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Virginia Dailey wrote this article as a student at The Florida State University College of Law, where she earned her Juris Doctorate with highest honors in 1999. The author would like to thank Professor Frank Garcia and Sandra Upegui for their invaluable inspiration and assistance. Ms. Dailey now works in the International Law Group of Clifford Chance Limited Liability Partnership in London, England.

SUSTAINABLE DEVELOPMENT: REEVALUATING THE TRADE VS. TURTLES CONFLICT AT THE WTO

VIRGINIA DAILEY*

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"[D]evelopment can only be prosecuted in harmony with the reasonable demands of environmental protection."
- Judge Weeramantry, International Court of Justice, 1997.[1]

I. INTRODUCTION

The world is losing between 27,000 and 150,000 species per year, approximately seventy-four species every day, and three species every hour.[2] Up to seventy percent of the world's fisheries are depleted or under stress after years of over-exploitation.[3] "For centuries, man has harvested fish from the world's oceans, for both business and pleasure, with relentless fervor and a blatant disregard for the incidental killing of marine mammals."[4] The health of the marine environment directly "affects the health of human beings as well as the health of creatures in the sea."[5] In an attempt to respond to this brewing environmental crisis, the United States has enacted a series of domestic legislation which aims to protect the environment and environmental resources.[6]

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1. Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Sept. 25, 1997, 37 I.L.M. 162, 206 (1998).

2. *See* DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 15 (Foundation Press 1998) [hereinafter HUNTER, SALZMAN & ZAELKE].

3. *See id.* at 18. Fish catch per person has steadily declined for more than ten years. *See id.* The eighty-eight million tons of marine animals caught in 1988 is more than the combined production of beef and mutton on the world's rangelands. *See id. See also* UNITED NATIONS FOOD AND AGRICULTURAL ORG., THE STATE OF WORLD FISHERIES AND AQUACULTURE 39-40 (1996); Ann Platt McGinn, *Promoting Sustainable Fisheries*, in STATE OF THE WORLD 1998: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY 59, 60-63 (Linda Starke ed., 1998).

4. Julie B. Master, Note, *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles Are "Sacrificed on the Altar of Free Trade,"* 12 TEMP. INT'L & COMP. L.J. 423, 424 (1998)(noting that commercial fishermen invariably kill millions of creatures incidentally caught using inefficient fishing methods).

5. *Id.* at 424 (quoting James C. Card, *Implementing the United Nations Convention on the Law of the Sea: A Coast Guard Perspective*, 7 GEO. INT'L ENVTL. L. REV. 725, 727 (1995)).

6. *See e.g.*, Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (1994 and Supp. 1997); International Dolphin Consumer Protection Act, Pub. L. No. 105-42, 111 Stat. 1122 (passed on 15 August 1997 and codified as amending the Marine Mammal Protection Act at 16 U.S.C. §§ 952-953, 1362-1365, 1411-1418 (1994 and Supp. III 1997)); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994 and Supp. III 1997).

However, to date, every United States environmental law that has been challenged under the General Agreements on Tariffs and Trade[7] (GATT) has been struck down. In October 1998, for example, the World Trade Organization[8] (WTO) Appellate Body[9] held that a United States environmental statute, which regulated the shrimping industry in order to protect endangered sea turtles, violated the GATT and was not acceptable under the GATT's environmental exceptions.[10]

The trade policies supported by the GATT have increasingly come into conflict with the growing field of international environmental law. The cases reflect a trend favoring trade and economic issues over environmental values.[11] Although a wealth of scholarly attention has been devoted to this conflict,[12] this article will

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7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

8. Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO Agreement].

9. The Appellate Body is the highest appellate review panel in the Dispute Settlement Body (i.e., court system) of the World Trade Organization. *See* Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1226, art. 17 [hereinafter Dispute Settlement Understanding].

10. *See* Appellate Body Report on United States Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999) [hereinafter Shrimp II].

11. *See* Master, *supra* note 4, at 424.

12. *See generally* Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debate*, 19 U. PA. J. INT'L ECON. L. 391 (1998); Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32(5) J. WORLD TRADE 73 (1998); Andrew L. Strauss, *From GATTZILLA to The Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769 (1998); Joel P. Trachtman, *"Trade and ... Problems," Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998); Mark Edward Foster, *Trade and Environment: Making Room for Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393 (1998); Jill Nissen, *Achieving a Balance Between Trade and the Environment: The Need to Amend the WTO/GATT to Include Multilateral Environmental Agreements*, 28 L. & POL'Y INT'L BUS. 901 (1997); Richard J. McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29 (1997); Alison Raina Ferrante, *The Dolphin/Tuna Controversy and Environmental Issues: Will the WTO's "Arbitration Court" and the ICJ's Chamber for Environmental Matters Assist the U.S. and the World in Furthering Environmental Goals?*, 5 J. TRANSNAT'L L. & POL'Y 279 (1996); Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341 (1996); Robert Howse & Michael J. Trebilcock, *The Fair Trade - Free Trade Debate: Trade, Labor and the Environment*, 16 INT'L REV. L. & ECON. 61 (1996); Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751 (1994); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185 (1994); Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE. L. REV. 1407 (1992); Thomas Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment - Irreconcilable Conflict?*, 86 AM. J. INT'L

make a modest attempt to address the validity and relative strengths of trade values and environmental values in the WTO, and to identify a way for both to coexist in the institutional framework of the WTO.

This paper will, in Part II, address the background of the linkages between trade and environmental values. Next, Part III will discuss the normative framework underlying the conflict between international trade law and international environmental law. Part IV will discuss the most recent Appellate Body decision to grapple with this issue; and Part V will suggest potential resolutions to the debate. This paper concludes that the trade-versus-environment conflict can and should be resolved using the principle of sustainable development,[13] in order to put trade and environmental values on a more level playing field. This paper suggests two methods to incorporate the principle of sustainable development: 1) to incorporate sustainable development, as a rule of customary international law, in the balancing test of Article XX's chapeau as an interpretive principle; or 2) to replace the "least trade restrictive measure" standard with a standard more consistent with the principle of sustainable development.

II. BACKGROUND OF "TRADE VS. ENVIRONMENT" LINKAGES

A. Trade

During the American "Great Depression," the United States Congress enacted the Smoot-Hawley Tariff Act of 1930,[14] dramatically raising tariffs on imports, in order to protect U.S. jobs in

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L. 700 (1992); Eric L. Richards and Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295 (Spring 2000); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (December 1999); Petros C. Mavroidis, *Essay: Dispute Settlement Procedures and Mechanisms*, 16 ARIZ. J. INT'L & COMP. L. 255 (Winter 1999); Carol J. Miller and Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73 (Fall 1999); Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (Fall 1999).

13. The principle of sustainable development includes four primary ideas: (1) the obligation to consider the needs of present and future generations; (2) the obligation to accept limits on the use and exploitation of natural resources for environmental protection reasons; (3) the obligation to apply equity in the allocation or rights and obligations; and (4) to integrate all aspects of environment and development. *See infra* notes 86-89 and related text for more detail.

14. Pub. L. No. 71-361, 46 Stat. 590 (1930).

the suffering American economy.[15] The higher tariffs prompted retaliatory tariff increases amongst the United States' trading partners, and ultimately resulted in a contraction in international trade.[16] The reduction in international trade exacerbated the world-wide economic depression and is frequently cited as a "major contributing cause" of World War II.[17] Following the war, states sought to create a global trade regime which would prevent such mutually destructive tariffs and increase international trading.[18] The General Agreement on Tariffs and Trade (GATT 1947) was thus created in 1947 to expand free market global trade.[19]

Fifty years later, the World Trade Organization was created as a successor organization to the GATT 1947.[20] The GATT Contracting Parties accomplished in 1995, following seven years of negotiation, what the negotiations with the proposed International Trade Organization (ITO) were never able to accomplish fifty years earlier in 1948: the creation of an international institution to regulate the conduct of international trade.[21] One hundred and thirty six nations are Members of the WTO and Contracting Parties to the GATT (GATT 1994 or GATT).[22] GATT 1994 and its related agreements are estimated to govern ninety percent of global trade.[23]

The WTO provides a forum for the negotiation and resolution of disputes concerning international trade with the goal of ever

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15. *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 243-44 (1994) [hereinafter ESTY]; *see also* Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 776 (1998).

16. *See* Strauss, *supra* note 15, at 776, *citing* JOHN JACKSON, WORLD TRADE AND THE LAW OF THE GATT 1-57 (1996).

17. Strauss, *supra* note 15, at 776, *citing* John Linarelli, *Peace Building*, 24 DENV. J. INT'L L. & POL'Y 253, 266-67 (1996).

18. *See* NIGEL GRIMWADE, INTERNATIONAL TRADE: NEW PATTERNS OF TRADE, PRODUCTION AND INVESTMENT 30 (1998), *discussed in* Strauss, *supra* note 15, at 777.

19. *See* Strauss, *supra* note 15, at 776. The GATT was one of a trilogy of institutions, known as the "Bretton Woods" institutions, created to establish this new liberal international economic order. The other two institutions were the International Monetary Fund (IMF) and the World Bank. *See id.* at 777 n.20. Precursor trade agreements to the GATT have been traced back as far as 1417. *See* John H. Jackson, *International Economic Law*, *in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 149 (R. Bernhardt ed., 1985).

20. *See* RAJ BHALA, INTERNATIONAL TRADE LAW CASES AND MATERIALS 85 (Michie 1996) [hereinafter BHALA].

21. *See id.* at 86. The ITO was the institution proposed to provide the institutional framework for the GATT in 1947. *See id.* However, because of United States opposition, the ITO Charter never went into effect. *See id.* Thus, the GATT existed for nearly fifty years without a formal institutional structure. *See id.*

22. *See* <http://www.wto.org/> (visited April 11, 2000) for general facts and information about the World Trade Organization, including the recent Panel Report.

23. *See* BHALA, *supra* note 20, at 85.

expanding international trade to improve global welfare by increasing the efficiency of international trade.[24] The three main principles of the GATT system are: most-favored-nation treatment; national treatment; and the prohibition of quantitative restrictions on trade.[25] The most-favored-nation treatment principle, found in Article I, requires a Member to automatically, unconditionally extend the best trade treatment that it extends to any country to every other Member,[26] prohibiting discrimination in trading between and among foreign nations by requiring Members to treat imported like products the same, regardless of the products' country of origin.[27] Second, the national treatment principle, found in Article III, prohibits discrimination between imported and domestically produced goods in establishing or applying domestic regulations.[28] Third, the GATT prohibits quantitative restrictions on imports.[29] The prohibition on quantitative restrictions, found in Article XI, essentially prohibits quotas and embargoes.[30]

Article XX allows states to violate their GATT obligations in pursuit of certain enumerated goals if the regulatory measures meet the tests set out in Article XX.[31] Sub-paragraphs (b) and (g) specifically permit regulatory measures which are "necessary to protect human, animal, or plant life or health," or "relating to the conservation of exhaustible natural resources . . . "[32] The three seminal cases interpreting Article XX have interpreted it in a narrow fashion, and have not yet upheld a measure.[33] The most recent decision seems to run counter to the academic and public calls for a broader reading of Article XX, which are based on the evolution of international environmental law and growing public dissatisfaction with the WTO.

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24. *See id.* at 90.

25. *See* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 1182.

26. *See* Final Act, *supra* note 7, art. I; *see also* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 1182.

27. *See* Strauss, *supra* note 15, at 777.

28. *See* Final Act, *supra* note 7, art. III; *see also* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 1182; Strauss, *supra* note 13, at 778.

29. *See* Final Act, *supra* note 7, art. XI; *see also* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 1182.

30. *See* Final Act, *supra* note 7, art. XI; *see also* Strauss, *supra* note 15, at 778.

31. *See* Final Act, *supra* note 7, art. XX.

32. *See id.*, art. XX(b), (g).

33. *See infra*, Section II.C.

B. Environment

Sovereign nations have a well-established right under customary international law to exploit resources and promulgate environmental regulations within their borders.[34] Customary international law recognizes a limit on that sovereignty when a state's actions cause transboundary harms.[35] Consequently, sovereign rights to "exploit resources and promulgate environmental regulations within a nation" are not absolute.[36] The growth of international environmental law demonstrates that nations recognize that "domestic actions contribute to global environmental problems."[37]

Although mankind's obligations to protect the environment have historically been recognized by some cultures for many centuries,[38] the Western notion of sovereignty, fueled by the industrialization movement, rejected such obligations in international law. However, in the last twenty years, the principle of sustainable development has become accepted as a rule of customary international law.[39] The rule of sustainable development requires that development can only be pursued "with due regard to environmental protection;"[40] in essence, that neither trade values nor environmental values can trump the other, and that each must be pursued with deference to the other. The multilateral consensus supporting the rule of

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34. *See* Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M. 874 [hereinafter Rio Declaration]; Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416 [hereinafter Stockholm Declaration]; Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1963); R.M. M'Gonigle, *"Developing Sustainability" and the Emerging Norms of International Environmental Law: The Case of Land-Based Marine Pollution Control*, 28 CANADIAN Y.B. INT'L L. 169, 177-81 (1990).

35. *See* Rio Declaration, *supra* note 34, at principle 2. This principle has been expressed in Latin as follows: *"maxim sic utere tuo ut alienum non laedas."* The obligation to refrain from injuring other states is recognized as a fundamental norm of international economic law. *See* John H. Jackson, *International Economic Law*, 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 158 (R. Bernhardt, ed., 1985); *see also* Stockholm Declaration, *supra* note 34, at principle 21; Corfu Channel Case (U.S. v. Alb.), 1949 I.C.J. Reports 4, 22 (Apr. 9, 1949); Trail Smelter Arbitration, III U.N.R.I.L.A. 1907 (1941), 35 AM. J. INT'L L. 684, 699 (noting that a state was held internationally responsible for causing transboundary harm).

36. Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 349 (1996).

37. *Id.*

38. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 690 (noting that the Maori viewed the ocean as a "common heritage").

39. *See* Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Sept. 25, 1997, 37 I.L.M. 162, 206-07 (1998). The International Court of Justice identified three factors that led to the crystallization of the customary rule of sustainable development: treaties, other international legal documents, and the behavior of states and international institutions. *See id.*

40. *See id.* at 204-17.

sustainable development has been broad and consistent for the last twenty years.[41] The state practice and opinio juris supporting the principle of sustainable development are sufficiently strong to create an international legal obligation on the part of nations to exploit their resources in a manner that is sustainable.[42]

1. *State Practice and Opinio Juris: Supporting Sustainable Development as Customary International Law*

Together with the multilateral environmental agreements (MEA's) mentioned below, several actions of states, international legal documents, judicial decisions, and writings of scholars acknowledge and support the customary international law of sustainable development.[43] Several of the international legal documents mentioned below not only demonstrate state practice supporting sustainable development as customary international law, but also demonstrate that a large number of states believe they are legally obligated to follow this principle of customary international law. These documents state the principle of sustainable development as a binding legal obligation under international law.

a. State Actions

Recently, Canada boarded and seized a Spanish fishing vessel on the high seas near Canada because of Spanish vessels' repeated practices of over-fishing the turbot fisheries of Nova Scotia in an unsustainable manner.[44] Although Canada's authority to forcibly

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41. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 224-25 (discussing the creation of customary international law, which depends on state practice, i.e., observable regularities of behavior, and opinio juris). Acceptance of the behavioral regularities as law by states, has been completed with regard to sustainable development. *See id.*

42. *See id.*

43. The existence of a principle of customary international law is generally proven by demonstrating four following elements, in accordance with Article 38 of the Statute of the International Court of Justice:

(a) state practice and *opinio juris* (evidence that states feel obligated to behave in accordance with the principle);

(b) international legal documents, whether general or particular, establishing rules expressly recognized by the contesting states;

(c) the general principles of law recognized by civilized nations, i.e. principles from domestic law; and

(d) judicial decisions and writings of scholars.

Article 38 (1), Statute of the International Court of Justice. This section organises the evidence supporting the principle of sustainable development as customary international law consistent with the elements in Article 38.

44. *See* Peter G.G. Davies, *EC/Canadian Fisheries Dispute in the Northwest Atlantic*, 44 INT'L & COMP. L.Q. 927, 933-38 (1995) (noting that this incident provoked major confrontation). Spain challenged Canada's ability to forcibly arrest its fishing vessel, but did not challenge the

detain the Spanish vessel had been contested, the customary international law of sustainable development was not challenged by Spain.[45] Moreover, not only does most of the United States' recently-passed environmental legislation require the sustainable use of natural resources, but international institutions, such as the World Bank Group, Asian Development Bank, and the ESSD, are also using the rule of sustainable development in their operations.[46] For example, the World Bank requires that projects seeking financial assistance be consistent with the rule of sustainable development.[47]

Further, the existence of the growing number of MEA's is itself evidence of states taking steps consistent with the principle of sustainable development. Actions of a state taken in negotiating, signing, ratifying and implementing MEA's are evidence that states feel obligated to act in accordance with the principle of sustainable development.

b. Multilateral Environmental Agreements

Since the beginning of last century, environmental concerns have expanded from public health and safety to include a much wider range of global environmental concerns.[48] Multilateral environmental agreements (MEA's) have proliferated widely. One of the most prominent MEA's is the Convention on the International Trade in Endangered Species of Flora and Fauna (CITES),[49] with over 100 member nations.[50] CITES was created in 1975 to protect threatened or endangered species of flora and fauna from over-exploitation through international trade.[51] It is enforced by allowing members to impose international trade restrictions on trade in the endangered species.[52]

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concept of sustainable development as a rule of customary international law. *See id.* The International Court of Justice, however, declared that it had no jurisdiction to adjudicate the dispute. *See* Case Concerning Fisheries Jurisdiction (Spain v. Can.), No. 96 (Dec. 4, 1998) (last visited Mar. 11, 2000) <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>.

45. *See id.*

46. *See generally* HUNTER, SALZMAN, & ZAELKE, *supra* note 2.

47. *See id.* at 482. The World Bank will not finance any project that is inconsistent with the borrower's international environmental obligations. *See id.*

48. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE L. 37, 37 (1991).

49. Convention on the International Trade in Endangered Species of Wild Flora and Fauna, July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

50. *See* William C. Burns, *CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal*, 8 DICK. J. INT'L L. 203, 204 (1990).

51. *See* CITES, *supra* note 49, at preamble; *see also* Fletcher, *supra* note 36, at 348.

52. *See* Burns, *supra* note 50, at 203.

The Montreal Protocol,[53] signed in 1987, regulates trade in ozone-depleting substances, products containing ozone-depleting substances, and products produced using ozone-depleting substances.[54] The goal of the Montreal Protocol is to reduce the production and use of ozone-depleting substances, particularly chlorofluorocarbons (CFCs).[55] This MEA prohibits signatories from trading any ozone-depleting substances and all related technologies with non-signatories.[56] Subsequent amendments to the Protocol require the complete termination of CFC production by 1996 with phase-outs of CFC use in developed countries in 2000 and in developing countries in 2010.[57]

The Basel Convention[58] was adopted in 1989 to restrict the transboundary movement of hazardous wastes among parties, and to prohibit the export of hazardous wastes to non-member nations.[59] The Basel Convention restricts trade in wastes, by requiring permission from both importing and exporting nations prior to transboundary shipment.[60] The Basel Convention also imposes a complete ban on waste trade with non-signatory nations.[61]

In addition, the Convention on Biological Diversity reaffirms that states are obligated to use their biological resources in a sustainable manner.[62] Furthermore, the Law of the Sea Convention requires the sustainable use of marine resources.[63]

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53. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

54. *See* ESTY, *supra* note 15, at 279-80.

55. *See* Montreal Protocol, *supra* note 53, at art. 2, annex A.

56. *See id.* at art. 4. The protocol also prohibits signatories from providing economic assistance to non-signatories if such assistance could facilitate the production of ozone-depleting substances. *See id.*

57. *See* ESTY, *supra* note 15, at 279-80.

58. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (entered into force May 5, 1992) [hereinafter Basel Convention].

59. *See* ESTY, *supra* note 15, at 280.

60. *See* Basel Convention, *supra* note 58, at art. 4, §1. The importing nation must certify that it will provide for "environmentally sound management of hazardous wastes." *Id.* at art. 4, §2(b). The exporting country must ensure that wastes to be exported will be "managed in an environmentally sound manner." *Id.* at art. 4, §8.

61. *Id.* at art. 4, §5.

62. *See* United Nations Conference on Environment and Development: Convention on Biological Diversity, Rio de Janeiro, Jun. 5, 1992, 31 I.L.M. 818, arts. 1, 3, 10.

63. *See* United Nations Convention on the Law of the Sea, 21 I.L.M. 1245, preamble, art. 192, 194 (signed Dec. 10, 1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. *See also* Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement), 34 I.L.M. 1542, preamble, art. 2, 5 (1995) (addressing issues such as the inadequate management of high seas

c. Other International Legal Documents

The foundation of the rule of sustainable development was laid in 1972 in the Stockholm Declaration of the United Nations Conference on the Human Environment.[64] The Stockholm Declaration acknowledged that the people of the world urgently desired to protect and improve the human environment, and that the defense and improvement of the environment for present and future generations had become an imperative goal for mankind.[65] Principle 21 specifically addresses economic development: "States . . . have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[66]

Principle 13 provides that development should be compatible with the need to protect and improve the environment for the world's benefit.[67] Principle 1 acknowledged mankind's responsibility to protect and improve the environment for present and future generations.[68] Principle 2 requires the safeguarding of the earth's natural resources for the benefit of present and future generations.[69] Principle 3, moreover, requires the earth's capacity to produce vital renewable resources to be maintained, restored, or improved.[70] Principles 1, 2, 3 and 13 state, in essence, the principle of sustainable development.

Between 1972 and 1992, the concept of sustainable development was generally treated as an evolving international legal norm. In 1974, the Charter of Economic Rights and Duties of States recognized the principle of sustainable development established in the Stockholm Declaration.[71] In 1982, the United Nations General

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fisheries, the over-utilization of fishing resources, and the inadequate regulation of fishing vessels).

64. *See* Stockholm Declaration, *supra* note 34.

65. *See id.*, at 1416.

66. *Id.* at 1420. This Principle has been expressly recognized as having evolved into customary international law. *See also* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 229.

67. *See* Stockholm Declaration, *supra* note 34, at 1419.

68. *See id.* at 1417-18.

69. *See id.* at 1418.

70. *See id.*

71. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), 14 I.L.M. 251, art. 30 (commenting that all states were allowed to establish their own environmental policies, so no international minimum standard was imposed). The Charter of Economic Rights treated sustainable development as "evolving international environmental norms." *See id. See also* Draft Principles of Conduct in the Field of

Assembly approved a Resolution affirming the urgency of maintaining the stability and quality of nature and of conserving natural resources.[72] The World Charter for Nature was written in more mandatory language, moving the obligation of sustainable development closer to a legal obligation rather than a principle.[73] The 1987 United States Restatement of Foreign Relations Law acknowledges, without defining, the existence of "generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment."[74]

The second major breakthrough in the evolution of sustainable development into customary law was the Rio Declaration on Environment and Development in 1992.[75] The Rio Declaration expressly incorporated Principle 21 of the Stockholm Declaration into its Principle 2, and provided that development could not be considered in isolation from environmental concerns. The Rio Declaration crystallized sustainable development into customary law; its Principles enumerate the elements of the customary rule of sustainable development. Since the Rio Declaration, other international legal documents have continued to affirm the customary rule of sustainable development.[76]

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the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, U.N. Doc. UNEP/IG12/2 (1978), 17 I.L.M. 1097 (adopted by U.N. Environment Programme Governing Council 1978), Principles 1, 3(2) (requiring states to cooperate in order to conserve a broad range of natural resources).

72. *See* World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7, 22 I.L.M. 455, 458 (1982). In 1987, the United Nations General Assembly reaffirmed its commitment to the customary international law of sustainable development in its Resolution on Environmental Perspective to the Year 2000 and Beyond. *See* Environment Perspective to the Year 2000 and Beyond, U.N. Doc. A/RES/42/186 (1987) (encouraging national action and international cooperation in achieving environmentally sound development).

73. *See* World Charter for Nature, *supra* note 72, at 458. Principle 1 states that nature "shall be respected and its essential processes shall not be impaired." *Id.* Principle 2 notes that population levels must be maintained sufficient so that all species survive over the long term. *See id.* Principle 4 requires the achievement and maintenance of the "optimum sustainable productivity" of ecosystems and natural resources. *See id.* Principles 7 and 8 require the assessment of the environmental effects of all economic development activities and of the long-term capacity of natural systems to survive the development activities. *See id. See also* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT EXPERTS GROUP ON ENVIRONMENTAL LAW, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1987) (establishing the first international legal document to include the term "sustainable development" in its title).

74. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §601(1)(a) (1987).

75. *See* Rio Declaration, *supra* note 34, at principle 2.

76. The UNCED's Agenda 21 specifically adopts the concept of sustainable development as a principle of international law. *See* Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part I*, 12 INT'L J. OF MARINE & COASTAL L. 307, 315-16 (1997). For example, Chapter 17 requires sustainable

d. Judicial Decisions and Writings of Scholarly Publicists

Two recent opinions of the International Court of Justice have recognized sustainable development as part of customary international law. In 1997, the Court expressly recognized sustainable development as a rule of customary international law, defined as the "need to reconcile economic development with protection of the environment."[77] Judge Weeramantry, of Sri Lanka, discussed the concept of sustainable development at length, stating that "development can only be prosecuted in harmony with the reasonable demands of environmental protection."[78] In fact, Judge Weeramantry noted that, for many cultures, sustainable development has been a governing principle for many centuries.[79] In 1995, the Court referred to the Rio Declaration, a World Bank Operational Directive of 1989, and the U.N.E.P. Draft Principles of Conduct as part of its discussion that sustainable development was part of customary international law.[80]

Many scholars have recognized that sustainable development is part of customary international law because of its broad support and frequent endorsement in practice.[81] Professor Birnie argues that the

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use of living marine resources and recognizes that the marine environment forms an integrated whole, which must be regulated as a whole system. *See id.* The Fisheries and Agriculture Organization (FAO) Code of Conduct for Responsible Fisheries adopts sustainable development as a general governing principle. *See* Code of Conduct for Responsible Fisheries, FAO Rome Conference, 31 Oct. 1995, art. 6 (last visited Mar. 12, 2000) <http://www.fao.org/fi/agreem/codecond/ficonde.asp#6>.

77. *See* Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Sept. 25, 1997, 37 I.L.M. 162, 200-1, ¶140 (1998). *See also* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 237-42.

78. Gabcikvo-Nagymaros Project, 37 I.L.M. at 206, ¶c.

79. Judge Weeramantry described the tribal culture in Sri Lanka, in which each member of the tribe had a duty to preserve the surrounding irrigation canals for future generations. *See id.* at 204-17.

80. *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of Court's Judgment of 20 Dec. 1974 in the Nuclear Tests, (N.Z. v. Fr.), 1995 I.C.J. 288 (Sep. 22, 1995). *See also* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 145-49.

81. *See* Birnie, *supra* note 76, at 311; *see also* Gary P. Sampson, *Trade, Environment, and the WTO: A Framework for Moving Forward* (Overseas Development Council 1999) (last visited Jan. 9, 2000) <http://www.odc.org/commentary/sampson2.html>; International Institute for Sustainable Development, *Six Easy Pieces: Five Things the WTO Should Do - And One It Should Not* (1999) (last visited Mar. 25, 1999) <http://iisd1.iisd.ca/trade/wto/sep1.htm>; Aaron Cosbey, *Chapter XXX - Environmental Management and International Trade,* Environmental Management (1997) (last visited Jan. 9, 2000) <http://iisd1.iisd.ca/trade/envman_trade.htm>; Konrad von Moltke, *International Environmental Management, Trade Regimes and Sustainability* (International Institute for Sustainable Development 1996) 49 [hereinafter Moltke]; Hector Rogelio Torres, *Environmental Rent: Cooperation and Competition in the Multilateral Trading System* (International Institute for Sustainable Development 1995) (last visited Jan. 9, 2000) <http://iisd1.iisd.ca/trade/knenvrent.htm>; Nevin Shaw & Aaron Cosbey, *GATT, the WTO and Sustainable Development: Positioning the Work Program on Trade and Environment*

U.N. Convention on the Law of the Sea reflects the customary law of sustainable development by establishing a legal order for the seas which promotes the conservation and efficient use of living resources.[82] Peter D. Sutherland, former Director-General of the GATT, recognizes that because it has become a customary rule of law, sustainable development must be addressed by the GATT.[83]

2. Sustainable Development: The Overarching Principle of the WTO Agreement

In 1994, the members of the World Trade Organization (WTO) signed the WTO Agreement,[84] also known as the Marrakesh Agreement, creating the WTO and incorporating the GATT and all other related treaties. The Preamble to the WTO Agreement provides an express obligation for every WTO Member to conduct its international trade relations in a manner consistent with the principle of sustainable development. The Preamble states that Members should allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[85]

3. The Scope of the Customary International Law of Sustainable Development

Although the customary law of sustainable development has an impressive documentary pedigree, the scope of the doctrine is still in controversy.[86] The first authoritative definition of the concept stems

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(International Institute for Sustainable Development 1995) (last visited Jan. 9, 2000) <http://iisd1.iisd.ca/trade/shaw.html>.

82. *See* Birnie, *supra* note 76, at 314.

83. *See* Peter D. Sutherland, *Exploring Sustainable Development: Three Scenarios for the Planet in 2050* (1998) (last visited Jan. 9, 2000) <http://www.odc.org/commentary/susconf.html>. However, Mr. Sutherland feels that the WTO is not institutionally competent to resolve these issues. *See* Peter D. Sutherland, *Managing the International Economy in an Age of Globalization* (1998) (last visited Jan. 9, 2000) <http://www.odc.org/commentary/pdsjacobsson.html>.

84. WTO Agreement, *supra* note 8.

85. *Id.*, at Preamble.

86. *See* Sanford E. Gaines, *Rethinking Environmental Protection for the Twenty-First Century: Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231 (1997) (stating that the sustainable development concept is very hard to define and unworkably vague); *see also* Birnie, *supra* note 76, at 311 (discussing ambiguity regarding the status and meaning of the above principles, and controversy regarding their contemporary application and the interpretation of the instruments espousing them).

from the Brundtland Report of the World Commission on Environment and Development (WCED):

> (a) development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it 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 idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[87]

This paper acknowledges the continuing debate over the scope of the provision, and adopts what appears to be the consensus view. Scholars attempting to define the principle have reached a consensus regarding four core principles embedded within the rule of sustainable development.[88] The consensus view, which is the definition used in this paper, is that sustainable development includes the obligations to: a) consider the needs of present and future generations; b) accept limits on the use and exploitation of natural resources for environmental protection reasons; c) apply equity in the allocation of rights and obligations; and d) to integrate all aspects of environment and development.[89]

The first core principle of the rule of sustainable development, known as the principle of intergenerational equity, is the preservation of natural resources for the benefit of present and future

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87. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (Oxford Univ. Press, 1987), *reprinted in* Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 58 (W. Lang, ed., 1995)[hereinafter Sands].

88. *See id.* In addition, the 1990 Fourth Lomé Convention includes all four principles in one Article: "In the framework of this Convention, the protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the ACP states concerned shall strive to achieve with Community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations." Fourth Lomé Convention, art. 4 (1990), 29 I.L.M. 783, *reprinted in* Sands, *supra* note 87, at 58. *But see* MOLTKE, *supra* note 81, at 61 (identifying seven principles of sustainable development: efficiency and cost internalizaton; equity; environmental integrity; subsidiarity; international cooperation; science and precaution; and openness).

89. *See* Sands, *supra* note 87, at 62.

generations.[90] This principle has been found in the Rio Declaration (Principle 4), the Climate Change Convention (Article 3(1)), and the Biodiversity Convention (Preamble).[91] The second core idea, known as the principle of sustainable use, requires exploitation of natural resources to be limited to levels which are "sustainable" or "optimal," in essence, prohibiting the exploitation of species to the extent that the species is depleted or exhausted.[92] This principle has been incorporated into several economic agreements.[93]

The third core idea, known as the principle of equitable use, implies that any one state's use of natural resources should take into account the needs of other states.[94] This principle introduces the flexible doctrine of equity into the mix when balancing the developmental and environmental needs of present and future generations, and is reflected in the principle of common but differentiated responsibility.[95] This principle gives consideration to the differing characteristics of states, including wealth, level of development, economic stability, availability of natural resources, and level of technology.

The principle of integration, which is the final core component of sustainable development, requires that environmental considerations be integrated into economic and other development plans and decision-making processes.[96] This component is found in the Rio Declaration (Principles 2 and 4), the Climate Change Convention (Preamble and Article 3(4)), and the Biodiversity Convention (Articles 6(b) and 10(a)).[97] The WTO Agreement Preamble evidences this integration component, combining trade and environment.[98] The integration component is the most important to this inquiry, together with the principle of intergenerational equity, because these two principles serve as the basis for requiring trade agreements to consider the environmental effects of trade.

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90. *See id.* at 59.

91. *See id.*

92. *See id.* at 60.

93. *See id.* Article 1(1) of the European Bank of Reconstruction and Development Agreement (EBRD) requires the EBRD to promote "environmentally sound and sustainable development" in all of its activities. Article 4 of the 1990 Fourth Lomé Convention requires "a sustainable balance between [the parties'] economic objectives, the rational management of the environment and the enhancement of natural and human resources." Article G(2) of the 1992 E.C. Maastricht Treaty establishes the objective of the promotion of "sustainable and non-inflationary growth respecting the environment."

94. *See id.* at 61.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See generally* WTO Agreement, *supra* note 8.

C. *Environmental Jurisprudence Under the GATT*

Until the 1990's, the areas of international trade law and international environmental law developed independently of each other. However, tensions arose between the two as early as the 1870's.[99] The conflicts between trade and environment generally arise from differing priorities and goals.[100] Environmentalists want to use international trade law as a tool to ensure compliance with MEAs.[101] They see trade sanctions as "the least destructive method of enforcement" of the MEAs.[102] In contrast, proponents of free trade are not willing to jeopardize the advantages of free trade for environmental goals, because they fear environmental measures may cloak protectionist motives.[103]

The three relevant cases that have been decided under the GATT are the Tuna / Dolphin Dispute, the Reformulated Gasoline Dispute, and the Shrimp / Turtle Dispute. This section will briefly introduce the facts of each case.[104] These cases clearly favor trade and economic issues over environmental issues.[105]

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99. *See* Fletcher, *supra* note 36, at 346. *See also* Charnovitz, *supra* note 48, at 38-39 (noting that trade restrictions designed to protect plant and animal health caused major commercial disputes). Trade restrictions were first used to protect human health in 1906 under a Swiss treaty adopted to end the production and importation of white phosphorous matches. *See id.* at 39.

100. *See* Fletcher, *supra* note 36, at 349.

101. *See id.*

102. *Id.* at 349-50.

103. *See id.* at 350. "The principle that trade sanctions should never be a legally permissible response to the environmental and labor policies of other countries has become an article of faith among most free traders, or at least the beginning point for any discussion of the relationship between GATT rules and global environmental and labour rights concerns." Howse & Trebilcock, *supra* note 12, at 62.

104. The legal analysis in each case will be discussed in more depth below. *See infra*, Section V. Each dispute involved two cases. The Tuna / Dolphin Dispute includes two different panel reports [hereinafter Tuna I and Tuna II). *See* 30 I.L.M. 1594 (1991); 33 I.L.M. 839 (1994). The Reformulated Gasoline Dispute includes a panel report [hereinafter Gasoline I] and an Appellate Body report [hereinafter Gasoline II]. *See* 35 I.L.M. 274 (1996); 35 I.L.M. 603 (1996). The Shrimp / Turtle Dispute also includes a panel report [hereinafter Shrimp I] and an Appellate Body report [hereinafter Shrimp II]. *See* 37 I.L.M. 832 (1998); *supra* note 10, at 118. Shrimp II was issued October 12, 1998 by the Appellate Body, and is thus the most recent decision relating to trade-environment conflicts. *See* Shrimp II, *supra* note 10, at 118.

105. *See* Master, *supra* note 4, at 430. The cases focus on whether the environmental laws are trade-friendly, without regard for whether the laws are appropriate for the environment. *See* Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 239 (1997). One author has suggested that it is "doubtful that any single country's efforts to protect the environment will be upheld by the international trade regime." *Id.*, at 430. *But see* Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 702 (1992)(stating that the GATT is not hostile to conservation measures). Allowing an importing state to unilaterally impose its domestic standards through market access restrictions could lead to chaos, rather than greater environmental protection.

1. The Tuna / Dolphin Dispute

The Tuna / Dolphin dispute centered on the United States' efforts to protect dolphins from being accidentally caught and killed by tuna fishermen. Dolphins were being killed because fishermen knew that schools of tuna always accompanied dolphins.[106] Thus, the fishermen would target dolphins with their nets -- hoping to catch nearby tuna.[107] Dolphins caught in the nets died. The United States legislation prohibited such conduct, by domestic as well as foreign tuna fishermen, and resulted in a much lower dolphin catch.[108] The Tuna I Panel held that the measures violated the GATT because the regulations were not the least trade-restrictive means available to the United States.[109]

Tuna I focused on the failure of the United States to show that no other GATT-consistent measures were reasonably available, especially the negotiation of international cooperative arrangements to protect dolphins.[110] The GATT panel applied the least trade-restrictive means test (adopted in the Thai Cigarettes case).[111] The Panel also noted the United States' failure to exhaust the avenues for a negotiated cooperative solution that would have avoided trade disruption.[112]

Tuna II involved a challenge to the secondary tuna embargo, whereby the United States refused to accept imports from countries which accepted tuna imports directly prohibited in the United States.[113] Significantly, Tuna II held that the United States must use the least trade restrictive means available to achieve its conservation goals.[114]

2. The Reformulated Gasoline Dispute

The Reformulated Gasoline dispute involved a challenge by Brazil and Venezuela to regulations promulgated under the United States Clean Air Act[115] that sought to reduce the emissions of toxic

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106. *See* Tuna II, *supra* note 104, at ¶2.1-2.2.

107. *See* H.R. REP. NO. 104-665, pt. 1 at 10 (1996).

108. See id.; Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (1994 & Supp. 1997).

109. *See* Tuna I, *supra* note 104, at ¶5.28.

110. *Id.*

111. *See* Panel Report on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted 7 November 1990, 30 I.L.M. 1122 (1991), *cited in* Tuna I, 30 I.L.M. 1594, at ¶ 5.27 (1991).

112. *See* Tuna I, *supra* note 104,. at 1620, ¶5.28.

113. *See* Tuna II, *supra* note 104, 839.

114. *See* Tuna II, *supra* note 104, at ¶5.35.

115. 42 U.S.C.A. 7401 et seq.

and smog-causing agents from motor vehicles.[116] While domestic gasoline companies had three choices of standards to use to comply with the regulations, imported gasoline companies had only one available standard to use to comply with the regulation.[117] Although the Appellate Body, in its first decision (Gasoline II) since the formation of the World Trade Organization and its new Dispute Settlement Procedures, held that the regulations fell within the provisional justification of Article XX(g), it also held that the regulations violated the introductory clauses of Article XX by constituting arbitrary and unjustifiable discrimination.[118]

3. The Shrimp / Turtle Dispute

The Shrimp / Turtle dispute centers on the United States' ban on imports of shrimp that were harvested using gear which traps and suffocates endangered sea turtles.[119] The United States legislation requires domestic shrimpers and foreign shrimpers who import shrimp to the United States to certify that their shrimp fisheries do not threaten turtles as a prerequisite for access to the United States market.[120] Domestic shrimpers are required to use turtle excluder devices (TED's) to allow turtles to escape from the nets used by shrimp fishermen.[121] Section 609, moreover, requires foreign fisheries to use techniques that protect sea turtles in a manner comparable to the protection afforded by the United States.[122] The Shrimp I Panel held that Section 609 violated the GATT because it constituted a threat to the multilateral trading system under the introductory clauses (the *chapeau*) of Article XX.[123] In Shrimp II, the Appellate Body reversed the Panel's holding regarding the threat to the multilateral trading system, but nevertheless struck the regulations which implemented Section 609 as an unjustifiable discrimination between products.[124]

The United States' opponents in the GATT have accused the United States of "eco-imperialism" and "enviro-imperialism," for attempting to dictate the smaller countries' domestic environmental

116. *See* Gasoline II, *supra* note 104, at 606.
117. *See id.* at 609-10.
118. *See id.* at 633.
119. *See* Shrimp I, *supra* note 104, at 838.
120. *See id.* at 837-38.
121. *See id.*
122. *See id.*
123. *See id.* at 849.
124. *See* Shrimp II, *supra* note 10, at ¶187.

policies by wielding economic strength through trade sanctions.[125] The following section attempts to critique the WTO's philosophical framework for resolving trade-environment conflicts, using three theories of international governance.

III. THE NORMATIVE FRAMEWORK OF INTERNATIONAL TRADE LAW

The function of justice is to articulate a "Right Order."[126] The WTO represents an attempt to create a Right Order at the international economic level. Thus, the institution of the WTO can and should be critiqued based on its ability to correctly resolve questions of distributive and corrective justice. Three philosophical models seem to be in conflict in the WTO: the Economic Efficiency Model, the Liberalism Model, and the Regime Theory.

First, the predominant philosophy on which the WTO is based, the Economic Efficiency Model, holds that free trade will increase aggregate welfare; everyone will fare better with more international trade.[127] This Model is a utilitarian (i.e. based on a cost-benefit analysis), consequentialist philosophy, in that it focuses on the outcomes of the system.[128]

In contrast, the Liberalism Model, embraced in international environmental law, holds that the fundamental moral unit is the human individual.[129] Liberalism focuses on the centrality of liberty and individual rights.[130] The Liberalism Model rejects utilitarian philosophy in favor of deontological theory, which declares acts to be right or wrong based on the nature of the act itself. According to the philosopher Emmanuel Kant, there is a universal morality of acts which are either right or wrong by their very nature.[131] The Liberalism Model differs from the Efficiency Model because, *inter alia*, it inherently includes non-economic values in its framework.[132]

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125. *See* HUNTER, SALZMAN & ZAELKE, *supra* note 2, at 1188. Mexico and Malaysia have recently been vocal opponents of United States environmental regulation. *See* Joshua Floum, *Exporting Environmentalism: Thoughts on the Use of Market Power to Improve the Environment in the "Free Trade" Era*, 35 SANTA CLARA L. REV. 1199, 1201-02 (1995) (economic demagoguery).

126. *See* Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debate*, 19 U. PA. J. INT'L ECON. L. 391, 393-94 (1998) [hereinafter Garcia].

127. *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 348 (1998) [hereinafter Dunoff].

128. *See id.*; Joel P. Trachtman, *"Trade and ..." Problems, Cost-Benefit Analysis and Subsidiarity*, 19 EUR. J. INT'L L. 32 (1997).

129. *See* Garcia, *supra* note 126, at 402.

130. *See id.* at 403.

131. *See id.* at 418.

132. *See* Dunoff, *supra* note 127, at 349.

Finally, the Regime Theory is a descriptive theory than a theory based on normative choices. It focuses on the institution's ability to resolve collective action problems, such as communication problems and lowering transaction costs.[133] The Regime Theory is primarily a realist philosophy, rather than a moral or philosophical construct. The Regime Theory recognizes that states will inevitably pursue their own best interests, and thus, international law is not always predictive of state behavior.[134]

A. The Economic Efficiency Model

The Economic Efficiency Model, the model upon which trade law is primarily based, holds that in the absence of trade restrictions, each nation will specialize in the production or export of goods and services that it can produce more efficiently than other nations.[135] Such specialization will increase the efficiency of international production, resulting in increased trade, availability of goods, and aggregate welfare and decreased consumer prices.[136] This theory regards trade barriers as "inefficient intrusions into otherwise autonomously functioning markets... [which] tend to divert resources from their most highly valued uses" and cause market losses.[137] The goal of international trade law, according to the Efficiency Model, is to maximize economic wealth, which will maximize welfare.[138]

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133. *See* Anne-Marie Slaughter, *Liberal International Relations and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 722 (1995) (stating that realists reject any role for international law other than short-term service of state interests).

134. *See id.* "Without a central authority, power determines the outcome of state interactions." *Id.* Further, states should be "treated as if their dominant preference were for power." *Id.* at 722. *See also* Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 95 (1999) (describing "relative gains" theory, a strand of realism very similar to Regime Theory).

135. *See* Dunoff, *supra* note 127, at 347.

136. *See id.*, at 349-50 (1998) (discussing Adam Smith's theory of specialization and David Ricardo's theory of comparative advantage).

137. *See id.* at 350.

138. *See id. See also* John H. Jackson, *International Economic Law*, *in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 154 (R. Bernhardt, ed., 1985). Trade liberalization and stability in economic relations are primary policies of international trade law. *See id.* International trade law is steered by economics. *See id.* at 155. Professor Petersmann argues that trade liberalization benefits every state by maximizing a country's consumptive possibilities beyond domestic production possibilities. *See* Ernst-Ulrich Petersmann, *International Economic Organizations and Groups*, *in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 161 (R. Bernhardt, ed., 1985).

"Free traders" support the WTO jurisprudence regarding trade and environment conflicts.[139] They feel that the difficulties of defining "a trade and environment dispute" and the lack of clear trade-off mechanisms leave much room for hidden protectionism and could weaken developing countries which are defending their newly-acquired rights under the trading system.[140]

Thus, this article will focus on critiquing the Efficiency Model. The assumptions of the Efficiency Model and its desired outcomes are flawed. Free trade neither maximizes human welfare nor efficiently allocates resources. The first weakness of the Efficiency Model stems from inaccuracies in the efficiency equation itself, based on the factors used in the equation. This weakness suggests a new ecological economics, which would use a cost-benefit economic analysis that includes environmental and other issues as factors in the efficiency equation. A second weakness of the Efficiency Model is the inadequacy of the efficiency equation.

To begin, the Efficiency Model ignores the environmental costs of trade. The Efficiency Model allocates resources to those who value the resources more, or those who will produce more with the resources, ignoring whether the use is right or wrong or sustainable in the long term. This is "bad" economics because it allows producers and consumers to externalize the costs of their production and consumption. These externalities, in effect, give environment-unfriendly actors a competitive advantage over environment-friendly actors who are disproportionately bearing the costs of their environmental protection efforts. Every profit-making entity has an interest in externalizing costs. The deregulation of commerce increases the externalization of costs.[141] The Efficiency Model should instead use a more accurate measure of efficiency, such as sustainable development, to require producers and consumers to internalize the costs of environmental damage produced by their actions.

Economic analysis ignores the environmental costs of free trade, such as the depletion of natural resources and the increase in waste production. Economists have traditionally ignored environmental values because they are not easily quantifiable or "monetized." Using current technology, however, economists should be able to quantify the value of the sustainable use of resources by, for

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139. *See* Petersmann, *supra* note 138, at 161.
140. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 1214.
141. *See id.* at 1176.

example, estimating what the future value of a depleted forest will be to a timber company or what the future value of an extinct tuna population will be to a commercial fisherman.

Government intervention is justified under the Efficiency Model in the event of market failures. Environmental protection is the classic example of market failure, where government intervention is required. Market failures related to environmental damage include the "tragedy of the commons,"[142] "the externalities problem,"[143] and the "free rider problem."[144] By focusing exclusively on prohibiting government restrictions, WTO jurisprudence ignores the level of governmental activity required to establish and maintain the free trade system. Therefore, a government's choice to establish conditions for free trade is inherently a choice to ignore environmental protection. Markets do not exist on their own.[145] A combination of prudently managed government action and inaction creates societies in which free markets can flourish.[146] Thus, the assumption underlying the Efficiency Model (that government inaction is the best choice) is incorrect, because at least some government action is required to create markets. Free trade requires state intervention.[147]

Furthermore, even when economists attempt to include non-economic values in the efficiency equation by "monetizing" those values, the equation is still incorrect. [148] Monetization does not reflect the true value of nonmonetizable goods.[149] Some values

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142. The tragedy of the commons is the phenomenon where, because all parties have access to the resource, and no parties have enforcement authority or control over the resource, all parties attempt to take more than their share of the resource, causing its ultimate depletion. This is especially problematic in global environmental situations such as ocean management, pollution on the moon, and ozone layer pollution.

143. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 1176. This problem is very similar to the tragedy of the commons.

144. The free rider problem occurs when one state attempts to cheat the system by taking the advantages gained through multilateral agreement without complying with the rules or paying the costs. This minimizes all parties' gains from the agreement.

145. *See* Dunoff, *supra* note 127, at 357 (commenting that free trade does not involve the absence of government regulation, but instead it involves the absence of government regulation intended to restrict undesirable market outcomes).

146. *See id.*

147. *See id.* Markets require the establishment of background norms, such as rules regarding the protection of property rights, enforcement of contracts, punishment of fraud, encouragement of competition and punishment of unfair competition. *See id.* These rules are created and enforced by governments as expressions of public policy. *See id.* For example, certain government actions were required to create markets for intellectual property rights, and to create and enforce the TRIPS Agreement. *See id.* at 358.

148. *See id. See generally* Charnovitz, *supra* note 12, at 751.

149. *See* Dunoff, *supra* note 127, at 351-52.

cannot be quantified.[150] Translating environmental or safety laws into their economic effect ignores important aspects of those laws; many legislative actions are valued in non-economic ways which can not be included in an "economic analysis."[151]

In addition, the efficiency-based system does not accommodate non-economic, non-monetized values like clean air and water, which creates tensions between economic and non-economic values.[152] This causes problems because the Efficiency Model discourages government action in support of non-economic values — which is often necessary to address certain welfare issues.[153] Human well-being is dependent upon more than monetary wealth; we cannot define what is desirable in purely economic terms.[154] The Efficiency Model inhibits governments' ability and willingness to pursue social goals. In essence, the underlying assumptions of the Efficiency Model inhibit environmental regulation.

Government deregulation creates a race to the bottom,[155] which cause a chilling effect on new environmental laws. "This economic vocabulary transforms our understanding of certain social goods."[156] The notion of the homo economicus, whose only goal is to maximize his or her wealth, ignores non-wealth-motivated individuals (such as philanthropists and environmentalists) who want to protect the environment for its aesthetic value.[157] The GATT demonstrates its inherent bias for trade values over non-trade values when it assumes the priority of trade law and resolves linkage issues pursuant to trade agreements.[158] This promotes the unsustainable consumption of natural resources and increased production of waste.[159]

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150. The monetization of values refers to the process by economists of assigning numerical monetary values to values which are not bought and sold on the market, i.e., clean air and water. Economists support this process because they feel that, for example, clean air has an identifiable monetary value, which is likely what businesses and consumers are willing to pay to ensure their air is not being polluted.

151. *See* Dunoff, *supra* note 127, at 355. *See infra,* at Section III.B., the discussion of the Embedded Liberalism Model.

152. *See id.*

153. *See id.* at 351-52.

154. *See id.* at 352.

155. The "race to the bottom" is the phenomenon where "countries competitively lower their environmental or labor standards, in an effort to capture a relatively greater share of a fixed volume of trade and investment." Howse & Trebilcock, *supra* note 12, at 76. *See also* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 1171.

156. HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 1175. "Free trade is a recipe for standards-lowering competition which prevents ecological sustainability." *Id.*

157. *See generally* Garcia, *supra* note 126.

158. *See id.*

159. *See* Dunoff, *supra* note 127, at 382.

The markets created by international free trade are in large part responsible for environmental damage.[160] Free trade is frequently the cause of environmental degradation.[161] Huge increases in per capita consumption caused by increased trade surpassed environmental technological protections, causing more widespread adverse environmental effects than ever before.[162] Low environmental standards do not actually reflect a welfare-maximizing outcome for poor or rich countries.[163]

Further, normative decision-making bodies, such as the WTO, should be representative, democratic, and transparent in order to achieve better compromise among competing values and reflect more diverse interests.[164] However, the WTO has no ability to reach compromise among competing values, or even to give non-trade values a "seat at the table."[165] Trade agreements shift decision-making from local democratic bodies to unaccountable global trade bureaucracies that enforce rules largely written by large multinational corporations.[166] Citizens' ability to govern themselves suffers, along with their environment and standard of living, when

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160. *See id.*

161. *See* Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVT'L L. REV. 185, 187 (1994).

162. *See id.* (noting that the markets created by international free trade are substantially responsible for environmental damage); *see also* Paul Raskin, Gilberto Gallopin, Pablo Gutman, Al Hammond, and Rob Swart, *Bending the Curve: Toward Sustainability* (last visited Jan. 9, 2000) <http://www.gsg.org/ btcsum.html>. Although the aggregate global economy has grown by a factor of five since 1950, approximately 1.3 billion people continue to live in absolute poverty, and approximately 900 million remain chronically undernourished. *See id.* Furthermore, the disparity between the rich and poor nations continues to widen. *See id. But see* Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment - Irreconcilable Conflict?*, 86 A.J.I.L. 700, 701 (1992) (stating that free trade does not necessarily destroy the environment). Professor Schoenbaum argues that trade helps the environment by fostering common standards for environmental protection that must be observed even by developing countries, and by fostering economic growth. *See id.*

163. *See* generally Gaines, *supra* note 86, at 231.

164. *See* Howse & Trebilcock, *supra* note 12, at 65. Lax environmental standards even in democratic societies can be attributed to the disproportionate influence of production and industrial interests on the political and regulatory process, or to misguided protectionist efforts to protect domestic jobs. *See id.* at 66.

165. The WTO Panels for trade-environment cases are not required to have any knowledge or expertise in environmental law; in fact, the panelists rarely have any such knowledge or expertise, and almost always have extensive trade law experience. This imbalance inevitably places environmental values at a disadvantage in the dispute settlement process.

166. *See* Dunoff, *supra* note 127, at 354. The GATT has been criticized for its "democracy deficit" because all decisions are made behind closed doors, and non-government entities are not given any representation or access. *See id.* However, the Appellate Body took a significant step forward in resolving the democracy deficit by accepting amicus curiae briefs from non-WTO Members in Shrimp II. *See* Shrimp II, *supra* note 10 at ¶ 91.

large multinational corporations can write the rules for global commerce with no effective accountability.[167]

Moreover, the Efficiency Model's goal of aggregate net wealth maximization is somewhat dishonest, because of the aggregation of the welfare increases from trade. Developing countries have complained since the 1970's that free trade creates distributive problems because the poor get poorer while the rich get richer. These distributive weaknesses of the Efficiency Model can likely be corrected by shifting the focus to a more liberal philosophy.

B. The Embedded Liberalism Model

Under this theory, the goal of international trade law is to reach welfare goals for all human individuals through the use of the trade regime.[168] Thus, free trade is justified only to the extent that domestic political goals are met, and to the extent that human welfare is maximized.[169] The Liberalism Model proposes that the primary goal of the WTO should be to lower trade barriers to the extent that trade policies do not violate certain domestic social policies.[170] Economic liberalism is embedded within a larger commitment to a just world order, or "Right Order,"[171] including commitments to non-economic values.[172] Thus, nations should have greater freedom to restrict trade in pursuit of non-trade goals.[173] According to Kant, moral obligations are rooted in human nature; morality is found in the act itself, without regard to a cost-benefit analysis. Thus, the Liberalism Model acknowledges a normative universal morality of right and wrong.[174]

The problem, then, is how to define those internationally accepted standards. Louis Henkin proposes positive universalism, which holds that although everyone may not morally agree, the rules become universal by consent or consensus.[175] This approach recognizes both general principles of international law, achieved by consensus, or by extrapolating principles from domestic levels; and customary international law, achieved by consent, or by establishing

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167. *See* Laura Grund, *The Costs of Free Trade*, WASH. POST, Dec. 31, 1997, at A20.
168. *See* Dunoff, *supra* note 127, at 350.
169. *See* Dunoff, *supra* note 127, at 351; Garcia, *supra* note 126, at 427.
170. *See id.* at 371.
171. *See* Garcia, *supra* note 126, at 393-394.
172. *See* Dunoff, *supra* note 127, at 372.
173. *See id. See also* Garcia, *supra* note 126, at 393.
174. *See* Garcia, *supra* note 126, at 427.
175. Louis Henkin, HOW NATIONS BEHAVE (1979).

state practice and opinio juris.[176] Because sustainable development has become accepted as customary international law, international trade law should accommodate the principle of sustainable development in resolving conflicts between trade and environmental values.

However, due to the distinguished pedigree of the Efficiency Model and its overwhelming acceptance in international trade law,[177] it is unlikely that the WTO will accept the Embedded Liberalism Model as a philosophical construct. Thus, it may be more helpful to examine another theory which has some ability to predict the international trade community's action, regardless of philosophical underpinnings.

C. *International Legal Realism and A Look at Regime Theory*

Although international law permeates every aspect of international relations, it often does not predict or control the actual conduct of inter-state affairs.[178] Realists argue that international law reflects whatever states do, and does not transcend nor constrain state behavior.[179] International law functions to regulate state interaction, and to construct an international society, where states conceive themselves to be bound by a common set of rules in relation with one another and share in the working of common institutions because they are conscious of their common interests and values.[180] Increasing globalization[181] leads to more state interaction, and more vertical deepening of the international community. Realism assumes

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176. *See id.*

177. *See* Dunoff, *supra* note 127, at 347.

178. *See* Dunoff, *supra* note 127, at 382.

179. The foundation of this theory lies in Rousseau's political essay entitled *The State of War*. In this classic essay, Rousseau suggested that laws without enforceable sanctions are not laws at all. *See* Jean-Jacques Rousseau, *The State of War*, *in* ROUSSEAU ON INTERNATIONAL RELATIONS 44 (Stanley Hoffman and David P. Fidler eds., 1991). Some scholars may go so far as to argue that all international law is merely aspirational in nature, as legal principles favoring stability over chaos, rather than legal in nature, and binding upon the state actors. In this author's opinion, the truth lies somewhere between those two views.

180. *See* Slaughter, *supra* note 133, at 724.

181. Globalization is defined as "processes whereby social relations acquire relatively distanceless and borderless qualities, so that human lives are increasingly played out in the world as a single place." *See* JAN AART SCHOLTE, GLOBALIZATION OF WORLD POLITICS 14 (1997). A similar definition of globalization describes the erosion and irrelevance of national boundaries in markets which can truly be described as global, and a blurring of traditional dividing lines between domestic and international issues. *See* Jost Delbrück, *Globalization of Law, Politics, and Markets - Implications for Domestic Law - A European Perspective*, 1 IND. J. GLOB. LEG. STUD. 9, 11 (1993).

that states act to maximize their own interests; states are assumed to desire power, wealth, and economic growth, amongst other things.

One genre of the international legal realism theory is institutionalism, or the Regime Theory, which provides that the rule of law through a regime can mitigate the effects of anarchy and power-grabbing in international relations.[182] International regimes also reduce the incentives to cheat, establish behavioral standards, and facilitate monitoring.[183] These lawyers and political scientists believe that international institutions can mitigate the power-grabbing anarchical system, modify state behavior, and make common goals attainable.[184]

International legal realists dispute the nature of the trade and environmental conflict, describing it as either "a fundamental and inevitable conflict between states competing to gain relative advantage over one another; a problem of institutional design affecting the ability of states to coordinate and cooperate to reach an optimal solution; or the misrepresentation of underlying individual and group interests such that conflicting state positions reflect the capture of domestic political processes by special interests."[185] The Regime Theory solution to the trade / environment conflict is to design an institutional regime to overcome coordination and information problems.[186] In essence, characteristics of the international trade regime could be used to mitigate some of the weaknesses of the Efficiency Model.

This undertaking into these models of international trade law establishes both the historical and philosophical underpinnings of the environmental jurisprudence of the GATT. Regardless of which theory is normatively the optimum theory, each of the theories illuminates weakenesses in the WTO's institutional framework for resolving trade/ environment conflicts. As trade-environment conflicts multiply, the WTO will need to design a sustainable institutional framework to resolve such conflicts. The next section will analyze the most recent attempt by the WTO Appellate Body to resolve the tensions between trade values and environmental values,

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182. *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 9-10 (1977).

183. *See* Slaughter, *supra* note 133, at 724-25.

184. *See id.* at 725, *citing* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 244 (1984).

185. *See id.* at 720.

186. *See id.* at 720, 726.

with an attempt to highlight how the theories underlying the WTO affect the Appellate Body's decision.

IV. THE SHRIMP / TURTLE DISPUTE

A. Factual and Procedural Background

Every year, approximately 150,000 endangered sea turtles suffocate and die in the nets of shrimp trawlers.[187] Sea turtles, once abundant,[188] have drastically declined over the last fifty years.[189] The National Academy of Sciences (NAS) reported in May of 1990 that shrimp trawling,[190] the process of collecting shrimp for commercial purposes with the use of large nets, kills more sea turtles than all other human activities combined.[191] Sea turtles spend the majority of their lives in water. However, as with all turtles, they must breathe oxygen to survive.[192] Shrimp trawls kill turtles by trapping the turtles in nets, preventing them from getting to the surface for oxygen.[193] Most turtles caught in shrimp trawls drown before the net is taken up to the surface.[194] According to John

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187. *See* Anne Swardson, *Taking the Turtle Test on World Trade; WTO Ruling on Shrimp Nets May Force U.S. to Choose Between Priorities*, WASH. POST, Aug. 19, 1998, at C9; *see also* Environmental News Network Staff, *Mixed Ruling Issued in Sea Turtles vs. Shrimp* (last visited April 25, 2000) <http://www.cnn.com/TECH/science/9810/ 14/turtles.yoto>.

188. Scientists believe that sea turtles have been on the earth for over 100 million years, surviving the extinction of the dinosaurs. *See Sea Turtle Restoration Project* (last visited Jan. 10, 2000) <http://www.earthisland.org/strp/>.

189. For example, in 1946, an estimated 40,000 female Kemp's ridley sea turtles nested on the beach at Rancho Nuévo, Mexico, in a single day. *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION 26 (1990) [hereinafter National Research Council]. By 1988, only an estimated 650 nested at the same site throughout the entire nesting season. *See id.*

190. United States domestic regulations define a "shrimp trawler" as "any fishing vessel which is equipped with trawl nets and fishes for shrimp, or whose on-board or landed catch of shrimp is over one percent by weight of all fish on board." *See* 52 Fed. Reg. 24244, §217.12 (June 29, 1987)(definitions).

191. NATIONAL RESEARCH COUNCIL, *supra* note 189, at 145; *see also* Center for Marine Conservation, *The TED Experience: Claims and Reality* (last visited Jan. 10, 2000) <http://www.edf.org/pubs/Reports/tedexperience.html>. Commercial shrimpers waste approximately 8-9 pounds of fish for each pound of shrimp they catch, approximately 2.5 billion pounds of fish per year. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 701; *see also* Ted Williams, The Exclusion of Sea Turtles, Audubon, Jan. 1990, at 26.

192. When sea turtles are active, they need oxygen several times an hour. When resting, however, sea turtles can spend up to two hours under the water without coming up for oxygen.

193. Modern fishing technology is more similar to a vacuum cleaner than a fishing rod. *See* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 677. Environmentalists have dubbed shrimp nets "curtains of death." *Id.* at 722.

McCosker, the Chairman of the Aquatic Biology Department at California Academy of Science, "each species[195] of sea turtles protected under United States law faces a very high risk of extinction in the wild."[196]

Inexpensive technology exists today that could practically eliminate all turtle deaths due to shrimping.[197] There are two effective methods to reduce the number of turtle fatalities resulting from commercial shrimp trawling: first, reducing tow times (the length of time the net is in the water behind the boat); and second, using turtle excluder devices (TEDs).[198] Reducing the trawls' tow time to less than ninety minutes will result in the survival of a great majority of the incidentally caught turtles.[199] Domestic regulations currently allow U.S. shrimpers, which are less than twenty-five feet in length, to use reduced towing times as their primary method of protecting turtles.[200] Larger shrimping vessels are required to use approved TEDs.[201]

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194. *See Sea Turtle Restoration Project* (last visited Jan. 10, 2000) <http://www.earthisland.org/strp.html>. The nets are often cast out and left to drift behind the boat for several hours, before the crew pulls them in. *See id.*

195. Six species of sea turtle are protected as endangered species under U.S. law. They are: the loggerhead (Caretta caretta); Kemp ridley (Lepidochelys kempi); green (Chelonia mydas); leatherback (Dermochelys coriacea); hawksbill (Eretmochelys imbricata); and Olive Ridley. *See* 16 U.S.C. §1531 (1973). The international community has also recognized the dangerously low levels of sea turtles. All six species of sea turtle protected under U.S. law are considered "threatened with extinction" according to the Convention of International Trade in Endangered Species of Wild Flora and Fauna. *See* CITES, *supra* note 49, at 1090.

196. H.O. Hillestad et al., *Worldwide Incidental Capture of Sea Turtles, in* BIOLOGY AND CONSERVATION OF SEA TURTLES (K.A. Bjorndal ed., 1990), at 489-95; *see also* NATIONAL RESEARCH COUNCIL, *supra* note 189.

197. *See* Office of Protected Resources, National Marine Fisheries Service, *Turtle Excluder Devices (TEDs)* (last visited Feb. 12, 2000) <http://www.NMFS.gov/prot_res/turtles/teds.html>. The technology for TEDs has existed for some time. The first TED was developed by the National Marine Fisheries Service (NMFS) in 1980. *See id.*

198. *See* Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (1987).

199. NMFS scientists believe that restricting the amount of time a shrimp trawl is under water will result in reduction of sea turtle mortality. *See id.* The ninety minute limit on towing time includes the time required to set and retrieve the trawls. *See id.* Therefore, the trawls will only be towing at depth for sixty to seventy-five minutes. *See id.*

200. *See* Sea Turtle Conservation, Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (1987). Additionally, shrimping vessels that utilize only "man-powered retrieval systems" are allowed to use restricted towing times as their only method for protecting turtles, since man-powered retrieval systems necessarily limit the amount of time that the trawl net can be underwater. *See id.* This exception only applies to vessels that do not have any motorized systems on board for trawl retrieval. *See id.*

201. *See id.*

TEDs are essentially trap doors in the shrimp net that allow the turtle to escape while keeping the shrimp from escaping.[202] TEDS are overwhelmingly effective, reducing the amount of sea turtle mortality by ninety-seven percent.[203] Currently, four types of TEDs are approved under U.S. law.[204] TEDs are generally inexpensive, costing between fifty and four hundred U.S. dollars.[205] Originally, the domestic shrimping industry complained that requiring the use of TEDs would hamper their collection of shrimp and hurt their profits.[206] However, once the regulations were implemented, the shrimp industry's total catch of shrimp has fallen only by two to three percent.[207] In 1990 and 1991, the total amount of shrimp caught each day in the Gulf of Mexico using TEDs was actually higher than the previous three years without TED use.[208] In addition, there were several unrelated positive results of using TEDs.[209]

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202. The basic design of a TED involves a metal or aluminum grid of bars with an opening at either the top or bottom, which is inserted into shrimp nets. *See* Office of Protected Resources, National Marine Fisheries Service, *Turtle Excluder Devices (TEDs)*(last visited Feb. 12, 2000) <http://www.nmfs.gov/prot_res/turtles/teds.html>. The grid is placed in the "neck" of the shrimp net. *See id.* The TEDs allow small animals like shrimp to slip through the bars, while large animals, such as turtles and sharks, are ejected through the opening. *See id.;* Jack Rudloe and Anne Rudloe, Shrimpers and Lawmakers Collide Over a Move to Save the Sea Turtles, Smithsonian, Dec. 1989, at 45; National Research Council, *supra* note 189, at 128.

203. *See* NATIONAL RESEARCH COUNCIL, *supra* note 189, at 128 (1990).

204. The four types are: the NMFS TED; the Cameron TED; the Matagorda TED; and the Georgia TED. *See* Sea Turtle Conservation, Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (1987).

205. *See* Swardson, *supra* note 161, at C9; *see also* Environmental News Network Staff, *Mixed Ruling Issued in Sea Turtle vs. Shrimp* (last visited Oct. 13, 1998) <http://www.cnn.com/TECH/science/ 9810/14/turtles.yoto>.

206. *See* Deborah T. Crouse, et al., *The TED Experience: Claims and Reality* (last visited Jan. 12, 2000) <http://www.edf.org/pubs/Reports/tedexperience.html>.

207. *See Sea Turtles Timeline 1973-1998* (last visited Jan. 10, 2000) <http://www.earthsummitwatch.org/shrimp/sea_turtles/turtltim.html>. A recent study conducted in Malaysia documented forty-seven experiments on the use of TEDs and the shrimp industry. The study found that a minimal amount, between 0.01 and 7.7 percent, of "trash fish" escaped from the nets. *See* A. Ali, S.S. Sayed Alwi and S. Ananpongsuk, *Experiments on the Use of Turtle Excluder Devices (TEDs) in Malaysian Waters* (1994), paper presented at the regional workshop on Responsible Fishing, 24-27 Jun. 1997, Bangkok, Thailand. Another study conducted in Thailand on the "Thai Turtle Free Device" found that the shrimp trawlers lost only 1.84 percent of the total shrimp catch as a result of TED use. *See TED Gained Thai Fishermen's Acceptance*, SEAFDEC NEWSLETTER, (Jul.-Sept. 1996).

208. *See* Crouse, *supra*, note 206.

209. The devices not only exclude turtles, but also other large sea animals (such as sharks), debris, and larger fish that often outweigh the shrimp by ten to one. *See TED Case Studies, Turtle Excluder Devices* (last visited Jan. 12, 2000) <http://www/gurukul.ucc.american.edu.ted/TEDS.HTM>. The weight of endangered sea turtles varies greatly. A small Kemp's Ridley may weigh only eighty pounds, while a Leatherback can weigh over 1,000 pounds. *See Sea Turtle Restoration Project* (last visited Mar. 10, 2000) <http://www.earthisland.org/strp.html>. By excluding these unwanted, and often heavy, incidentally-caught animals and objects, the use of TEDs significantly reduces fuel costs

In 1987, the United States Congress began an effort to protect endangered sea turtles by regulating the domestic shrimping industry.[210] In response to concerns from the domestic shrimping industry and environmentalists, Congress executed its protection of sea turtles with the passage of the "Protection and Conservation of Sea Turtles Act,"[211] (hereinafter "Section 609"), which required world-wide protection of endangered sea turtles. Domestic shrimpers were concerned that, without requiring TED use on imported shrimp, the domestic regulations would result in a significant loss of profits.[212] Environmentalists claimed that the only way to effectively protect sea turtles, because of their highly migratory nature, was to ignore arbitrary national boundaries and protect turtles regardless of their location.[213]

In 1989, Congress enacted Section 609 regulating the international shrimping industry.[214] Section 609 called upon the U.S. State Department to conduct bilateral and multilateral negotiation relating to the proection of sea turtles.[215] Secondly, Section 609 prohibited the importation of shrimp and shrimp products not harvested with proper precautions taken for the protection of sea turtles.[216] The Act further gave the President[217] the authority to develop a certification procedure to determine if a particular State had adopted a protection program for turtles, and to grant those nations which had done so access to the U.S. market. The President was to certify annually those nations employing a regulatory program comparable to that of the United States and with an average rate of incidental takings of sea turtles comparable to that of the United States, or employing harvesting techniques that did not threaten incidental takings of sea turtles.

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on shrimping vessels. *See id.* Scientists estimate that every pound of shrimp caught using a shrimp trawling net produces 5.2 pounds of wasted marine life, including red snappers, croakers, and sea trout, as well as sea turtles. *See Shrimp Cocktail - Recipe for Disaster, Oceans and Marine Life* (last visited Apr. 28, 2000) <http://www.nrdc.org/wildlife/fish/ffishf.asp>. TEDs also produce a better quality of shrimp. *See id.* Shrimp caught in nets without TEDs are often bruised or crushed by the heavy animals and debris not excluded. *See id.*

210. *See* 16 U.S.C. §1531 (1999).

211. *See* Pub. L. No. 101-162, Title VI, §609, 103 Stat. 988, 1037-1038 (1989) (codified as amended at 16 U.S.C.A. §1537 (West Supp. 1999)).

212. *See* Crouse, *supra* note 206.

213. *See id.*

214. *See* Protection and Conservation of Sea Turtles Act §609.

215. *See id.*, §609(a).

216. *See id.*, §609(b).

217. The President delegated this authority to the Department of State. *See* Memorandum: Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the U.S., 56 Fed. Reg. 357 (1990).

Over the following decade, several different sets of guidelines were introduced to implement the turtle protection legislation.[218] In 1991, the first set of guidelines issued by the Department of State were promulgated under Section 609.[219] These guidelines included two major provisions. First, the Department determined that the import ban on shrimp did not apply to aquaculture shrimp, because they come from a commercial farm, with no danger of incidental capture of sea turtles.[220] Second, the Department determined that Congress intended the scope of Section 609 to extend to the wider Caribbean and Western Atlantic region.[221]

The 1991 Guidelines required the use of TEDs on all shrimping vessels where there was a likelihood of intercepting sea turtles, in order to exempt a country from the import ban, with certain exceptions.[222] Vessels less than twenty-five feet in length were allowed to reduce towing times as an alternative to using TEDs.[223] The guidelines also prohibited the retention of any incidentally-caught sea turtles, and required the resuscitation of any incidentally-caught sea turtles that were unconscious at the time of retrieval.[224] The 1991 Guidelines were phased in over a period of three years.[225]

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218. *See* Sea Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines, 56 Fed. Reg. 1051 (1991) [hereinafter 1991 Guidelines]; Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015 (1993) [hereinafter 1993 Guidelines]; Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17342-02 (1996) [hereinafter 1996 Guidelines]; and Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46094 (1998) [hereinafter 1998 Guidelines].

219. *See* 1991 Guidelines, *supra* note 218.

220. *See id.* According to the National Fisheries Institute, there are four categories of shrimp on the U.S. market: cold water shrimp; farm-raised, aquaculture shrimp; small, surface-net-caught shrimp; and trawl-net caught-shrimp. *See* National Fisheries Institutes, The Shrimp Council (last visited Mar. 10, 2000) <http://www/environment.miningco.com/library.weekly/aa041298.htm>. Out of these categories, only trawl-net-caught shrimp pose a threat to sea turtles. *See id.*

221. The Department of State specifically listed several countries that engaged in commercial shrimp trawling, including: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tabago, Guyana, Suriname, French Guiana, and Brazil. *See* 1991 Guidelines, *supra* note 218. The Department cited congressional floor debates in Congress and the legislative history reports on Section 609, which addressed specifically the problems with turtle mortality from shrimp trawling in the Gulf of Mexico, as support for this geographical scope. *See id.*

222. *See* 1991 Guidelines, *supra* note 218.

223. *See id.*

224. *See id.*

225. The 1991 Guidelines provided: "three years for the complete phase-in of a comparable program. This allows sufficient time for affected nations to acquire TED technology, conduct experimental deployments of TEDs and evaluate alternative turtle exclusion technologies." *See* 1991 Guidelines, *supra* note 218, at 1051.

In 1993, the State Department revised the 1991 Guidelines, making minor modifications and bringing them in line with the domestic regulations for shrimp trawling.[226]

In 1996, in response to a federal court order in *Earth Island Institute v. Warren Christopher*,[227] the State Department made sweeping changes to the 1993 Guidelines.[228] In *Earth Island*, the plaintiff, an environmental organization, challenged the geographical limitation on the import ban in the 1991 and 1993 Guidelines as insufficient to carry out the purpose of Congress.[229] The plaintiffs argued that the Congressional mandate of Section 609 was clear and unambiguous and did not restrict its application to any particular region.[230] Section 609 applies to "all foreign governments which are engaged in or which have persons or companies engage in commercial fishing operations which . . . may affect adversely [endangered or threatened] species of sea turtles."[231] The Court of International Trade held that the 1993 Guidelines were not a proper enforcement of §609.[232] The Court further directed the State Department to prohibit the importation of shrimp from any country in the world utilizing commercial shrimping practices that endanger those species of sea turtles protected by Section 609, no later than May 1, 1996.[233] The 1996 Guidelines, as required by the Court, extended the import ban on shrimp and shrimp products throughout the world.[234]

In response to the introduction of the 1996 Guidelines, India, Pakistan, Thailand and Malaysia challenged the United States embargo before the WTO.[235] The countries alleged that Section 609,

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226. *See* 1993 Guidelines, *supra* note 218. The 1993 Guidelines retained the geographic limitation on the scope of the import ban to countries in the wider Caribbean and Western Atlantic region. *See id.*

227. Earth Island Inst. v. Warren Christopher, 913 F. Supp. 559, 580 (Ct. Int'l Trade 1995) (Aquilino, J.), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996).

228. *See* 1996 Guidelines, *supra* note 218, at 17342.

229. *See* Earth Island Inst., 913 F. Supp. at 569.

230. *See id* at 575-580.

231. Pub. L. No. 101-162, Title VI, §609, 103 Stat. 1037.

232. *See* Earth Island Inst., 913 F. Supp. at 580.

233. On April 10, 1996, the Court denied the State Department's request for a stay of the Court's December 29, 1995 order requiring the extension of the import ban on shrimp harvested without TEDs throughout the world by May 1, 1996. *See* Earth Island Inst. v. Warren Christopher, 922 F. Supp. 616 (Ct. Int'l Trade 1996).

234. *See* 1996 Guidelines, *supra* note 218, at 17342.

235. In a communiqué to the WTO in October of 1996, India, Malaysia, Pakistan and Thailand filed a joint request with the Dispute Settlement Body (DSB) of the WTO for consultations relating to the United States - Import Prohibition of Certain Shrimp and Shrimp Products. *See* WTO/DS58/1 (last visited Mar. 10, 2000) <http://www.wto.org>. In January of 1997, Malaysia and Thailand requested the DSB to establish a panel to examine their complaint

a unilateral ban on the importation of shrimp from non-certified countries, violated the GATT 1994[236] by utilizing discriminating trade practices and treating "similarly situated countries differently."[237]

In May 1998, the Panel[238] held that Section 609 did not fall under the "scope" of regulations protected under Article XX of GATT 1994, and therefore violated the treaty. The WTO's Appellate Body reversed the Panel, finding error in both the analysis and the conclusions.[239] The Appellate Body conducted what it considered to be the "proper" analysis and found that Section 609 did provisionally fall under the Article XX(g) exception.[240] The end result was the same, however, because the Appellate Body found that Section 609 violated the *chapeau* to Article XX as it was applied in a discriminatory manner.[241] Although the outcomes are identical, the Appellate Body decision was a bold step forward for the WTO because the Appellate Body recognized for the first time the possibility that environmental regulations of the type found in Section 609 can be justified under the GATT 1994.

B. The Appellate Body Decision: A Framework for Compliance With Article XX After Shrimp II

The Appellate Body[242] was presented with two major issues on appeal.[243] The first issue, a procedural matter, addressed the

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against the United States. *See* WT/DS58/6 (10 Jan. 1997) <http://www.wto.org>. This request was quickly followed by the requests of Pakistan, WT/DS58/7 (7 Feb. 1997) and India, WT/DS58/8 (4 Mar. 1997), for the establishment of panels to examine their complaints as well. The DSB established three panels as a result of their requests. These panels were consolidated into one panel pursuant to Article IX of the Dispute Settlement Understanding. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/M/29, 26 Mar. 1997 [hereinafter 1997 Dispute Settlement Understanding]; *see also* Dispute Settlement Understanding, *supra* note 9.

236. *See* Final Act, *supra* note 7. GATT 1947 was modified and adopted as Annex IA of the WTO Charter. *See* 33 I.L.M. 1124 (1994) (GATT 1994).

237. India, Malaysia, Pakistan and Thailand alleged that the regulations violated Articles I:1, XI:1, and XIII:1 of GATT 1994. *See* Shrimp I, 37 I.L.M. 832 (1998).

238. On April 15, 1997, all of the parties to the dispute agreed on the following composition of the Panel: Chairman, Mr. Michael Cartland; Members: Mr. Carlos Cozendey and Mr. Kilian Delbrück. *See* WT/DS58/9 (15 Apr. 1997) (last visited Jan. 10, 2000) <http://www.wto.org/>.

239. *See* Shrimp II, *supra* note 10 (1999).

240. *See id.* at ¶187.

241. *See id.*

242. Under the DSU, the seven members of the permanent Appellate Body are chosen for four-year terms. *See* Dispute Settlement Understanding, art. XVII, ¶1. They must be qualified in international trade, and not affiliated with any particular government. *See id.*

243. *See* Shrimp II, *supra* note 10 (1999).

question of whether the WTO Panel erred by holding that the Dispute Settlement Understanding (DSU) did not allow the acceptance of unrequested information (amicus briefs) from non-governmental organizations.[244] The Appellate Body found that the Panel did err by forbidding non-governmental organizations to file non-requested information with the dispute body.[245]

The second issue was whether the Panel erred by finding that Section 609 constituted discrimination that was not justified under Article XX of GATT 1994.[246] The complaining parties charged that Section 609 and the 1996 Guidelines violated various provisions of GATT 1994, and were not permitted by the general exceptions of Article XX.[247] The Appellate Body, reversing the Panel Report, outlined a two-step analytical framework for Article XX: first, it would assess whether the measure at issue falls within one of the exceptions found in paragraphs (a) through (j) of Article XX, referred to as "provisional justification;" and second, it would determine whether the measure satisfied the requirements of the chapeau, or introductory clauses of Article XX. [248] The Appellate Body rejected the Panel's attempt to reverse the analysis, claiming that the two-tier analysis is a part of the "fundamental structure and logic of Article XX."[249]

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244. *See* 38 I.L.M at 145-148, ¶ 99-110 (1999). This paper will not address the issue of *amicus* briefs before the Appellate Body. Several commentators have weighed in on this subject. *See, e.g.*, Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32(5) J. WORLD TRADE 73 (1998).

245. This finding had no practical effect on the decision in this case because the Panel allowed the non-solicited information to be incorporated into the United States' brief. *See Shrimp II*, 38 I.L.M. at 148, ¶ 109-10 (1999).

246. *See* 38 I.L.M. at 149, ¶111 (1999).

247. *See id.* at 131-134, ¶ 34-45.

248. *See id.* at ¶118. "The analysis is . . . two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX." Gasoline II, 35 I.L.M. 603, 626 (1996). This analysis assumes that the Panel or Appellate Body has already found a violation of substantive GATT principles. Section 609 arguably violates each of the three primary GATT principles. Section 609 violates the most-favored-nation obligation because shrimp are "like products," regardless of how they are harvested. *See id.* Thus, discrimination based on methods of harvesting between "like products" violates the United States' obligation to treat all like products the same. The 1996 Guidelines likely violate the national treatment principle because of the different treatment given to some developing countries that was not given to others. *See id.* Section 609 clearly violates the Article XX prohibition on quantitative restrictions because it sets a quantitative quota of zero, thus imposing a total embargo on imported shrimp harvested without TEDs.

249. *See id.* at ¶119. "[T]he Panel disregarded the sequence of steps essential for carrying out such an analysis." *Id.* at ¶117. Professor Howse has criticized the Panel's decision for the same reasons. *See generally* Howse, *supra* note 244.

The United States, however, claimed that the measure fell within the ambit of sub-paragraph (g) of Article XX, because it was a measure "relating to the conservation of exhaustible natural resources."[250] Sub-paragraph (g) provides an easier standard to satisfy than sub-paragraph (b) because it imposes a rationality standard, rather than the necessity standard imposed in sub-paragraph (b).[251] The Appellate Body ultimately found that Section 609 was provisionally justified under Article XX(g), and so it did not address the measure's validity under Article XX(b).[252]

1. Article XX(b) – Protecting Human, Animal, or Plant Life or Health

To be provisionally justified under Article XX, the measure must meet either the necessity test set out in sub-paragraph (b) or the rationality test in sub-paragraph (g). To meet the test under XX(b), the measure must be necessary, i.e., it must be the least trade-restrictive alternative reasonably available.[253] No measure has been able to meet this standard.

2. Article XX(g) – Conserving Exhaustible Natural Resources

a. "Exhaustible Natural Resources"

To determine whether the measure fits within Section 609, the Appellate Body first looked to the definition of the phrase "exhaustible natural resources."[254] Indonesia and Thailand argued that the term "natural resources" should be confined to non-living finite resources, such as minerals.[255] The Appellate Body rejected that argument, finding that living resources can be exhaustible because they can be "susceptible of depletion, exhaustion and extinction, frequently because of human activities."[256]

Further, and more importantly, the Appellate Body stated that the term "must be read by a treaty interpreter in the light of

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250. Final Act, *supra* note 7, at art. XX(g).

251. *See id.*; *see also* Garcia, *supra* note 126.

252. *See* Shrimp II, *supra* note 10 (1999).

253. Gasoline II, *supra* note 104 at 622; Tuna I, *supra* note 104 1594, ¶ 5.24-5.28 (1991); *see also* Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999) (criticizing the XX(b) necessity test because it does not require that the less trade-restrictive alternative be equally, or substantially equivalently, effective in achieving the environmental goals of the legislation). *See also* discussion of rationality test and necessity test, *infra*, and accompanying text.

254. *See* Shrimp II, *supra* note 10 (1999).

255. *See id.*

256. *Id.* at ¶ 128.

contemporary concerns of the community of nations about the protection and conservation of the environment."[257] Defining the term was found to be an evolutionary analytical task, rather than static.[258] The Appellate Body focused on the preambular language in the WTO Agreement, in which the WTO Members explicitly acknowledged "the objective of sustainable development" and "the optimal use of the world's resources."[259] The Appellate Body took judicial notice of non-GATT-related international environmental developments.[260] The six species of endangered sea turtles protected by Section 609 were found to be "exhaustible natural resources."[261]

b. "Relating to" – The Rationality Test

The second interpretive step under sub-paragraph (g) is the rationality test, i.e., whether there is a substantial relationship between the measure at stake and the legitimate policy of conserving the natural resources.[262] The analysis focuses on the relationship between the general structure and design of Section 609 and the conservation of sea turtles.[263] The rationality test of sub-paragraph (g) is much more broad than the necessity test of sub-paragraph (b), which requires that the only action which will be justified under (b) is the imposition of the least-trade-restrictive alternative reasonably available to the regulating party.[264] In contrast, the rationality test requires only "a close and genuine relationship of ends and means."[265]

The Appellate Body found that the measure had a sufficient relationship to the legitimate policy of conservation of sea turtles to

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257. *Id.*, at ¶129.

258. *See id.* at ¶130. This definition would exclude biological and renewable resources. *See id.* This proposal was based on a statutory interpretation argument that Article XX(b) addressed living resources. *See id.* Thus, it was logical that Article XX(g) was meant to address resources not addressed in sub-paragraph (b), specifically nonliving resources. *See id.*

259. *Id.* at ¶129.

260. *See e.g.*, the World Commission on Environment and Development, Our Common Future (Oxford University Press, 1987); G. Handl, "Sustainable Development: General Rules versus Specific Obligations," in Sustainable Development and International Law (ed. W. Lang, 1995).

261. *See* Shrimp II, *supra* note 10 (1999).

262. *See* WTO Agreement, *supra* note 8, at preamble; *see also* Shrimp II, *supra* note 10, 131 (1999).

263. *See* Shrimp II, *supra* note 10 (1999); *see also* United Nations Convention on the Law of the Sea, arts. 56, 61, 62, *reprinted in* 31 I.L.M. 818 [hereinafter UNCLOS].

264. *See* Shrimp II, *supra* note 10 (1999). The Appellate Body described Section 609 and its implementing guidelines to be "fairly narrowly focused." *Id.* at ¶138.

265. *Id.*, at ¶136.

meet the rationality test.[266] The exceptions from the embargo for countries where shrimp harvesting did not affect sea turtles and for countries certified by the United States demonstrated that the measure was "directly connected with the policy of conservation of sea turtles."[267]

The Appellate Body's comfort with the certification procedures seemed based on the fact that the procedures merely required other countries to adopt a regulatory program *comparable* to that of the United States and leading to an incidental taking rate *comparable* to that of the United States, rather than to adopt the same regulatory program. Section 609, for example, did not require other countries to mandate the use of TEDs.[268] If countries could show alternative regulations which reduced the incidental take of turtles comparably with the TED program in the United States, those countries would be certified.[269]

The rationality test is still somewhat ambiguous. The Appellate Body's use of terms such as "narrowly focused"[270] and "reasonably related"[271] leave much room for interpretative creativity. An analogy has been drawn between the Article XX necessity and rationality tests and the American constitutional standards of review, from strict scrutiny to mere rationality.[272] The U.S. constitutional standards are, in essence, a set of pre-determined presumptions. The vague language is used to balance the factors the Court finds relevant in deciding whether to accept or reject the presumption. Thus, the ambiguity in the Article XX(g) rationality test may be used to expand its scope by creating a presumption that, unless the measure is "disproportionate" or not "reasonable," it will be provisionally justified under XX(g). This interpretation of Article XX(g) should be accepted, because it gives some weight to non-trade

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266. *Id.*, at 141. *See* Section 609(b)(2), described by the Appellate Body as "essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles." *Id.*

267. *Id.* at ¶¶ 138-141. Section 609 was "not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles." *Id.* at ¶141.

268. *See id.* at ¶141.

269. *See id.* at ¶140.

270. *Id* at ¶138.

271. *Id.* at ¶141.

272. *See* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 400 (1996-97).

values, and gives the WTO and its Members the ability to accommodate non-trade values within the WTO trade regime.

c. "Made effective in conjunction with restrictions on domestic production or consumption"

This final step in the provisional justification of a measure under Article XX(g) incorporates the "national treatment" obligation found in Article III of GATT 1994 into Article XX(g). Article XX(g) contains an embedded "national treatment" component by requiring that the conservation measures must be "made effective in conjunction with restrictions on domestic production or consumption."[273] This step is "a requirement of even-handedness in the imposition of restrictions . . . ."[274] Section 609 was enacted as part of a regulatory scheme that encompassed both foreign and domestic shrimp trawling.[275] Thus, the Appellate Body found that it was "an even-handed measure."[276]

This requirement will likely be interpreted very strictly, because measures imposed on imports but not on domestic products will likely carry a presumption of protectionism unacceptable in the GATT. The obligation of national treatment is one of the most fundamental principles of the GATT regime. Interestingly, though, the express inclusion of this embedded national treatment principle in sub-paragraph (g) could be used to demonstrate that there is no such principle in sub-paragraph (b).[277]

Thus, Section 609 and its implementing guidelines were provisionally justified under Article XX(g). The Appellate Body then turned to whether the application of the measures was consistent with the *chapeau* of Article XX.

3. The Chapeau

The introductory language of Article XX, known as the *chapeau*, provides three standards with which a measure must comply to be

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273. GATT, art. XX(g). *Compare* GATT, art. III (setting forth a national treatment provision that requires countries to give imports equal treatment with domestic products).

274. Shrimp II, *supra* note 10.

275. *See id.* at ¶144. The Appellate Body tracked the domestic aspects of the legislation and its implementing guidelines. *See id.*

276. *Id.*

277. There is a canon of construction, called *inclusio unius est exclusio alterius*, which provides that when an idea is expressly in one part of a rule, but not in another, it was expressly excluded by the drafters. Because the GATT drafters demonstrated that they were aware of the need to include such a requirement, the failure to include it in sub-paragraph (b) could imply that the principle should not be included in the rule.

accepted under Article XX.[278] The overall question being asked, though, is "whether the application of . . . [the] measure constitutes an abuse or misuse of the provisional justification made available by Article XX (g)."[279] First, the measure must not be applied in a manner which would constitute "arbitrary discrimination" between countries where the same conditions prevail.[280] Second, the measure must not be applied in a manner which would constitute "unjustifiable discrimination" between countries where the same conditions prevail.[281] Third, the measure must not be applied in a manner which would constitute "a disguised restriction on international trade."[282]

The *chapeau* is intended to prevent abuse of Article XX.[283] Despite the step-by-step sound of the three-part analysis of the *chapeau*, there remains a great deal of uncertainty regarding this analysis.[284] For example, the discussion entitled "general considerations" of the *chapeau* focused at length on restraining countries to "reasonable"[285] or "good faith"[286] uses of Article XX.[287] Thus, the Appellate Body has arguably added the principle of good faith as a fourth standard by which to evaluate a measure under the *chapeau*. Further, the Appellate Body has adopted a balancing test in its application of the *chapeau*, by stressing "the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand."[288] The Appellate Body described the balancing test as the need to find a:

> line of equilibrium between the right of a Member to invoke an exception . . . and the rights of the other

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278. *See* Shrimp II, *supra* note 10.

279. *Id.* at ¶160.

280. *Id.* at 161.

281. *Id.* at 161.

282. *Id.* at 161.

283. *See id.* at ¶151 (quoting Gasoline II, *supra* note 104, at 626). The exceptions are "limited and conditional." *Id.* at ¶157.

284. The Appellate Body admits that the analysis under the chapeau will not be "fixed and unchanging," but rather will depend on the particular facts and circumstances involved. *Id.* at ¶159.

285. *Id.* at ¶151.

286. *Id.* at ¶157. The Appellate Body recognizes that the principle of good faith is a "general principle of law [that] . . . controls the exercise of rights by states." *Id.* at ¶158.

287. *See id.* at ¶¶148-60.

288. *Id.* at ¶156.

> Members under varying substantive provisions . . . so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.[289]

The analysis, therefore, may consist of five issues, with the addition of the balancing test and the principle of good faith.[290] However, these additional factors ignore the principle that the fundamental purpose of Article XX was to define situations in which it was justified to infringe upon other Members' rights under the GATT.

a. Unjustifiable Discrimination

This is where Section 609 ran afoul of Article XX. The Appellate Body found that "[the measure's] intended and actual coercive effect on the specific policy decisions made by foreign governments" constituted "the most conspicuous flaw" in its application.[291] The Appellate Body discussed five aspects of Section 609 and the 1996 Guidelines which constitute unjustifiable discrimination.

First, the Appellate Court found that the 1996 Guidelines essentially required foreign governments to adopt the same regulatory and enforcement program as that applied to U.S. domestic shrimp trawlers,[292] because the flexibility afforded to the foreign countries by Congress was eliminated in the 1996 Guidelines and through the pattern of certification decisions by the State Department.[293] The Appellate Body stated that the test for foreign regulatory programs is not whether it is comparable, but whether it is essentially the same.[294] Presumably, then, a regulatory program that gives foreign governments some flexibility in establishing administrative and enforcement programs would not violate the *chapeau*.[295]

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289. *Id.* at ¶159.

290. An additional requirement of due process may be a sixth requirement.

291. *Id.* at ¶161.

292. *See id.* at ¶161. But that is already required under the provisional justification part of XX(g) (made effective in conjunction with domestic restrictions).

293. In practice, the State Department officials only examined whether there was a regulatory program requiring the use of TEDs or one that came within one of the "extremely limited" exceptions available to U.S. shrimp trawlers. *See id.* at ¶162.

294. *See id.* at ¶163.

295. *See id.* at ¶163 (faulting the United States for establishing "a rigid and unbending standard").

Second, the embargo was applied regardless of differing conditions in foreign countries.[296] This "uniform standard" was unacceptable because it did not take into account "the actual incidence of sea turtles in . . . [the foreign country's] waters, the species of those sea turtles, or other differences or disparities . . . "[297] Shrimp II arguably establishes an affirmative duty on the part of Members attempting to impose extraterritorial environmental regulation to evaluate the different conditions occurring in the territories of other Member States that will be affected by the regulation.[298] This increases the administrative costs of, and is likely to have a chilling effect on, the imposition of such regulation.

Third, the Appellate Body criticized the coercive aspects of the 1996 Guidelines, which banned imports of shrimp caught using TEDs, but caught in waters of countries not certified by the United States.[299] The Appellate Body concluded that Section 609 could not directly result in the protection of sea turtles; it could only do so indirectly. The only goal of such a prohibition was the coercion of another state to change its regulatory program to be consistent with that of the United States.[300]

Fourth, the Appellate Body criticized the United States for its failure to reach, or even seriously attempt to reach, international agreement on the protection of sea turtles.[301] The Appellate Body pointed to the wealth of international environmental law to demonstrate that the conservation of migratory species requires multilateral efforts.[302] Although the Appellate Body recognized the negotiation of the Inter-American Convention for the Protection and

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296. *See id.* at ¶ 164.

297. *Id.* at ¶164. But what "other differences or disparities" should be considered? That is an open-ended standard. Should technological or economic disparities be considered? What about relative dependencies on the industry being regulated?

298. *See id.* at ¶164.

299. *See id.* at ¶165.

300. *See id.*

301. *See id.* at ¶167. The Appellate Body found this failure to negotiate especially troublesome in light of the clear Congressional instruction to the State Department to initiate negotiations and report back to Congress on their progress. *See id.* For a detailed discussion of this aspect of the decision, *see* Lakshman Guruswamy, *The Annihilation of Sea Turtles: WTO Intransigence and US Equivocation*, 30 ENVTL. L. REP. 10261 (April 2000).

302. *See* Shrimp II, *supra* note 10, listing: WTO Decision on Trade and Environment, creating the Committee on Trade and Environment; Rio Declaration Principle 12; Agenda 21 ¶2.22(1); Biodiversity Convention Article 5; Convention on the Conservation of Migratory Species of Wild Animals, Annex I; and the Report of the Committee on Trade and Environment. The Appellate Body, by saying there was no international effort, is ignoring these MEA's. *See* discussion *infra*, section V.

Conservation of Sea Turtles (CPCST) in 1996, it affirmed the Panel's finding of no evidence of negotiations.[303] A better approach would be to use multilateral agreements, such as the CPCST, as the definition of "the equilibrium line" sought in applying the *chapeau*.

Finally, the differing treatment afforded to different foreign countries was seen as "plainly discriminatory" and "unjustifiable."[304] The difference in phase-in periods imposed heavier burdens of compliance on some countries than others.[305] The court order requiring the Environmental Protection Agency to enforce Section 609 and the 1996 Guidelines did not relieve the United States of the legal consequences from the discriminatory impact of Section 609.[306] Further, the Appellate Body noted that the United States had transferred TED technology to some exporting countries, but not all.[307]

b. Arbitrary Discrimination

Because the Appellate Body found that Section 609 and the 1996 Guidelines constituted unjustifiable discrimination, it did not focus much attention on the analysis of whether Section 609 constituted arbitrary discrimination or a disguised restriction on international trade.[308] In discussing *arbitrary* discrimination, the Appellate Body focused on many of the same defects criticized with regard to unjustifiable discrimination – such as the lack of discretion afforded to foreign governments.[309]

However, the Appellate Body recognized additional deficiencies of Section 609 which constituted arbitrary discrimination, primarily the lack of transparent, predictable administrative procedures.[310] The Appellate Body established a standard of "rigorous compliance with the fundamental requirements of due process" in the application and administration of a measure which "effectively results in a suspension *pro hoc vice* of the treaty rights of other

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303. *Id.* at ¶¶166, 169. This ignores the negotiations required for the CPCST and the fact that CITES Appendix I lists endangered sea turtles, and CITES is a negotiated multilateral treaty. *See* CITES, *supra* note 49, at 1090.

304. *See* Shrimp II, *supra* note 10.

305. *See id.* at ¶174.

306. *See id.* at ¶173. The Appellate Body found that a Member State is responsible for the acts of all of its governmental departments, including its judiciary. *See id.*

307. *See id.* at ¶175.

308. *See id.* at ¶176.

309. *See id.* at ¶177.

310. *See id.* at ¶183. The Appellate Body found that Article X(3) applied to the use of Article XX, requiring uniform, impartial and reasonable application of all measures. *See id.*

Members."[311] Finding that Section 609's application was "contrary to the spirit, if not the letter," of Article X(3), the Appellate Body seems to have judicially created an additional affirmative duty on the part of Members attempting to invoke an Article XX exception.[312] Those States must now comply with the letter and spirit of Article X(3), although such requirement is nowhere mentioned in Article XX itself.

c. Disguised Restriction on International Trade

Finally, because the Appellate Body found that Section 609 and the 1996 Guidelines constituted both unjustifiable and arbitrary discrimination, the Appellate Body did not address whether it constituted a "disguised restriction on international trade."[313]

In summary, the measure was declared inconsistent with Article XX because its application constituted unjustifiable and arbitrary discrimination. However, the Appellate Body made clear what it did not decide: 1) that environmental protection is not important to WTO Members; 2) that Members "cannot adopt effective measures to protect endangered species;" and 3) that States should not act together to protect the environment.[314] Despite the negative result with respect to Section 609, the Appellate Body made great strides by acknowledging the existence and validity of environmental values. The decision recognized that environmental protection has become increasingly important to WTO Members; and that the adoption of environmental protection measures can be consistent with the GATT. Members may adopt environmental policies so long as those policies afford sufficient recognition to the other Members' treaty rights.[315]

V. TWO SUGGESTIONS FOR REFORM

The remaining difficulty in the trade-environment conflict is how to balance the two equally important goals of free trade and environmental protection.[316] This article does not suggest that environmental values should always trump trade values. Rather,

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311. *Id.* at ¶182.
312. *See id.* at ¶183.
313. *Id.* at ¶184.
314. *Id.* at ¶185.
315. *See id.* at ¶186.
316. *See id.* at ¶156. The Appellate Body itself discussed this need for a line of equilibrium between trade goals and environmental goals. *See id.* "[A] balance must be struck between the right of a Member to invoke and exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members." *Id.*

this article suggests that the presumptions embedded within Article XX should be shifted to ensure a level playing field - one that gives both trade and environmental values equal weight.[317]

A. Reinterpret "Reasonably Available" Under the Article XX(b) Necessity Test to Include Environmental Considerations, Consistent With Sustainable Development

The first potential reform would be for the Appellate Body to modify its interpretation of the Article XX(b) necessity test to include a requirement that the less-trade-restrictive alternative (LTRA) was equally or substantially equivalently effective in achieving the environmental objective.[318] The current necessity test imposes no requirement for proportionality of measures, nor for substantially equivalent effectiveness of the least-trade-restrictive alternative. Professor Garcia advocates reinterpreting the phrase "reasonably available" to require that the LTRA is "equally or substantially as effective in terms of its impact on [the environmental protection purpose] in question."[319] The failure to require reasonable equality of environmental effectiveness concerning the less-trade-restrictive alternatives is an example of how trade values are inherently privileged over environmental values.[320] If the Appellate Body were to incorporate the principle of sustainable development into its interpretation of the necessity test in Article XX(b), environmental and trade values would be closer to a level playing field.[321] The analysis under Article XX, then, should focus only on LTRAs which are substantially as effective in terms of environmental protection as the trade measures chosen by the defending Member State.

The Appellate Body's current interpretation of the necessity test has been widely criticized.[322] The Appellate Body's interpretation

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317. *See* Howse & Trebilcock, *supra* note 12, at 62 (distinguishing between arguments subordinating trade values to environmental values, and those establishing "fair rules of the game").

318. *See generally* Garcia, *supra* note 126 (making the argument to modify the necessity test in this way for a human rights exception).

319. *Id.* at 51.

320. *See id.*

321. *Compare* Garcia, *supra* note 126, *with* Trachtman, *supra* note 12, at 40 (suggesting that the Appellate Body should adopt a dynamic cost-benefit analysis, which requires panels to maximize net benefits or minimize net costs, rather than a simple static cost-benefit analysis, which ignores other equivalently effective alternatives). Trachtman argues that the benefits and costs analyzed can not be limited to monetized values only, but should include non-monetary values as well, such as environmental considerations, consistent with the sustainable development principle. *See id.* at 41.

322. *See id. See also* HUNTER, SALZMAN, & ZAELKE, *supra* note 2, at 1192.

does not correspond with the ordinary meaning of necessary in Article XX(b), which focuses on the need for the measure to achieve the goal of environmental protection, rather than on its effect on international trade. Further, implying a test about trade-restrictiveness into Article XX(b) is inconsistent with the explicit inclusion of such a test in the chapeau. The LTRA unduly elevates concerns for market access over other important policy goals enumerated in Article XX. Market access should not always trump other goals; that is the very essence of Article XX.

The LTRA imposes on nations' sovereignty by failing to attribute appropriate levels of deference to government decisions and also constrains governments' choices about how they can pursue environmental objectives. The necessity test could require governments to attempt to negotiate an MEA as a precondition to taking any kind of trade measure. This is clearly inconsistent with the intent of Article XX, which explicitly retains countries' abilities to *unilaterally* use certain limited discriminatory trade measures to achieve the policy goals of Article XX, and makes no mention of multilateral agreements.

Unfortunately, trade sanctions are the best arrow in the environmentalists' quiver.[323] The failure to require nations to internalize the environmental costs of unsustainable behavior could provide incentives for violating countries to increase their bad behavior.[324] A proposed LTRA, eco-labelling, presents a "collective action problem" because its success is dependent upon consumers' product loyalties.[325] Thus, trade sanctions remain the most effective, and most efficient, method to impose environmental standards. Reforming the WTO to ensure that LTRAs are substantially as effective in achieving environmental protection would require the Appellate Body to recognize the effectiveness and efficiency of trade restrictions as instruments of environmental reform.

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323. *See* Howse & Trebilcock, *supra* note 12, at 70. Admittedly, trade sanctions do not have an overwhelming track record of effectiveness. According to a study by Hufbauer, Schott and Elliott, the overall success rate of trade sanctions in altering the conduct of the targeted country is only thirty-four percent. *See id.* Trade sanctions are most likely to succeed where policy changes are modest, and where the country imposing the sanctions is significantly larger and more powerful than the sanctioned country. *See id.* But in relation to other arrows, trade sanctions are likely to be the most targeted and most effective measures. *See id.*

324. *See id.* at 71. Further, it is difficult to ethically or politically justify a principle by which the victim of environmental damage is forced to "pay ('bribe') violators to achieve compliance." *Id.*

325. *Id.* at 72. Further, consumers may want to terminate production altogether, not just reduce consumption and production which presents the collective action problem.

This reform might not be very effective for environmental cases under the GATT because, after the Tuna cases,[326] no state has relied on justifying its actions under Article XX(b). Because the Panels and the Appellate Body have been more flexible in interpreting Article XX(g), and because the XX(g) standard is easier to satisfy, States have more heavily relied on sub-paragraph (g) to justify their measures. However, if the Appellate Body were to adopt this reform, more cases would be argued under Article XX(b). The reform would certainly lower the bar to allow more measures to be justified under sub-paragraph (b).

This reform would likely drastically change the outcome in every one of the environmental cases heard in the GATT thus far. For example, in the Tuna, Gasoline, and Shrimp cases, the Panels and the Appellate Body viewed the United States' failure to negotiate international multilateral agreements as a bar to imposing unilateral actions.[327] However, applying the new "reasonably available" interpretation, the Panels and the Appellate Body would have to recognize that the negotiation of such agreements requires considerable commitments of time and resources, and can be stalled by holdout members, and thus, might not be reasonably available alternatives to unilateral action. By integrating the environmental considerations into the evaluation of less-trade-restrictive alternatives, the Panels and the Appellate Body would be acting consistently with the principle of sustainable development. Further, in Gasoline II, the Appellate Body rejected any consideration of the administrative difficulties suffered by the United States in establishing refining baselines for importers.[328] The Appellate Body refused to weigh the feasibility of policy options in economic or technical terms, as suggested by the United States.[329] This reform would require the Appellate Body to adopt a more dynamic cost-benefit analysis, which is more consistent with the principle of sustainable development, and could likely have changed the outcome in Gasoline II.[330]

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326. *See* Tuna I, *supra* note 104; Tuna II, *supra* note 104.

327. *See* Tuna I, *supra* note 104 , at ¶5.28; Tuna II, *supra* note 104, at ¶5.35; Gasoline II, *supra* note 104; Shrimp II, *supra* note 10.

328. *See* Gasoline II, *supra* note 104.

329. *See id.*

330. Had the Appellate Body recognized the administrative and technical difficulties of allowing the importers to use any of the three methods to compute their baseline standards, the Appellate Body would likely have decided that the guidelines were the least trade restrictive alternative that was "reasonably available." Again, giving more precedence to the environmental effectiveness of the measure is likely to change the outcome of trade-

B. Incorporate Sustainable Development into the Chapeau's Balancing Test

The second potential reform is to modify the scope of the terms of reference of the Appellate Body and GATT Panels to include customary international law, and to acknowledge conflicting MEA's. Thus, in applying the balancing test of the *chapeau*, the Appellate Body would be required to take into account the principle of sustainable development, as well as any MEA's under which the challenged measure was justified. This would create a presumption of validity under the *chapeau*, as part of the balancing test, if the challenged measure were consistent with customary international law or an MEA.

In Gasoline II, the Appellate Body stated that the GATT cannot be read "in clinical isolation from public international law."[331] The Appellate Body's interpretation must give effect to the purpose and objectives of the GATT.[332] The Article XX exceptions cannot be read so broadly as to emasculate Articles I, III, and XI, but cannot be read so narrowly as to emasculate Article XX.[333] "[C]ommitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources."[334] Article 3.2 of the Dispute Settlement Understanding should be reinterpreted to mean "in accordance with customary rules of public international law," rather than "in accordance with customary rules of interpretation of public international law."[335] WTO parties should favor interpretations that support broader international law principles, i.e., sustainable development.[336]

In the trade-environment cases, the Panels and the Appellate Body have repeatedly lamented the lack of an international standard to apply, but their actions ignore a well-established, overarching international environmental standard — the principle of sustainable development — that exists with or without a treaty on point. Thus,

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environment conflicts. *See also* Trachtman, *supra* note 12, at 40 (arguing in favor of a dynamic cost-benefit analysis in order to accommodate non-monetary values).

331. Gasoline II, *supra* note 104.

332. *See id. See also* Dispute Settlement Understanding, *supra* note 8, at 3.2.

333. *See* Shrimp II, *supra* note 10.

334. Gasoline II, *supra* note 104.

335. Dispute Settlement Understanding, *supra* note 9, at art. 3.2.

336. Some could argue that Gasoline II should be interpreted to mean only that international rules of treaty interpretation are applicable. Under such a reading of Article 3.2, to interpret the words "of interpretation" out of Article 3.2 is arguably beyond the Panel's and Appellate Body's jurisdiction. However, this author suggests that Article 3.2 is not limited to rules of treaty interpretation, but rather Article 3.2 means that the Appellate Body should use customary interpretations of public international law.

this reform allows the Appellate Body and Panels to apply the principle of sustainable development in the *chapeau's* balancing test, which would give the Appellate Body and Panels a workable international standard to apply.

This reform would also likely reverse the outcomes in each of the environmental cases decided under the GATT thus far. In each case, in applying the balancing test of the chapeau, the Appellate Body and Panels evaluated the challenged measure only vis-à-vis WTO law - without evaluating the justification of the challenged measure vis-à-vis customary international law or any applicable MEAs. For example, in Shrimp II, the Appellate Body ignored the fact that the United States had been in the process of negotiating a sea turtle protection treaty for several years.[337] If the Appellate Body had recognized that treaty, and if Section 609 were found to be consistent with that treaty, Section 609 should have been given a presumption of validity. This would be a great step forward in applying the principle of sustainable development (i.e., requiring sustainable use of resources and requiring integration of economic and environmental concerns).

VI. RECENT DEVELOPMENTS

A. Court of International Trade Litigation

On April 2, 1999, the U.S. Court of International Trade ruled that enforcement of Section 609 as it is currently written will be required, even though it violates the WTO Appellate Body's ruling that Section 609 is inconsistent with the GATT, and must be amended or withdrawn.[338] In March 1999, the State Department proposed Guidelines to bring Section 609 into compliance with the Appellate Body's ruling.[339] The 1999 Guidelines proposed the use of a shipment-by-shipment importation standard, which the Court of International Trade has now ruled is illegal under Section 609.[340] The Court of International Trade has again compelled the Department of State to return to the nation-by-nation importation

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337. *See* Shrimp II, *supra* note 104. *See* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 734, 742 (1998) (discussing the Inter-American Convention for the Protection and Conservation of Sea Turtles (CPCST) that was signed in 1996 by seven countries).

338. *See* Earth Island Inst. v. William M. Daley, 48 F. Supp. 2d 1064 (Ct. Int'l Trade April 2, 1999) (Aquilino, J.).

339. *See* 48 F. Supp. 2d at 1076.

340. *See id.*

standard rejected by the Appellate Body.[341] The United States will now be forced to either disobey its own court order, amend the statute, or disobey the WTO Appellate Body Report.

This new ruling evidences the continuing tension between international trade and domestic environmental protection. The potential for backlash against international economic bodies grows, because domestic environmental groups do not appreciate limits on United States sovereign power to enact domestic environmental regulations. In contrast, though, other WTO Members resist the United States' attempts to unilaterally enforce its own environmental standards on their products.

B. Seattle Ministerial Round

On 30 November 1999, the WTO held its Ministerial Meeting in Seattle, Washington. The meeting was disrupted by widespread, and often riotous, protests against the WTO.[342] Thousands of people protested outside the Meeting, preventing WTO delegates from attending the Meeting and preventing the conduct of any business. The protesters advocated linking trade liberalization to environmental standards and improved labor standards.[343] The meeting quickly adjourned, without much substantive progress.[344]

C. Implementation of the Appellate Body Report

On 27 January 2000 at the Dispute Settlement Body Meeting, the United States stated that it has implemented the WTO Shrimp II ruling. The State Department has issued new guidelines implementing Section 609 which are intended to (1) introduce greater flexibility in considering the comparability of foreign programmes and the U.S. programme; and (2) to elaborate a timetable and procedures for certification decisions.[345] The United States reported that it is continuing negotiation efforts with states in the Indian Ocean region regarding the protection of sea turtles in that region.[346] The United States also reported that it continues to offer technical training in the design, construction, installation and

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341. *See id.* at 1080.

342. *See* Helene Cooper, *Clash in Seattle: Poorer Countries Are Demonstrators' Strongest Critics*, WALL ST. J., Dec. 2, 1999, at A2.

343. *See id.*

344. *See id.*

345. Daniel Pruzin, Malaysia, *U.S. Reach Modus Vivendi on WTO Shrimp-Turtle Row; India Next*, INT'L TRADE REPORTER, Jan. 20, 2000.

346. *See id.*

operation of TEDs to any government that requests it.[347] The United States has reached an understanding with respect to this matter with Malaysia, and is reportedly close to reaching understandings with the remaining four states party to the case.[348] Malaysia has agreed at this stage not to challenge United States assertions that it has complied with the Appellate Body Report.[349] The United States has, in turn, agreed not to oppose any Malaysian efforts to seek a WTO ruling on the question of United States compliance with the Appellate Body report, should Malaysia wish to do so in the future.[350]

VII. CONCLUSION

The philosophical compromise between trade and environmental values seems simple: the economic efficiency model should not be rejected, but rather, integrated into an international governance regime which also includes environmental issues.[351] The goals of traditional trade policy and international environmental policy are tasks of one overarching goal, or branches of the same tree - the construction of a just international society.[352] Sustainable development is the connection that resolves conflicts among the branches of the same tree. The dilemma lies in how to implement the principle of sustainable development in the WTO system. This paper has advocated two methods of integration of economic and environmental values: first, the reinterpretation of "reasonably available" in the necessity test to require substantially equivalent environmental effectiveness of the less trade restrictive alternative; and second, the incorporation of the principle of sustainable development, notably the principle of sustainable use and the principle of integration, into the *chapeau's* balancing test. Both solutions will alter the balance between trade and environmental values in the WTO to provide a level playing field between the two.

Regardless of whether the reader accepts the underlying philosophical justification for environmental action, the Appellate Body will likely be forced to concede some ground to environmental values, as a matter of practicality and reality, in order to maintain the

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347. Robert Evans, *Switzerland: Shrimp-Turtle Trade Now Said Close to Accord*, Reuters News Service, Jan. 18, 2000.

348. *See* Pruzin, *supra* note 345.

349. *See id.*

350. *See id.*

351. Garcia, *supra* note 126, at 425.

352. *Id.*

stability and legitimacy of the WTO Regime. Even those who disapprove of the acceptance of environmental values into WTO jurisprudence will likely concede, on Regime Theory grounds, that the WTO system is much too important to put at risk over environmental values. And in light of recent events, it may well be at risk. Thus, in order to avoid a potential showdown and preserve the WTO regime, the Appellate Body should carefully reconsider the balance between trade and environmental values.