States and the European Union are "not transferable to the GATT" because the former institutions are highly respected institutions, which is not so with the GATT Panels. Id. Such a view, however, is unsupported by evidence. On the contrary, the WTO Panels decide issues of worldwide importance and as such are binding on the parties until the decision is overruled. See Philip M. Nichols, Trade Without Values, 90 NW. U. L. REV. 658, 659 (1996).


16 For a discussion of the similarities and differences between the two systems, see Stein & Sandalow, supra note 12, at 4.
The European Union is "ambitious" in terms of achieving the goal of a single market. Toward that goal, Articles 30 and 34 of the European Treaty ensure the free movement of goods across its member States. Article 30 states that "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." Similarly, Article 34 states: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States." Together, they prohibit quantitative restrictions on exports and imports.

The zeal with which the free movement of goods principle was sought to be enforced is reflected in the European Court's ruling in the landmark decision of the Dassonville case where it drew a wide circle for the "measures having equivalent effect". The European Court held: "All trading rules enacted by Member States which are capable of hindering, directly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions." Thus, even potential hindrance was not tolerated. Such a high policy commitment was not reflected toward the environment in the formative years of the European Union.


18 Art. 30, European Union Treaty.

19 Art. 34, European Union Treaty.


22 Id. at 852.
2. **Environmental Policy of the European Union**

Like in the GATT/WTO, environment was not an explicitly recognized policy in the European Union. Rather, it's environmental policy that we see today took shape in three stages. In the first stage, environmental policy was unsupported by the treaty provisions. The second stage from the Single European Act in 1987 to that of the European Union Treaty evidenced a growth of legal basis for the environmental policy. The third phase which started with the entry into force of the European Union Treaty characterizes a strong policy commitment to "achieve environmental protection and sustainable development." Article 130r, para. 2 of the European Union Treaty sets out the basic environmental policy of the Community.

Under European Union law, a provision similar to Article XX of the GATT is Article 36 of the European Union Treaty. Article 36 provides:

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animal or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restriction shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade.

It is seen that the Treaty provides a catalog of exceptions in Article 36 under which member States may use national measures to protect the life and health of humans, animals

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24 *Id.*

25 Art. 36, *EUROPEAN UNION TREATY.*
and plants as well as for other selected reasons.\textsuperscript{26} Nevertheless, the word "environment" has not been explicitly mentioned and as such, it may not be an adequate means to safeguard the environment.

3. \textbf{The Theory of Mandatory Requirements}

As mentioned above, the European Court had interpreted Article 30 very widely in a way that was hard to tell "where the reach of this branch of EC law 'stops'".\textsuperscript{27} The classic case in which the European Court moderated its \textit{Dassonville} ruling and developed the 'Rule of Reason' was the \textit{Cassis de Dijon} case.\textsuperscript{28} The European Court said:

\begin{quote}
Obstacles to movement within the Community resulting in disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of health, the fairness of commercial transactions and the defense of the consumer.\textsuperscript{29}
\end{quote}

This case arose when the Federal Republic of Germany slapped an import ban on alcoholic beverages from the Member States which did not contain a minimum of 25 percent alcohol content. Relying on Article 36, the German government claimed that the restriction was necessary in order to protect the public health, because non-German alcoholic beverages had a lower-proof which allegedly induced a tolerance towards alcohol than those with a higher

\textsuperscript{26} Andreas R. Ziegler, \textit{Trade and Environmental Law in the European Community} 61 (1996).


\textsuperscript{28} Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (\textit{Cassis de Dijon}), 1979 E.C.R. 649 (1979)[hereinafter \textit{Cassis}].

\textsuperscript{29} \textit{Id.} at 692.
alcohol content.\(^{30}\) Germany also claimed that the tax rate was lower on the lower-proof beverages; thus the producers of lower proof alcoholic beverages had an unfair advantage over the producers of higher proof alcoholic beverages.

The European Court rejected both the arguments. To reject the alcohol tolerance argument of Germany, the European Court did not make any effort to go into scientific evidence. Rather, it rested its reasoning on the facts. Indeed, the European Court found that, in practice, much of the higher proof alcohol was consumed after it was diluted: consequently, it was unnecessary to examine the scientific basis of 'tolerance inducement' claim of Germany. With regard to the 'unfair advantage' argument, the European Court pointed that Germany could have achieved the result of a 'level-playing field' for both producers of higher and lower-proof alcohol by less burdensome measures such as labelling, rather than applying different tax rates.\(^{31}\) In so doing, the European Court applied the "rule of reason" test under which it weighed the contending goals of the measures against its impact on trade.\(^{32}\) Thus, the European Court adopted a balancing approach between the environmental concerns and the trade interests. In order to satisfy the rule of reason analysis, the Court looks not only into the motives of the measure but also into the effects of the measure.

The \textit{Cassis} ruling stands for several propositions. First, the Court of Justice has allowed two sets of bases under which member States may safeguard environment: the

\(^{30}\) \textit{Id.} at 662-63.

\(^{31}\) \textit{Id.} at 664.

Article 36 and the Cassis doctrine. Second, the Cassis doctrine created an open ended list of "mandatory requirements" which could limit the application of free movement of goods; thus reflecting that free movement of goods is not an overriding concern.\(^{33}\) Even under Cassis however, the "mandatory requirements" did not explicitly mention environmental protection, although its implication became evident.\(^{34}\) Though some commentators\(^{35}\) mention Waste Oils case as including environment into the mandatory requirements, it was the Danish Bottles\(^{36}\) case which confirmed the protection of environment as part of the mandatory requirements. Moreover, even though the environment may now be protected by national measures either under Article 36 or the rule of reason, after an analysis of the case-law, one commentator concludes that Article 36 and the rule of reason has been merged in its application.\(^{37}\) Furthermore, the European Court applies the condition laid down in the


\(^{34}\) Geradin, supra note 15, at 180, citing the "communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (Cassis de Dijon) 1980 O.J. (C256)2." Id. at note 202.

\(^{35}\) Geradin, supra note 15, at 181. Another commentator is of the view that the rule of reason was formulated in the Dassonville case. See Stephen Weatherhill & Paul Beaumont, EC Law: The Essential Guide to the Legal Workings of the European Community 502 (new ed., 1995). The authors suggest that the rule of reason is a 'fusion' of the Dassonville and Cassis cases. Id.


\(^{37}\) Ziegler, supra note 26, at 69.
second sentence to Article 36 as part of rule of reason analysis.\(^{38}\) Thus, it is clear that a challenged measure may not be discriminatory\(^{39}\) or constitute disguised discrimination.

4. **The Rule of Reason Conditions**

In the view of Verloren Van Themaat, a noted authority on the Community law, the rule of reason describes a "general principle of interpretation in relation to strict interpretation laid down by provisions of the [European Union] Treaty."\(^{40}\) As shown above, the rule of reason applies the second sentence of Article 36 which states that a measure should not "constitute a means of arbitrary discrimination or a disguised restriction on trade."\(^{41}\)

It is evident from an analysis of the case-law that the European Court has formulated four conditions under the rule of reason. First, the policy objectives must fall in an area where the Community legislation is scarce. Second, the measure at issue must genuinely pursue the stated goals of Article 36 or be covered by the mandatory requirements. Third, the measure must not arbitrarily discriminate or be a disguised one. Fourth, a "relationship"

\(^{38}\) *Id.* at 72.

\(^{39}\) See *e.g.*, Case 4/75, Rewe Zentralfinanz GmbH v. Landwirtschaftskammer, 1975 E.C.R. 843, [hereinafter the REWE case] in which the European Court states that differences in treatment between imported and domestic products could be viewed as discriminatory unless there is reason to believe to the contrary. *Id.* See also *Burrrows, Free Movement in European Community Law* 60 (1987), where Burrows points out that the European Court has applied only one condition of the second sentence of article 36, namely, arbitrary discrimination and has left out "disguised discrimination". *But see Ziegler, supra* note 26, at 73, where Ziegler points out, referring to subsequent case-law that the second sentence is applied to the rule of reason test. *Id.*


\(^{41}\) Article 36, *European Union Treaty.*
should exist between the stated objective and the measure at issue. To determine whether a relationship exists or not, the European Court typically examines the following factors:

(a) whether the measure is capable of attaining the indicated objective,
(b) whether the measure chosen is the least trade-restrictive measure leading to the desired level of protection, and
(c) whether the restrictive character of the measure is proportionate, that is, not excessive in relation to the improvement in environmental quality.\(^\text{42}\)

The first and second conditions are particular to the context of the European Union; the third and fourth conditions are relevant for this analysis. It must be pointed out however that other than specifying the conditions broadly, the European Court like the GATT Panels have also had difficulty in articulating the specific elements that would fall under the salient conditions.

a. Arbitrary Discrimination

What precisely constitutes 'arbitrary discrimination' is elusive. In legal parlance, 'discrimination' connotes unequal treatment of equals.\(^\text{43}\) If so, it might seem that the term 'arbitrary' is superfluous.\(^\text{44}\) However, case-law suggests that this is not so. In Italy v. Commission, the European Court articulated that:

\[\text{42 ZIEGLER, supra note 26, at 73.}\]

\[\text{43 The word "discriminate" is defined as "to make a difference in treatment on a basis other than individual merit." See THE MERRIAM WEBSTER DICTIONARY (new ed., 1994).}\]

\[\text{44 OLIVER, supra note 20, at 182. Oliver believes that the use of the word "arbitrary" is "no doubt due to the fact that the term "arbitrary discrimination" appear in Article XX of GATT on which Article 36 is modelled." Id.}\]

\[\text{45 See e.g., BURROWS, supra note 39, at 63. Burrows believes that the term "arbitrary" is not without significance. Id.}\]
The different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination. An appearance of discrimination in form may therefore in fact correspond to an absence of discrimination in substance. Discrimination in substance would consist in treating either similar situations differently or different situations identically.\(^{46}\)

Under this rule it becomes important then to determine whether there is "similarity" of situations. This comparison of how the domestic goods are treated as opposed to imported goods has helped the European Court to determine the presence of arbitrary discrimination. State promotion to purchase domestic goods as opposed to foreign goods is an arbitrary discrimination. The *Buy Irish*\(^{47}\) case is a good example. Similarly, restrictions that fall heavily on imported products than on domestically produced good would constitute arbitrary discrimination.\(^{48}\) A lack of domestic restrictions would constitute discrimination; however, it is the lack of proper justification that makes a measure constitute "arbitrary discrimination." This was demonstrated in the *Rewe-Zentralfinanz v. LandwirtschaftsKammer*\(^{49}\) where even though were no corresponding phytosanitary controls on domestically produced apples that were required for imported apples, the European Court held that:

The different treatment of imported and domestic products, based on the need to prevent the spread of the harmful organism could not, however, be regarded as arbitrary


\(^{48}\) See *Commission v. France*, [1981] 2 C.M.L.R. 743, para. 7.33 (where advertising restrictions were imposed on imported alcoholic drinks on grounds of public health. Even though some domestic industries were caught by the restrictions, the European Court held that it was arbitrary discrimination).

This equality of treatment was reiterated by the European Court in the *Conegate* case in which it held that a total ban of "dolls" on public morality grounds must be matched by a ban on the domestic 'manufacture or marketing of the same goods" within the regulating State.\(^{52}\)

### b. Disguised Restriction

This test is to examine whether the measure at issue is protectionist in nature. In order to do so, the European Court will not take the measure at its face value but will look behind the measure.\(^{53}\) The underlying rationale for this test is to detect whether there are motives other than those supplied by the regulating party.\(^{54}\) Typically, the Court looks to see if there are any "non-economic" reasons.\(^{55}\)

An obvious form of disguised restriction was seen in *Commission v. United Kingdom,*\(^{56}\) in which United Kingdom banned the import of poultrymeat alleging public

\(^{50}\) *Id.*


\(^{52}\) *Id.*

\(^{53}\) ZIEGLER, *supra* note 26, at 90.

\(^{54}\) *See* Hession & Macrory, *supra* note 17, at 199. *But see* OLIVER, *supra* note 20, at 184, where Oliver states that "it has been suggested that Article 36 would have much the same meaning even without this expression [disguised restriction]." *Id* (footnotes omitted).


health and animal health reasons to prevent the spread of Newcastle disease. The European Court rejected this claim because it found that the measure was motivated by reasons other than those supplied.\(^57\) The European Court went further to state that "since the import ban constituted a disguised restriction on trade between Member States, the presumption that it was not justified under Article 36 was increased."\(^58\)

c. The Principle of Proportionality

In general terms, the Proportionality rule states that the trade-restrictiveness of an environmental measure must be directly proportional to the level of protection needed for the protection of the targeted entity. Typically, two factors must be known for this rule to apply. First, a "target" that needs protection must be identified. In this regard, there is very little discretion for the Member States as it is confined to the policy objectives stated in Article 36 or the rule of reason. Second, the level of protection needed to retain, regain or conserve the "target". Since the dangers to the environmental target and consequently the level of protection needed to conserve the target varies from case to case, the European Court has approached this issue on a case-by-case basis. As such, the European Court has not evolved a clear set of rules and the assessment of the degree of protection determine the level of trade

\(^{57}\) The European Court found "that for some months prior to the introduction of the ban the United Kingdom Government had been subject to pressure from domestic poultry producers to block imports. This was well documented in the British press. Secondly, the ban was announced on August 27, 1981 and came into effect on September 1, 1981. It was thus introduced so hastily that the Commission and the Member States were neither consulted nor even informed in good time. This timing also had the effect of excluding French Christmas turkeys from the British market for the 1981 season. Thirdly, when France sought to comply with the new British requirement, the United Kingdom refused to take cognisance of it, adding a further requirement which France did not meet." OLIVER, supra note 20, at 184. Cases such as these are rare. In reality however, the disguised restriction is more subtle and hard to determine.

\(^{58}\) OLIVER, supra note 20, at 185.
restriction that may be allowed. However an analysis reveals that the European Court has consistently applied the following guidelines:

(a) whether the measure is genuinely aimed at or reasonably justified for the attempted objective (suitability or reasonableness of a measure),
(b) whether the measure is essential or necessary for the attainment of the objective, implying that it has to be the least trade-restrictive measure available among several alternatives (least trade restrictive measure), and
(c) whether the improvement in environmental quality is proportionate to the restriction of trade resulting from this measure. This third aspect requires a sound relationship between the restrictive character of a measure and its result (proportionality or prohibition of excessiveness).^59

The *Danish Bottles* case,^60 is a classic illustration where the European Court applied the Principle of Proportionality. In this case, the Danish Government introduced a system under which the manufacturers of beer and soft drinks had to market their beverages in reusable containers. Also, such reusable containers had to be approved by the Danish environmental authorities. However, following protests from other Member States and the Commission that the rule is burdensome for foreign exporters, the Danish Government amended the law and established a deposit-and-return system under which non-approved containers could be used up to a certain quantity set by the Danish Government.^61

The Commission challenged the Danish measure as inconsistent with Article 30 of the Treaty and claimed that the Danish Government's object of protecting the environment could be achieved by less trade restrictive means. The Commission alleged that the deposit and return system with limits amounted to a quantitative restriction. The Danish

^59 ZIEGLER, *supra* note 26, at 97-8 (footnotes omitted).

^60 *Danish Bottles* case, *supra* note 36.

^61 *Id.*
Government contended that its measure constitutes a "mandatory requirement" for the protection of the environment. With regard to the compulsory deposit-and-return system, the European Court recognized that the recycling of containers furthered the aims of the measure. Though the deposit and return system imposes a burden on the free movement of goods among member States, the European Court found that the measure was not "disproportionate" to the goal sought to be achieved. Nevertheless, the European Court reasoned that the restriction on quantity could not be tolerated since it hinders free movement of the good and the adverse trade effects outweigh the benefits the measure seeks to achieve. The European Court found that the adverse trade impacts created by the measure was disproportionate to the objective pursued.62 Such measures are not "necessary" measures.

Further, in several other cases, the European Court has held Proportionality Principle to mean and include 'necessity' which requires the European Court look into the extent of the burden the challenged measure imposes on trade.63 Thus, in the German Meat Preparation Case,64 Germany adopted a regulation whereby it prohibited the sale of meat products from meat which had not been processed in the country the meat was produced. Rejecting Germany's "public health" arguments, the European Court found that though Germany did not prevent meat imports from other countries, the "processing requirement" was considered burdensome and disproportionate to the purported objective of the measure.65 Moreover, 'necessity' requires that there be a "casual connection" between the measure

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62 Id. at 4632.

63 ZIEGLER, supra note 26, at 182.


65 Id.
imposed and the objective sought. Likewise, in the *Gilli* case, the European Court rejected the Italian ban on the sale of non-wine vinegar unjustifiable, since the Court did not see the nexus "justifying any restriction on the importation of the product [non-wine vinegar] in question from the point of view either of the protection of public health or of the fairness of commercial transactions or the defense of the consumer."67

Furthermore, the European Court has pointed out in some cases that, where adequate alternatives are available, measures whose effects on trade are minimal should be used to attain the objective.68 This emphasis on the "least restrictive alternative(s)" was made in the *Waste Oils* case. In *Waste Oils*, the European Court reiterated that free movement of goods, freedom of competition, and freedom of trade make up the elemental principles of the Community law.70 Simultaneously however, the European Court hastened to add that freedom of trade is not superior than other concerns and consequently, trade concerns do not require absolute treatment over other concerns. Rather, it must be seen in the "perspective of environmental protection, which is one of the Community's essential objectives."71 Essential as environmental protection is, if less restrictive alternatives exist, a Member State is required to adopt such a measure. This principle derived further strength in the *Belgian*

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67 *Id.* at 2078.


70 *Id.* at 548.

71 *Id.* at 549.
Butter case,\(^\text{72}\) where the measure which required imported margarine be sold in a cube-shaped blocks to differentiate between butter and margarine on health grounds was rejected as other effective measures such as labelling were available.\(^\text{73}\)

C. The Balancing Approach of the United States

1. The Dormant Clause Power

The principle of unhindered movement of the goods across the several States in the United States is implicitly stated in the Commerce Clause of the United States Constitution. It states that "[t]he Congress shall have power . . . to regulate Commerce . . . among the several States."\(^\text{74}\) However, since the Commerce clause "does not say what the states may or may not do in the absence of congressional action,"\(^\text{75}\) the United States Supreme Court has interpreted the Commerce Clause to include an affirmative grant of authority to the Congress to integrate the markets across the several States and, at the same time, a negative prohibition on the States' power to place unjustifiable burdens on interstate commerce.\(^\text{76}\)

Further, in the context of trade and environment conflict, it is important to notice the absence of explicit reference to environmental protection in the United States Constitution. Given this absence, the "green" power first belong to the several States. Even as the States' exercised

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\(^{72}\) Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 613 (1982)[hereinafter Belgian butter case]. See also Case 104/75, Adriaan de Peijper, Managing Director of Centrafarm BV, 1976 E.C.R. 613 (1976)(challenging a Danish regulation which required importers of pharmaceutical products to obtain clearance documents from its national health authorities).

\(^{73}\) Belgian butter case, supra note 72.

\(^{74}\) U.S. Const., Art. I, s. 8, cl. 3.


their power to protect the environment, they must do so without affecting unduly the free flow of commerce. The Supreme Court realized that a balance must be struck in order to ensure the benefits of free flow of commerce and high environmental quality. An analysis of the case-law shows that the Supreme Court has favored a balancing approach that required a distinction between "outright protectionism" and the "indirect burdens on the flow of trade."  

Measures that hinder trade across the States may be either facially discriminatory or facially neutral measures. In contrast, subtle but definite burdens on trade may be caused by non-discriminatory measures also. To be sure, the Supreme Court has created different tests for each of these categories. In order to determine the test to be applied, typically, the Court uses a two-step analysis. The first step involves a determination of the degree of discrimination. The degree of discrimination determines the test to be applied. Discriminatory measures receive a strict scrutiny, whereas non-discriminatory measures receive a less strict balancing approach between the burdens and the benefits of the measure.

2. The Dean Milk Test

As early as in 1950, the Supreme Court of the United States answered what happens when a measure is facially neutral in the Dean Milk Co. v. City of Madison. In Dean Milk, the city of Wisconsin erected a ‘five-mile milk’ ordinance under which milk which was pasteurized beyond five miles radius of the city was prohibited from sale, allegedly to protect

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the quality of milk and thus the health and well-being of the local community. The Court noted that the ordinance at issue was facially neutral, as it applied to all milk producers outside the five mile limit equally.\textsuperscript{80} That sanitary regulation was a legitimate local concern was readily conceded.\textsuperscript{81} Nevertheless, the Court held that the City of Madison's measure is a plain discrimination against interstate commerce.\textsuperscript{82} It held that even "unquestioned power to protect the health and safety of its people" cannot justify discriminatory measures, if reasonably non-discriminatory alternatives, adequate to conserve legitimate local interests are available.\textsuperscript{83} The Court found that non-discriminatory alternatives such as inspection and certification system were available.\textsuperscript{84} Similarly, in \textit{Hunt v. Washington State Apple Advertising Commission},\textsuperscript{85} the Court held that a facially neutral measure would survive judicial scrutiny only if it furthers a legitimate state goal and there are no reasonable non-discriminatory alternatives. Placing the burden on the regulating state, the Court in \textit{Hunt} added:

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the state to justify it both in terms of the local benefits flowing

\textsuperscript{80} \textit{Id.} at 353.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 354.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 354-56. In order to determine the adequacy of alternatives, the court took note of the testimonies and recommendations. \textit{Id.} This was not sufficient for the dissent. The dissent argued that the record was not sufficient to determine the adequacy of the solutions. Moreover, the courts cannot 'second-guess' the adequacy of alternatives. \textit{Id.} at 359-60 (Black J. dissenting, Douglas & Minton JJ., concurred, dissenting).

\textsuperscript{85} 432 U.S. 333 (1977).
from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.86

3. The Pike Test: A Further Refinement

When faced with measures that have legitimate local interests, the Court has applied a lower standard of scrutiny set forth in Pike v. Bruce Church, Inc.87 Under Pike, the Court deliberately balances the legitimate local interests against its incidental effect on trade. The measure will pass scrutiny unless the burden on trade is clearly in excess of the local interests. In its words, the Court in Pike held that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local interest is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with lesser impact on interstate activities.88

Further, for the Pike test to apply, a statute must be evenhanded. When there is no discrimination between in-state and out-of-state commerce, the measure is viewed as evenhanded. Even in evenhanded measures, the Court recognizes however that some incidental effects on trade could occur. Considering the local benefits the measure would bring, the minimal trade impacts could be ignored. If impact on trade is excessive, the measure will be struck down. In Minnesota v. Clover Leaf Creamery Co.,89 the Supreme

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86 Id. at 353 (citations omitted).


88 Id. at 142.

Court applied the *Pike* test to uphold a Minnesota law that banned plastic non-returnable containers on the grounds of environment protection. Note must be made that the Court favored the Minnesota legislation even though the measure had burdensome effects on trade, such as paralyzing out-of-state industry and protecting local industry.\(^9\) In other words, the Supreme Court has clearly indicated that it would lean toward legitimate local interests if the burdens on trade are not excessive.

4. **The Per Se Standard**

With regard to discriminatory measures, the Court has applied a stricter level of scrutiny. *Philadelphia v. New Jersey\(^9\)* tested the validity of a New Jersey statute which prohibited the import of waste into the state from outside.\(^9\) Pointing out that whatever the ultimate aim of the measure at issue, the principle of non-discrimination must be not violated,\(^9\) the Court reiterated that there are two standards that may be applicable in the context. One is the "per se" rule which condemns measures that are simply protectionist in nature; those measures "overtly block[] the flow of interstate commerce."\(^9\) On the other hand, if a measure advances a local interest in a non-discriminatory way, the *Pike* test would apply.\(^9\) To apply the right test then, it is critical to determine whether the measure is


\(^9\) *Id.* at 618.

\(^9\) *Id.* at 627.

\(^9\) *Id.* at 624. See also Welton v. Missouri, 91 U.S. 275 (1875).

\(^9\) *Id.* at 624.
protectionist. The Court held that though a "purpose" analysis would be helpful to determine whether the measure is protectionist or not, it is not dispositive because the "evil of protectionism can reside in legislative means as well as legislative ends."^66

Furthermore, the Court noted that New Jersey had not offered any explanation to show why it violated the principle of non-discrimination^77 by treating out-of-state waste differently from the in-state waste. Consequently, the Court concluded that the New Jersey statute was a protectionist measure. Further, the Court emphasized that adequate alternatives were available such as restricting the flow of waste into landfills, even though incidental trade distortions may occur.^88 Thus, not only should the end be justifiable, but also the means by which a goal is achieved should be justifiable.

Whenever the Supreme court saw "economic protectionism" in the guise of environmental measures, it has not hesitated to apply the Philadelphia test. In Fort Gratiot Sanitary Landfill Inc., v. Michigan Department of Natural Resources,^99 for example, Michigan’s Solid Waste Management Act (SWMA) provided that solid waste generated in a county must be disposed within that county. Waste from another county, State or country was banned. A statute as clearly discriminatory against trade as this one would be controlled by Philadelphia law. Indeed, the Court applied the 'per se' rule and held that the Michigan statute constitutes "economic protectionism." In order to avoid such a conclusion however, the Supreme Court indicated that Michigan should demonstrate a valid reason other than

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^66 Id.

^77 Id. at 626-27.

^88 Id. at 626.

economic reasons. Michigan failed. Rather, Michigan attempted to persuade the Court that *Dean Milk* test should apply. Rejecting this line of argument, the Court ruled that in a facially discriminatory measure, the burden of proof that the same goal cannot be adequately achieved by non-discriminatory alternatives must be met. Michigan failed this test. Further, the related *Maine v. Taylor* requires that the regulating state offer justification for out-of-state discrimination. Michigan failed this test too.

Similarly, in *Chemical Waste Management Inc. V. Hunt* the Court applied the *Philadelphia* law and struck down the tax applied on out-of-state waste imports. The respondent tried to justify the fee on environmental grounds. However, the court rejected the argument on the ground of availability of the "non-discriminatory alternatives."

That the *per se* standard of *Philadelphia* is limited in application and, that even a discriminatory measure does not automatically attract *Philadelphia* law is evident from the Supreme Court's decision in *Hughes v. Oklahoma*. In *Hughes*, the validity of an Oklahoma export ban shipments of minnows from Oklahoma waters was questioned. Arguably, the application of the *Philadelphia* law would have been justified. Further, the Court conceded that the statute discriminates on its face, the Court held that "at a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of absence of non-discriminatory alternatives." Though the Court noticed that "non-discriminatory alternatives" could have been adopted, the Court in *Hughes* nevertheless

100 477 U.S. 131 (1986).


103 Id. at 377.
rejected the strict *Philadelphia* test and instead applied the more balanced *Dean Milk* test. The Court built on the Hughes' analysis in *Maine v. Taylor*[^104] and other cases as well.[^105]

D. Should the WTO Adopt the Rule of Reason: An Analysis

It is not intended to make a comparison between the two systems;[^106] rather, the examination reveals that both the systems have developed a jurisprudence that reflects their ability to foster integration of trade and the environment by legal principles. However, this is not to say that the principles developed by them do not have problems. To be sure, both the regimes have not been able to give us a clear set of criteria other than relying on guiding phrases such as "arbitrary discrimination" and "disguised restriction" or "evenhandedness." While they bite the easy ones, they seem to have trouble when it comes to testing measures that fall within uneasy borders.

Nevertheless, both the courts by their ingenious interpretation of the legal provisions have in effect supplemented the vigor that was perceived lacking in the legislative arena for adequate protection of the environment. As demonstrated above, the rule of reason


[^106]: See Geradin, *supra* note 15, for a comparative analysis of the approaches taken by the European Union and the United States. See also Walter, *supra* note 78 (the comparison is primarily focused on the waste cases).

[^107]: For a criticism of the *Pike* analysis, see e.g., Vincent Blasi III, *supra* note 13, at 186. Blasi points out that the *Pike* analysis has several limitations. First, the *Pike* standard employs only a "contingent balancing test: before any balancing is to be undertaken, the state regulation must pass a three-pronged threshold scrutiny and be judged (1) 'even-handed', (2) designed to effectuate a legitimate local public interest' and (3) 'only incidental' in its effects on interstate commerce." Second, the test "does not specify what is to happen if a regulation fails to pass the three-pronged threshold scrutiny." Third, "the *Pike* standard does not specify exactly how 'the extent of the burden' on commerce is to be assessed." *Id.* For a criticism on adapting the approaches of the European Court and the United States Supreme Court to the GATT, see Charnovitz, *supra* note 14, at 481-486.
approach taken by the European Court of Justice and the *Pike* analysis taken by United States Supreme Court in order to bring equilibrium between trade and the environment issues are very similar. The dominant method of analysis by both the courts is to strike a balance between the two competing goals. Such an approach has facilitated the process of integrating trade and the environment.

The United States has more power granted to it under the Commerce Clause. The Supreme Court has ingeniously used the "silence" of the Constitution to advance the free flow of commerce. Unlike protection of the environment, the free flow of interstate commerce is a constitutionally mandated goal. Even though the Supreme Court advanced this goal vigorously, it realized that this pursuit is not an end in itself. The balancing approach found in *Pike* exemplifies this concern.

On the other hand, the European Union was cut from a different cloth. Not to mention that, unlike the United States which is two centuries old, the European Union is of recent origin. Much like the GATT/WTO, the growth of environmental law regime has been slow. The European Union Treaty provisions lacked the legislative commitment and strength that was needed to support an environmental regime. Realizing that the harmonization of environmental laws at the Community level is rather inadequate, the European Court of

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108 ZIEGLER, *supra* note 26, at 75.


Justice has been creative. The theory of mandatory requirements or the rule of reason doctrine exemplifies this approach.

For the purpose of analysis, the European Union Treaty is more closer to the GATT. The wordings of Article 36 of the European Union Treaty and Article XX of the GATT are similar. Unlike the United States Supreme Court, the European Court had to grapple with interpretations of key phrases that define the scope of the provision's application. Consequently, the jurisprudence of the European Court was examined closely. This thesis argues that the WTO Dispute Settlement Body should adopt a rule of reason approach.

E. Structure of the Suggested Rule of Reason

From the above analysis, an attempt is made in this section to develop a rule of reason that the WTO Body may utilize to reconcile trade and environment disputes. The doctrine primarily contains three tests: (1) The Proportionality Test, (2) The Arbitrary Discrimination Test and, (3) The Disguised Discrimination Test. It may seem that the rule of reason adds only the Proportionality test to the already existing other two conditions that are applied by the GATT/WTO Panels. Nonetheless, as the foregoing analysis show, the Proportionality principle tempers the other two tests as well by placing equal emphasis to both trade and environmental concerns. Moreover, it must be remembered that the suggested elements are not exhaustive. It is left open-ended to let changes take place as the law takes shape through application by the WTO.

111 See Joseph Weiler, The Community System: The Dual Character of Supranationalism, 1 Y.B. EUR. L. 267 (1982) taken from Nichols, supra note 14, at 713. "Joseph Weiler, who has long studied the European Court of Justice, believes that active and independent judicial review is a critical element in making a supranational body both legitimate and effective." Id.
1. The Proportionality Test

If there is one principle that cuts across the entire analysis of the European Court, it is the Principle of Proportionality. The European Court has used this principle to determine: whether measure is necessary (or justified). Further, the Proportionality Principle has guided the European Court to examine whether the challenged measure constitutes arbitrary discrimination or disguised discrimination.

While GATT uses the word "necessary", the European Union Treaty uses the word "justified"; however the latter has been interpreted to mean "necessary."112 In order to find out whether a particular measure is "necessary", rather than employ the "least-restrictive standard," the rule of reason approach employs the Proportionality principle. This looks into the level of protection the 'target' requires. The degree of protection determines how restrictive the challenged measure may be. A very high level of protection for the target requires stringent trade measures such as a total ban, absent adequate alternatives. Oftentimes, the degree of protection required is subjective and is best left to the regulating state with burden of proof on them. Though scientific evidence may be helpful to evaluate the degree of protection required,113 its usefulness is circumscribed due to difficulties in application.114 In some cases, it may not be needed to go into the scientific evidence.115

112 See McDonald, supra note 11, at 434. Both the GATT and the European Union have held the term "necessary" to mean two things: exhaustion of available remedies and proportionality. Id. at 434.

113 See Hession & Macrory, supra note 17, at 201.

114 Id. at 200.

115 See Cassis case, supra note 28, which illustrates the European Court’s tactful avoidance of the use of scientific evidence to reject Germany's alcohol tolerance inducement claim and instead base its decision on facts.
Proportionality principle rightly places emphasis on the environmental target to be protected. On the other hand, the "least-restrictive measure" standard employed by the GATT Panels simply places emphasis on the challenged trade restriction and ignores the environmental target. Further, the least trade restrictive approach requires a scaling of the "restrictiveness" of the measures. As Esty points out, a lesser restrictive measure is always conceivable and consequently the test becomes almost insurmountable.\(^\text{116}\)

2. **Arbitrary Discrimination**

Non-discrimination is a first principle. Its violation is rarely excused. Nevertheless, in warranted circumstances, discrimination becomes a non-issue.\(^\text{117}\) The crucial question then is whether the measure at issue constitutes "arbitrary discrimination." From the above analysis, it is evident that a measure becomes arbitrary when a "proper justification" is not provided. Put differently, the absence of a valid justification makes a discrimination arbitrary.\(^\text{118}\) In the case of the European Union, the European Court looks to see if the measure falls under either the heads of justification under Article 36 or the mandatory requirements. A national measure becomes hard to justify if Community law exists. Member States have very little discretion if the Community has harmonized the law. In the United States, the approach is more or less similar. Federal law pre-empts state power. In


\(^{117}\) See Danish Bottles case, supra note 36; see also Geradin, supra note 15, at 185. "It is noteworthy that the [European] Court did not raise the issue of discrimination. The Court focused exclusively on the principle of proportionality." Id. Geradin however criticizes the reasoning of the European Court and argues that the European Court should have examined discrimination as an issue. Id.

\(^{118}\) See Oliver, supra note 20, at 182.
the absence of federal legislation, the Court is convinced about the power of States to regulate their environment. 119

Further, the analysis points out that Courts must look for "similarity" of circumstances. The European Court has clearly articulated this position in the Italy v. Commission120 case. Indeed, the language of the chapeau in Article XX clearly captures this notion when it states that any measure is "subject to the limitation that it does not constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail."121

It may also be suggested that the term "unjustifiable discrimination" in the chapeau of Article XX is superfluous. It is seen that the "arbitrary discrimination" test incorporates the justification test. In numerous cases, the GATT Panels have agreed in principle with the regulating state that the target of protection is a valid justification to take regulatory measures.122 However, the measures have failed to satisfy the other conditions.

Furthermore, it is clear that arbitrary discrimination has been given a rather open-ended definition. Rather than define what 'arbitrary discrimination' means, the European Court has struck down cases in which it felt that the measures did not disclose proper justifications. The case-law of Henn & Darby123 and Conegate124 are illustrative. Both these cases were total bans on public morality grounds. However, in Henn & Darby,

120 Supra note 46.
121 Art. XX, GATT (emphasis added).
122 See chapter II, supra note 26 and accompanying text.
124 Case 121/85, supra note 51.
notwithstanding the fact that there was absolute ban, the European Court concluded that there was no arbitrary discrimination because the "[European Court] was willing to find that United Kingdom law did restrain the manufacture and marketing of pornography sufficiently to enable it to conclude that there was no lawful trade." In contrast, the European Court in Conegate "reached the opposite conclusion: the restrictions which existed could not be said to amount to a prohibition on domestic manufacture or marketing." The discrimination seen such as in Conegate could not be justified. The meaning of the term 'arbitrary discrimination' was further clarified by the European Court in the REWE case. In REWE, the fact that the imported products were subject to phytosanitary inspection although domestic products were not subject to an equivalent examination might be taken to constitute arbitrary discrimination. Such a conclusion would be flawed under the European Court's approach. It reasoned that mere differences in treatment of imported and domestic products should not mislead the Court. If there is a justifiable need, such as the "need to prevent the spread of harmful organism" from foreign apples, then the measure could not be regarded as constituting arbitrary discrimination "if effective measures are taken" likewise to prevent the harmful organism on the domestic front as well.

125 CRAIG & DE BURCA, supra note 27, at 600.

126 Id. at 601.

127 Case 4/75, supra note 39.

128 Id.

129 Id. See also Maine v. Taylor, 477 U.S. 131 (1986)(where the Court upheld the statute that imposed trade restrictions on the ground that it was necessary to prevent the spread of livebaitfish disease).
3. Disguised Restriction

Because this test is designed to test if the challenged measure has any protectionist motives, it is suggested that it might be more appropriately classified as part of the substantive test. It is not merely to examine and to test the measure in its application. Rather, it is used to detect wrong or ulterior motives such as a non-economic reasons or protection of one's domestic industry. Unlike arbitrary discrimination which exposes lack a valid justification, disguised discrimination exposes a lack of proper motives. This is best exemplified in the Commission v. United Kingdom,\(^{130}\) where, the real purpose was to protect domestic production. But it was couched on animal and health grounds. Indeed, this is the purpose of the disguised restriction test. Notably, the Appellate Body clearly articulated this aspect in its decision in the United States Gasoline Standards case in which it states that:

> It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction."\(^{131}\)

Not all cases however present a distinct presence of wrong motives as found in the Commission v. United Kingdom. It is not hard to imagine cases where genuine motives exist, which might nonetheless become distorted in their application. The measure could have negative effects of trade. In such cases, the Proportionality principle should guide whether the incidental effects on trade can be excused. If the impact on trade is clearly excessive than the putative benefits, then the challenged measure may not be allowed.

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\(^{130}\) Case 40/82, supra note 56.

\(^{131}\) Id. at 629.
It might be troubling to notice however that even where the measure is undoubtedly justified, this test has the effect of nullifying the measure as invalid. This might lead to questionable results. This pitfall might be avoided if in cases where the restriction constitutes a disguised restriction on trade, "the presumption that [the measure] was not justified" increases. The disguisedness or the protectionist motives should be viewed "as evidence that a measure is not justified." This approach gives flexibility to Courts to allow measures that are valid in themselves, while having some trade distortions subject to Proportionality.

4. Article XX(g) Analysis

It may be noticed that the above analysis has not touched on Article XX(g) of the GATT. As demonstrated above, Article XX(b) has a companion in Article 36 of the European Union Treaty or the mandatory requirements. Article XX(g) does not. Consequently, the jurisprudence relating to terms found in Article XX(g) form a separate analysis. Chapter II above examined how the GATT Panels and the WTO Appellate Body have interpreted Article XX(g). It is clear that the chapeau applies to Article XX(g). To be sure, the above analysis applies to the application of the Chapeau terms "arbitrary discrimination" and "disguised restriction."

With regard to the interpretation of Article XX(g), the interpretation given to it by the Appellate Body in the United States Gasoline Standards case is correct. This decision rejected the line of reasoning followed by the previous GATT Panels. Importantly, the Appellate Body's view relaxes the standard of review under Article XX(g) for genuine

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132 See OLIVER, supra note 20, at 185. [italics in original](Oliver cites Commission v. France ("Italian Wine") [1980] E.C.R. 2299, as an authority for this proposition).
conservation goals. The view of the Appellate Body should be re-affirmed in future disputes to give it the value and credibility it deserves.
CHAPTER IV
THE UNITED STATES' SHRIMP BAN: AN ANALYSIS

A. Introduction and Background

The reader will recall that it was proposed to take the opportunity to examine the rule of reason approach on a current problem. The problem chosen to apply the rule of reason is the United States' ban on importation of shrimp and shrimp products harvested in a manner causing high mortality to the endangered species of marine sea turtles. As the facts would show, the tuna-ban and the shrimp ban are identical. Thus, it gives us an excellent opportunity to try the rule of reason and make a comparison of the analysis and outcome under the rule of reason with that of the existing WTO analysis. The facts of the shrimp ban as it unfolded is outlined below.

On May 1, 1996, the United States imposed a ban on the importation of shrimp and shrimp products caught by methods that could adversely affect the endangered species of sea turtles. The ban was implemented pursuant to the orders of the United States Court of International Trade (CIT)\(^1\) and, was based on the United States' Endangered Species Act\(^2\) (ESA), as amended in 1989. Section 609 of the amended ESA ("Turtle law") prohibits importation of shrimp or products from shrimp which have been harvested with commercial fishing technology that affect adversely certain species of sea turtles. Further, the Turtle


\(^{2}\) 16 U.S.C. §1531 et seq.
law requires certification with documentary evidence that the "incidental taking" of sea turtles is comparable to that of the United States; and that the "fishing environment" does not pose a threat to sea turtles.\(^3\)

Beginning January 1, 1993, all the commercial shrimp trawl vessels in the United States fishing in the waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas were required to use turtle excluder devices (TEDs) at all times in all areas.\(^4\) Since the United States' shrimp fishermen had to use TEDs in the above geographical area, it was determined that the efforts for conservation of sea-turtles would be undermined if similar efforts were not made as well by foreign fishermen fishing in those areas. Accordingly, the geographical scope requiring foreign fishermen to use TEDs was limited.\(^5\)

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\(^3\) Pub. L. No. 101-162, 103 Stat. 988, 1037-38 (1989). In pertinent part, the statute reads:

> Sec. 609. (a) . . .

> (b)(1) IN GENERAL.-- The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

> (2) CERTIFICATION PROCEDURE.-- The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that --

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

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

> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting. Id.


\(^5\) 913 F. Supp., at 574. "In passing section 609, Congress recognized that these conservation measures taken by U.S. shrimp fishermen would be of limited effectiveness unless a similar level of protection is afforded throughout the turtles' migratory range across the Gulf of Mexico, Caribbean and western Atlantic Ocean." Id.
On challenge, the United States CIT held that the Turtle law does not contain any geographical limitations and directed the United States to apply the Turtle law against all nations that caught shrimp in a turtle unfriendly manner regardless of geographical limitations.6 Subsequently, the United States sought a modification of deadline for one year, which was refused.7 The United States Department of State had determined that 36 countries have met the requirements of the Turtle law; shrimp imports from all other countries were banned.8 Under the revised guidelines, the United States had "determined that import prohibitions imposed pursuant to section 609 do not apply to shrimp or products of shrimp harvested in a turtle friendly manner."9 As such, the United States applied the Turtle law on a shipment-by-shipment basis with an exporter's declaration that the Turtle law was complied with. The declaration was required to accompany the shipment throughout the export process. This procedure of allowing shrimp caught using TEDs and banning shrimp caught without TEDs was challenged before the United States CIT as "dangerous" and "disingenuous." The CIT rejected the United States' claims and held that the shrimp ban applies against the harvesting nation.10 Accordingly, the United States banned import of all shrimp and shrimp products from nations that do not show proof that it has adopted a sea-turtle conservation program similar to the United States. Now, in order to gain access to the

6 913 F. Supp. at 574.
9 Id. at 600.
10 Id.
United States market, shrimp exporting countries must require their shrimp industry to use TEDs at all times.

Shrimp is the most valuable fishery and the most popular seafood item in the United States market. According to a 1993 estimate, about 600 million pounds of shrimp were imported into the United States valued at roughly $2.17 billion. Moreover, shrimp imports account for approximately 80% of domestic consumption with only 20% of domestically produced shrimp.\textsuperscript{11} Out of nearly 120 nations that export shrimp, Thailand, Ecuador, Mexico, India, China, Indonesia, Bangladesh, and Honduras are the leading exporters of shrimp.\textsuperscript{12}

The member States affected by the United States' ban have predictably filed a complaint before the WTO. On October 8, 1996, India, Malaysia, Pakistan, and Thailand filed a joint complaint. They have alleged violations of articles I, XI and XIII and nullification and impairment of benefits of the GATT 1994. At its February 25th meeting, the WTO Dispute Settlement Body established a panel. Australia, Colombia, the EC Philippines, Singapore, Hong Kong, India, Guatemala, Mexico, Japan, Nigeria and Sri Lanka have reserved their third-party rights in this matter. As on June 25, 1997, the dispute was yet to be decided.\textsuperscript{13} The Panel's ruling is expected early next year.\textsuperscript{14}


\textsuperscript{12} See 913 F. Supp. at 570.

\textsuperscript{13} See Overview of the State-of-play of WTO Disputes, \texttt{<http://www.wto.org/dispute/bulletin.html>} (visited 07/08/97). The Overview is upto date as on June 25, 1997.

B. Should the Turtle Law be Allowed?

The Turtle law is a PPM identical in facts to the tuna-ban. It was seen that the GATT Panels held the tuna-ban to be illegal under the GATT. Both the bans are based on a domestic law of the United States and applied in a manner that requires the change of fishing practices of other countries. Failure to do so results in non-access to the United States markets. Both are process based bans which are proscribed under the GATT law. Considering the number of countries that are affected by this law--over one hundred and sixty nations export shrimp out of which around thirty six nations have standards comparable to the United States--the United States seeks a world wide change of fishing practices. Literally, the United States Congress may be said to have legislated for the world.

In defense of the Turtle law, a strong policy justification for the United States is that the sea-turtles are an endangered species. Unlike dolphins, sea-turtles are listed under the CITES.\textsuperscript{15} That this is worthy of conservation by trade restrictions is of no doubt. Further, the United States Turtle law strengthens and furthers the policy goals of the CITES. Consequently, the import ban under the Turtle law should not be viewed as a ban under a domestic law. However, such a claim may not be persuasive, since the shrimp ban is based on the ESA, a domestic law of the United States; it is not is based on CITES. If a measure is pursuant to the CITES, it should follow the policies and procedures prescribed therein. Similarly, a claim that the application of the Turtle law is not an unilateral action nor that it has no extrajurisdictional effect may not hold ground, since the measure seeks to reach world wide in application. Notwithstanding, as sea-turtles are listed under the CITES, and

due to the fact that they are migratory, the United States has jurisdiction to pursue conservation measures under the "shared environment" argument. The shrimp ban is such a measure; accordingly it could be justified under Article XX. Nonetheless, as the tuna-ban Panel pointed out, if the target of conservation is sea-turtles the measure must regulate sea-turtles and, not shrimp. Further, in the tuna-dolphin dispute, the process ban rested on a particular "symbiotic relationship" between tuna and dolphins; no such relationship is observed between shrimp and sea-turtles.

C. The WTO Analysis of the Shrimp Ban

1. The Like Product Issue

The preliminary question to be examined would be whether the foreign shrimp and the United states shrimp are like products. It is well established that the "likeness" of the product depends on the products themselves and not on the way it is produced or processed. In this case, the Turtle law is a PPM ban. There is no difference between foreign shrimp or a US shrimp as a product. Consequently, they would be considered "like products."

2. Is the Measure Necessary?

As a first step, the Panel would identify the measure that is the subject of the dispute. Within each of their domestic jurisdictions, all the shrimp harvesting nations must catch shrimp in a manner comparable to the United States. This requires that all foreign shrimp producers use TEDs at all times. This is the mandate of the Turtle law. Earlier, the United States allowed shipments of shrimp or its products if it was accompanied by the exporter's declaration that the said shipment of shrimp was caught using TEDs. Now, because the United States CIT expanded the scope of application of the Turtle law, shrimp can be
exported to the United States only if the harvesting nation has been certified that all of its shrimp is harvested using TEDs.

In order to justify the ban under Article XX(b) exception, it is important to show that the measure is a necessary one. This burden lies on the United States. To begin with, creating a zero trade situation between two member countries is not the least-trade restrictive method. On the contrary, it is the most trade-restrictive. Further, the WTO panel would look to see if alternative and inconsistent measures that could be reasonably employed are available. Indeed, the Turtle law itself provides alternate measures such as negotiation for the "development of bilateral or multilateral agreements" with other countries. Other measures such as labelling could also be effectively used. Moreover, the United States must prove to the satisfaction of the WTO Panel that least restrictive measures were not reasonably available to it. It could be said that exhaustion of available remedies or at least an attempt to pursue the remedies before resorting to the challenged measures would be very persuasive to the Panel. Finally, under the tuna-ban Panel analysis, the WTO Panel would likely conclude that a measure whose intended effect is predicated on change in policies of other countries could not be considered "necessary."

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18 See Second Tuna Panel, supra note 16.
3. Article XX(g)

The Panel would readily concede that turtles constitute an exhaustible natural resource and thus they would fall with the policy of conservation.¹⁹ Prior to the Appellate Body's decision in the United States Gasoline Standards case²⁰, the question the Panel would frame was whether the measure held inconsistent under Article III analysis could be considered as a measure "relating to" the conservation policy. Such an analysis borrows the legal conclusion under one set of criterion and applies it to find if the measure was in fact related to the conservation efforts. Under the current analysis, the test would have to examine whether the measure is related to the objective sought to be achieved--conservation of turtles. An examination of the provisions of the Turtle law, section 609 of the amended ESA would reveal that its stated policy is to conserve sea-turtles. It requires shrimp trawls to use TEDs, the use of which is viewed as an adequate means to conserve sea-turtles. Accordingly, the Panel would find that the measure--the use of TEDs-- is related to the policy goal.

Further, the Panel would examine to see if the measure has been "made effective in conjunction with domestic consumption or production." Again, under the tuna-ban analysis, the test was whether it was "primarily aimed at" conservation. Now, the Appellate Body has relaxed the test. It held that "made effective" refers to the measures being "operative, as "in force" or as having come into effect."²¹ Likewise, "in conjunction with" is to be read as

¹⁹ McDonald, supra note 15, at 441. The existence of an international agreement "seemed to be critical to the [tuna-ban] Panel's determination that there was a need for conservation measures." Id.


²¹ Id. at 623.
"together with" or "jointly with".\textsuperscript{22} Under this terminology, the Turtle law would pass the "made effective" and "in conjunction with" test as well.

4. The Chapeau Analysis

Though the United States' measure has satisfied the test under Article XX(g), the measure must pass the requirements set out in the chapeau of Article XX. In the United States Gasoline Standards case, the WTO Appellate Body announced that "the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade."\textsuperscript{23}

Having said that the "purpose" of the chapeau is to detect abuse or misuse of the exceptions, the Appellate Body analysis suggests that the adequacy of alternatives forms part of this analysis. Indeed, the burden lies on the United States to prove it did not have any reasonable alternatives other than a ban against nations and discriminating between domestic and imported shrimp products. The United States could argue that there is essentially no discrimination between nations that have regulatory programs comparable to the United States. The import ban applies only to nations that do not have such conservation policies; and as such, they would not be countries "where same conditions prevail." However, there are several other alternatives such as labelling and cooperative agreements, which the United States could have pursued. Further, the United States could have allowed a shipment by shipment import of shrimp or its products. Such a regulation is definitely less trade restrictive than a total ban. Moreover, the United States' Turtle law could be suspect in view

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 629.
of the fact that the domestic shrimp industry is only twenty percent of the United States' consumption of shrimp. On the one hand, this market power favors the effectiveness of the conservancy program. On the other hand, it could be suspected as protectionist in nature. It is incumbent on the United States to establish that it is not protectionist of its domestic industry.

More troubling to the Panel would be the fact that the United States, through its Turtle law, has legislated for the world. In order to export to the United States, the shrimp harvesting nations--around one hundred and thirty nations--are required to show proof that they have sea-turtle conservation programs comparable to the United States, which is to use TEDs at all times. Such an economic balkanization or isolation is detrimental to free trade interests. Moreover, it is noteworthy mention here that the United States has not applied the import ban pursuant to any international environmental agreement. Under the tuna-ban analysis, this would have been sufficient to reject the measure as GATT/WTO inconsistent. Thus, the Panel would most likely view that the Turtle law constitutes "unjustifiable discrimination" and a "disguised discrimination on international trade."

It is seen that even though the Turtle law is justifiable under Article XX(g) of the general exceptions, it is not justified under the chapeau of Article XX as a whole. In final analysis, Article XX would not excuse the United States' shrimp ban.

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D. The Rule of Reason Analysis

In this section, a rule of reason analysis of the shrimp ban is made to see if it would pass the analysis. As demonstrated above, the rule of reason is a less stringent test when compared to the GATT/WTO analysis.

1. The Proportionality Test

In the foregoing analysis, it was strongly urged that the term "necessary" should be subject to a rule of reason analysis which applies the Principle of Proportionality. Accordingly, the Panel would first determine what is the policy goal of the measure. Second, what is the degree of protection that may be needed for protection of the target. Third, it would examine if the measure employed is proportional, or disproportionate or excessive. If there are less restrictive alternatives available, then such a means should be adopted. Indeed the burden lies on the United States. The Panel would have no hesitation to concede that the conservation of sea-turtles constitute a valid environmental protection. With regard to second question, the United States must show that the sea-turtles require the degree of protection it has sought to implement: a total ban of imports of shrimp and the use of TEDs at all times. It has been estimated that over one hundred thousand sea-turtles die annually due to commercial fishing activities. The United States must be required to support such a

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25 It was estimated that annually 124,000 sea-turtles die due to shrimp fishing activities. The Earth Island Institute estimated that the United States accidentally killed around 11,000 sea-turtles without TEDs. This figure was extrapolated to calculate the average kill of all the other shrimp harvesting nations which came to 124,000 sea-turtles. Out of these, the major shrimp producers would account for a large share. The United States law has identified five species of sea-turtles as endangered or threatened. The Earth Island Institute provided the Court with opinion of scientists to claim that sea-turtles migrate in large areas. See Earth Island Institute v. Christopher, 913 F. Supp. at 559.
Indeed, as mentioned above, that sea-turtles are listed in the CITES is a strong justification. Even though the claim of the United States could be well supported, the Panel would have problem accepting the world-wide shrimp ban as proportional to the objective of conservation of the sea turtles. Particularly, shrimp exports constitute both wild and acquacultured shrimp. By banning all shrimp products regardless whether they were wild or aquacultured could be viewed as excessive and disproportionate to the policy goals. In addition, there are other methods such as labelling. Arguably, the United States could have allowed shrimp imports that were caught using TEDs with a certification from the exporter. Even though, this causes some burden in that the certificate is required to accompany the product all stages of import, it could be excused considering the objective.

More importantly, the Panel would have trouble with the issue of PPM. The above analysis of the case-law clearly indicates that the measure must deal with the products themselves. Trade restrictions for non-products are frowned upon; and they are restricted to concerns within the domestic jurisdiction. The rule of reason analysis also finds it troublesome to allow PPMs and, trade restrictions that go beyond the regulating country’s domestic jurisdiction.

Thus, even under the rule of reason analysis, the measure would be considered excessive and disproportionate.

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26 On June 17, 1997, a group of scientists called on the WTO not to support the complaint by Malaysia, India, Thailand, and Pakistan against the United States’ shrimp ban in the WTO. A Statement signed by more than 160 scientists from 24 countries was introduced supporting the US ban. See BNA INT’L TRADE REPORTER, June 25, 1997.
2. **Arbitrary Discrimination**

If the United States law had required foreign nations to harvest shrimp with TEDs with no such corresponding requirement for domestic shrimp producers, such a measure would constitute arbitrary discrimination. That is not the case. Rather, the Turtle law discriminates between shrimp caught by shrimp harvesting nations that do not have programs comparable to the United States and those that do have such programs. Such a discrimination is not justifiable unless the United States supports its measure with proper justification. It may be pointed out that there is no justifiable difference between imported and domestic shrimp as a "product." Consequently, the Panel must conclude that the United States' Turtle law operates in a manner which constitutes arbitrary discrimination.

Further, the United States has based its measure on a domestic law for non-domestic concerns. Undoubtedly, it has the right to protect the resources within its domestic jurisdiction. However, a unilateral regulation requiring foreign governments to enact regulatory programs comparable to the United States could not be justified. If the United States had acted pursuant to a multilateral agreement such as the CITES, a valid justification could be made out. Indeed, by acting unilaterally, the cause of the environment is not fully advanced. For instance, the problem of commercial extinction of sea-turtles is not unique to the United States geographical region. Nor is it a concern with geographical limitations. If the problem is global, then measures that are effective globally should be pursued. As mentioned above, a CITES listed target could be conserved under rules and procedure therein. Similarly, a large number of fish species and natural resources are affected as a result of commercial fishing bycatch. A unilateral policy choice would only cure the
symptoms rather than the disease. On the other hand, a multilateral action could be more effective in solving environmental problems.\textsuperscript{27}

3. **Disguised Restriction**

For any measure to be dismissed as a disguised restriction, the measure at issue must be protectionist in nature. Reasons other than those supplied by the regulating country must be found. In the case of the shrimp ban, it would be hard to come to such a conclusion. First, as demonstrated above, the ban was imposed pursuant to the court orders. Second, the legislative goal of the Endangered Species Act as amended is clear: protection of sea turtles from dangers of commercial fishing activities. However, the complaining parties could bring to the attention of the Panel that the United States has a huge market for shrimp. The market share of imported shrimp well exceed, by nearly sixty percent, the domestic production of shrimp which is dominated by the U.S. Gulf and South Atlantic region shrimp industry.\textsuperscript{28}

As early as in 1985, a Commission had noted the complaint of the U.S. shrimp industry

\textsuperscript{27} See Laura B. Campbell, *Comment on the Paper by Robert Reinstein, in Sustainable Development and International Law* 233 (Winfried Lang ed., 1995). With the Montreal Protocol as an illustration, Campbell argues that a multilateral approach is "more effective in solving global environmental problems." *Id.* Further, she states that rather than use unilateral trade restrictions, multilateral policy choice could benefit from a "combination of measures." *Id.* For instance, the Montreal Protocol uses a combination of measures such as "those concerning ongoing scientific evaluation of the causes of ozone depletion and the effectiveness of its environmental standards and control measures, special and differential treatment for developing countries, industrial rationalization of ozone-depleting chemical production, and financing technology transfer and technical assistance for developing countries." *Id.*

\textsuperscript{28} See Report of the Commissioners Paula Stern, Chairwoman; Susan W. Liebeler, Vice Chairman; \textit{et al.}, pursuant to a request of Ambassador William E. Brock, the U.S. Trade Representative on Oct. 5, 1984. The investigation was made "for the purpose of gathering and presenting information on the competitive, technological, and economic factors affecting the performance of the U.S. Gulf and South Atlantic shrimp industry", 1985 ITC LEXIS 144, 3 (1985).
about their injury from shrimp imports.\textsuperscript{29} Though the problem of bycatch of shrimp harvesting is noticed, the Commission failed to recognize the by-catch of marine turtles as a specific problem.\textsuperscript{30} Even though the United States could stress the urgency of the restoration of endangered species of sea-turtles and justify the shrimp ban, the Panel would likely emphasize the availability of adequate alternatives to reach the same goal and reject the United States' arguments.

In sum, the Turtle law as applied is likely to be declared as constituting a disguised restriction on trade by the United States.

\textsuperscript{29} \textit{Id.} "Member of the U.S. Gulf and South Atlantic region shrimp industry have expressed concerns about their competitive position in the U.S. market, largely in terms of competition from shrimp imports. The principal claims of the U.S. Gulf and South Atlantic region shrimp industry are as follows:
1. Shrimp harvesters in the Gulf and South Atlantic region are being injured as a result of imports;
2. Shrimp industries in foreign countries benefit from government assistance, which makes their products more competitive in the U.S. market; and
3. Access has been restricted to traditionally open foreign shrimping grounds, particularly off the coast of Mexico, thus limiting U.S. Gulf and South Atlantic region harvesters to U.S. waters and increasing the pressure on shrimping activities." \textit{Id.} at 5.

\textsuperscript{30} \textit{Id.} at 63. The Commission reports that "[t]here is a significant bycatch, or incidental catch, associated with shrimp harvesting. Most of the bycatch in the Gulf area is composed of ground fish such as Atlantic Croaker, spot, sand citrate, and sea catfish and is discarded at sea. . . . In the South Atlantic area, the bycatch consists mostly of "trash" fish, but some commercially important species such as whiting, flounder, croaker, and spot, are captured. \textit{Id.} at 66."
CHAPTER V
CONCLUSION

It is worth reiterating that global trade and protection of the environment are policy goals fundamental to the well-being of the society. This thesis maintains that the goals of free trade and environmental protection can be accommodated and reconciled within the GATT/WTO framework. However, as the above study has shown us, the tuna-ban jurisprudence has revealed an overemphasis on trade concerns exposing the need for the protection of environmental values. Further, the austere legal standards created by the tuna-ban rulings has done little help to reconcile the two policy goals. Subsequent rulings, in particular, the Appellate Body's decision in the United States Gasoline Standards case has changed the scenario for the better from a free trader's perspective, but much is left to be desired from an environmentalist perspective.

This thesis recommends that the "least-trade restrictive" interpretation of Article XX of the GATT/WTO should be relaxed. Rather, a rule of reason approach should be adopted by the WTO Dispute Settlement Body. First, this doctrine would give the WTO Panels sufficient flexibility to lower the threshold and accommodate genuine environmental measures and free trade. Second, subjecting the challenged trade measure to a rule of reason analysis would also discourage any economic protectionism or disguised restriction that may seek shelter from global competition. Disguised trade restrictions that wear the environmental mask should fail. However, environmental measures that do not
unnecessarily hinder trade should be allowed. The rule of reason would facilitate and enhance the ability of the WTO to balance the two goals. Furthermore, the rule of reason would not allow trade restrictions unrelated to the products themselves. As the shrimp ban analysis illustrates, production or process-based bans would also fail under the rule of reason doctrine. Also, this thesis maintains that multilateral solutions should be preferred over unilateral actions. Multilateral environmental instruments which reflect the commitment to protect certain environmental values would be given more effect under the rule of reason than under the existing tuna-ban analysis. Measures pursuant to the CITES, the Montreal Protocol, or the Basel Convention, for example, which are doubtful under the tuna-ban analysis would be valid under the rule of reason doctrine.

Numerous environmental and trade issues are on the horizon. Lasting solutions must be found if we are to successfully resolve the trade and environment conflicts. A comprehensive approach to integrate trade and environmental interests must be made. In this regard, multilateral forums such as the Committee on Trade and Environment of the WTO could be effectively used. While proceeding in the right direction, the ongoing 'harmonization' efforts of the Committee on Trade and Environment is rather slow. The WTO Member States should actively support and pursue the agendas of the Committee on Trade and Environment. Trade and Environment policymakers should approach the Committee with an understanding of each other's significance and role in an interdependent and global community. On its part, the Committee must involve the participation of non-governmental organizations, environmental groups and non-profit organizations. The Committee must be more transparent and be accessible to input from the public as well.
Lastly, the thesis topic posed the question, "are tuna and dolphins the same?" While the answer is obvious, this author, who was struck by the strange "symbiotic relationship" that exists between tuna and dolphins, believes that global trade and environment share a similar symbiotic relationship. It is the author's hope that everyone will approach the subject with similar view.
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