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An Ode to Sea Turtles & Dolphins: Expanding WTO's Mandate to Bridge the Trade-Environment Divide

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I. INTRODUCTION

The Rio Earth Summit (Rio Declaration on Environment and Development) in 1992 first recognized the importance of ensuring that trade and environmental policies are compatible and supportive of sustainable development.[1] Since then, however, the globalization of world economy and the transboundary nature of many environmental problems have only exacerbated the tension between the two regimes of international law: the multilateral environmental agreements ("MEAs") and the World Trade Organization ("WTO").[2] The potential for conflict between these two has commanded attention for a long time, although actual conflict has not occurred yet.[3]

Some scholars emphasize that free trade by itself is not a direct cause of environmental degradation.[4] Even without trade, the production and consumption of environmentally harmful products will continue in national markets, if the value of environmental goods is not appreciated accordingly.[5] Instead, it is a matter of market failure as the value of environmental goods is not

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[1] United Nations Conference on Environment and Development, Rio de Janeiro, Braz. June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).
[2] Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. U. L. REV. 401, 404 (2014)
[3] *Id.* The WTO Panel and Appellate Body have never ruled on the inconsistency of the trade provisions of the MEAs with the obligations of the WTO regime.
[4] Jagdish Bhagwati, *Trade and the Environment: The False Conflict?*, in TRADE AND THE ENVIRONMENT — LAW, ECONOMICS, AND POLICY 162–64 (1993).
[5] *Id*.

reflected in the price of goods and services.[6] Economists call this phenomenon, "the failure of internalization of environmental costs."[7] In the meantime, other economists argue that international trade hurts the global natural environment.[8] Thus, there is no consensus even among economists, let alone among environmentalists, on whether trade harms the environment.

The ultimate aim of environmentalists differs significantly from that of free traders.[9] Environmentalists view the WTO's efforts to be biased in favor of trade, because they fear that the principles of free trade would override even legitimate efforts for environmental protection.[10] The MEAs seek to protect the environment, even if achieving this goal requires prohibiting the free flow of products across borders.[11] On the other hand, the WTO's priority is on liberalizing trade by lowering trade barriers and providing a forum for efficient resolution of trade disputes.[12] In the eyes of free traders, the use of trade restrictions as a tool for enforcing environmental goals goes against their efforts to reduce trade barriers.[13] Even without explicit conflict, simply the existence and purpose of WTO may have the effect of dwarfing environmental causes.

Achieving mutual supportiveness between MEAs and WTO rules will strongly enhance global governance of sustainable development. Achieving this, however, will involve harnessing considerable political will in order to establish the necessary legal and policy framework that will

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[6] FORD RUNGE, THE ENVIRONMENTAL EFFECTS OF TRADE 8 (1991)
[7] *Id*.
[8] *See generally* BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001).
[9] TRISH KELLY, THE IMPACT OF THE WTO: THE ENVIRONMENT, PUBLIC HEALTH AND SOVEREIGNTY 3 (2007).
[10] *Id*.
[11] For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora contains import and export restrictions, and imposes permitting requirements for species in trade. In fact, its whole purpose is to directly impact on international trade in order to protect endangered species. *See infra* notes 61–73 and accompanying text.
[12] *See* KELLY, *supra* note 9, at 3–4.
[13] *Id.* at 4.

underpin this relationship. Actions to be taken are both institutional and substantive. Therefore, a variety of solutions, both within the WTO and beyond, should be considered and developed.

Unfortunately, the conundrum of finding the most effective way of harmonizing the two regimes remains unanswered.[14] Therefore, it is meaningful to examine and evaluate possible solutions to this problem. In fact, there is already much in the General Agreement on Tariffs and Trade ("GATT") to deal with environment-related trade issues. Article XX of the GATT on the General Exceptions provides for the adoption of measures to protect human, animal and plant life and health and to preserve exhaustible natural resources.[15]

The purpose of this paper is therefore to examine what have been the past attempts by WTO Dispute Settlement Body to tackle this issue and to suggest better solutions. Bearing in mind that the WTO-MEA clash is potentially a serious source of conflict in the near future, this paper seeks to comprehensively review the subject, examine potential ways to harmonize the two regimes, and suggest a solution.

II. CONFLICT BETWEEN TRADE AND ENVIRONMENT

1. Environment-Related Rules in the WTO

A. Most Favored Nation, National Treatment, and Quantitative Restrictions

The GATT advances two fundamental principles of international trade law: Most Favored Nation ("MFN") and National Treatment ("NT").[16] MFN means that WTO Members are required

[14] *See*, *e.g.*, PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW & THE ENVIRONMENT 753–66 (2009).
[15] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
[16] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 36 (3d ed. 2013).

to grant the same benefits to equivalent goods regardless of the country of origin.[17] NT essentially means treating foreign and domestic products equally.[18] In addition, GATT prohibits measures that limit the quantity of a product that may be imported or exported.[19] When MEAs restrict trade, such trade-restrictive measures are most likely to be inconsistent with the principles of MFN, NT and the prohibition of quantitative restrictions.

B. GATT Article XX

As mentioned above briefly, Article XX of GATT lays out a number of specific instances in which WTO Members may be exempted from trade rules.[20] Article XX provides for the adoption of measures to protect human, animal and plant life and health and to preserve exhaustible natural resources.[21] The chapeau of Article XX establishes as threshold requirements that a measure must not be applied in a manner constituting a means of "arbitrary" or "unjustifiable" discrimination between countries or a "disguised" restriction on international trade.[22] WTO Members are allowed to protect their right to adopt and enforce measures falling within any of the

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[17] *Id.* at 316.
[18] *Id*.
[19] *Id.* at 481.
[20] The full relevant text of Article XX reads as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption of enforcement by any contracting party of measures:
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> (b) necessary to protect human, animal or plant life or health…;
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> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

GATT, *supra* note 15, art. XX.
[21] *Id*.
[22] *See* BIRNIE, BOYLE & REDGWELL, *supra* note 14, at 774–76.

ten categories. Significant among the ten categories are Article XX(b) and Article XX(g).[23]

Article XX(b) concerns the measure "necessary to protect human, animal or plant life or health."[24] Article XX(g) mentions about the measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[25]

The provisions provide significant interpretative issues in relation to the environment such as "like product analysis," "necessity," "relating to," and the interpretation about PPMs (Process or Production Methods).

Members are required to treat "like products" in a similar or equivalent manner, according to Article I and Article III, which respectively impose MFN and NT obligations.[26] Therefore, how to interpret the term "like product" is important. It has been already well established that the "like product" analysis should be dealt with on a case-by-case basis. The criteria for determining whether two kinds of products are "like," are namely: (a) the product's end-uses in a given market; (b) consumers' tastes and habits; (c) the product's properties, nature and quality; and (d) the product's tariff classification in the Harmonized System.[27] Environmental risks or impacts of a product may be considered in a like product analysis as well as under Article XX. Environmental risks of a product can be examined when assessing the similarity of two products and the consumers' tastes and habits. Under Article XX, the justifiability and the necessity of a measure may also be examined in relation to the environmental risk of a product. For purposes of Article XX(b), the term "necessary" has been interpreted to require use of the least GATT inconsistent

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[23] *Id.* at 759–61.
[24] *Id*.
[25] *Id*.
[26] GATT, *supra* note 15, arts. I and III.
[27] Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, ¶ 170, WT/DS403/AB/R (Dec. 21, 2011).

means reasonably available to fulfill the health policy objective.[28] The Panel's interpretation of the term "relating to" under Article XX(g) to require a measure to be "primarily aimed at" the conservation of the natural resources at issue.[29]

C. Non-discrimination Principles and PPMs (Processing and Production Methods)

Under the GATT, one panel in *Tuna – Dolphin I* case expressed its view that a process and production method (PPM) regulation is an impermissible means for distinguishing products for tax or regulatory purposes under the National Treatment and Most Favored Nation obligations of GATT.[30]

The NT principle prohibits discrimination between *like* domestic and imported products, and the MFN principle requires that Members do not treat *like* products of other parties less favorably. WTO has treated two products as *like* products[31] if they have the same or similar physical characteristics, consumer preferences, end uses, or tariff classifications.[32] Some scholars subscribe to this view that processes or production methods do not affect products, and therefore like products cannot and should not be differentiated based on PPMs.[33] However, pointing to the fact that the *Tuna – Dolphin I* panel report remains unadopted, other commentators opine that up to now, there is no authoritative interpretation of PPMs.[34]

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[28] *See infra* notes 124–132 and accompanying text.
[29] *See infra* notes 182–206 and accompanying text.
[30] *See infra* notes 133–150 and accompanying text.
[31] The test for like products is essentially the same for MFN and NT. Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.141, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998).
[32] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 101, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos (AB)*].
[33] PPM regulations do not affect the physical characteristics of a product so they cannot distinguish like products. CHRIS WOLD, ET AL., TRADE AND THE ENVIRONMENT: LAW AND POLICY 208 (2d ed. 2005).
[34] *See, e.g.*, Robert Howse & Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249, 249–89 (2000).

D. SPS (The Agreement on Sanitary and Phytosanitary Measures)

The SPS Agreement deals with measures designed to protect human, animal and plant life or health.[35] The SPS Agreement emphasizes the need for scientific justification, calling for not maintaining measures without sufficient scientific evidence.[36] Notably, the SPS Agreement encourages Members to base their SPS measures on international standards where they exist.[37] Again, the focus on scientific justification comes in, enabling Members to introduce or maintain SPS measures that are stricter than those reflected in international standards "if there is a scientific justification."[38] Moreover, breaking away from GATT's rigid rule on PPMs, the SPS Agreement provides that in their risk assessment, Members may take into account relevant PPMs and ecological/environmental conditions in addition to available scientific evidence.[39] Yet another important provision allows for adopting provisional SPS measures if relevant scientific evidence is insufficient.[40]

E. TBT (The Agreement on Technical Barriers to Trade)

The TBT Agreement covers other technical standards not regulated by the SPS Agreement.[41] The TBT Agreement seeks to ensure that technical regulations and standards such

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[35] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [Hereinafter SPS Agreement].
[36] *Id.* arts. 2.1 and 2.2.
[37] The rationale is that this will promote the harmonization of SPS measures. *Id.* art. 3.2.
[38] *Id.* art. 3.3.
[39] *Id.* arts. 5.1 and 5.2.
[40] *Id.* art. 5.7. *See also* Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT'L L. 323, 323–90 (2002).
[41] Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

as packaging, labelling, and marketing requirements do not create unnecessary obstacles to trade.[42] The TBT Agreement recognizes that technical regulations may be necessary to fulfill a legitimate objective, including "the protection of human health or safety, animal or plant life or health, or the environment."[43] Like the SPS Agreement, the TBT Agreement suggests that both characteristics of the product itself, and the process by which it is produced, are relevant in assessing the health or environmental risks posed by a product.[44] The TBT Agreement also requires Members, in their technical regulations, to use relevant international standards where they exist or their completion is imminent.[45] However, this requirement is limited if the international standards are an inappropriate means for environmental protection.[46] The TBT Agreement's fast track procedure further embodies the Members' belief in the need for environmental regulations.[47] Members may introduce a technical regulation quickly if there are "urgent problems of safety, health, environmental protection or national security."[48]

F. TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property)

The objective of the TRIPS Agreement is to promote effective and adequate protection of intellectual property rights.[49] The TRIPS Agreement makes explicit reference to the environment in Section 5 on patents.[50] The TRIPS Agreement allows Members to refuse to patent inventions

[42] PHILIPPE SANDS, ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 810 (3d ed. 2012).
[43] TBT Agreement, *supra* note 41, art. 2.2.
[44] *Id*.; SANDS, ET AL., *supra* note 42, at 810.
[45] TBT Agreement, *supra* note 41, art. 2.4.
[46] SANDS, ET AL., *supra* note 42, at 810.
[47] TBT Agreement, *supra* note 41, art. 2.10.
[48] *Id*.
[49] *See* VAN DEN BOSSCHE & ZDOUC, *supra* note 16, at 954–56.
[50] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

that may endanger the environment.[51] Article 27.2 specifically lists the following as legitimate objectives: "to protect human, animal or plant life or health or to avoid serious prejudice to the environment." [52] Additionally, Members can exclude "diagnostic, therapeutic and surgical methods for the treatment of humans or animals" from patentability.[53]

G. GATS (The General Agreement on Trade in Services)

The GATS contains a "general exceptions" clause, Article XIV, similar to GATT Article XX.[54] The GATS Article XIV starts with a chapeau that is identical to that of GATT Article XX.[55] Just like the GATT Article XX(b), GATS Article XIV(b) allows WTO members to adopt GATS-inconsistent measures if such measures are "necessary to protect human, animal or plant life or health."[56] Thanks to the identical language in the chapeau, applying GATS-inconsistent measures must not result in arbitrary or unjustifiable discrimination and must not constitute protectionism in disguise.[57]

Thus, various WTO provisions do provide for environmental exceptions. As mentioned above, however, environmentalists fear that pro-trade WTO panels and appellate body would override even legitimate efforts for environmental protection.[58] In order to see if such fear is warranted, it is necessary to analyze GATT/WTO jurisprudence on environment disputes.

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[51] *Id.* art. 27.2.
[52] *Id*.
[53] *Id.* art. 27.3.
[54] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.
[55] *Id.* art. XIV.
[56] *Id*.
[57] *Id*.
[58] *See* KELLY, *supra* note 9, at 3.

2. Trade-Related Measures in the MEAs

The use of trade measures in international environmental agreements has a long history.[59] For example, the 1933 London Convention controlled and regulated the import, export and traffic in certain trophies.[60] Other subsequent agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) establish quantitative restrictions on international trade to achieve environmental protection objectives.[61]

A. CITES

The objective of CITES is to control international trade so that it does not threaten the survival of species of animals and plants facing extinction or endangerment.[62] CITES places a species in one of three Appendices, according to the degree of protection they need. [63] Appendix I includes species threatened with extinction. [64] Trade in this category is permitted only in exceptional circumstances. [65] Appendix II includes species not necessarily threatened with

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[59] SANDS, ET AL., *supra* note 42, at 801.
[60] *Id*.
[61] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES]; Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal, UNEP Doc. IG.80/L.12 *adopted and open for signature*, Mar. 22, 1989, reprinted in 28 I.L.M. 649 (1989) [hereinafter Basel Convention]; and Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1554 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].
[62] Chris Wold, *An Analysis of the Relationship between the Trade Restrictions of CITES and the rules of the World Trade Organization*, INTERNATIONAL ENVIRONMENTAL LAW PROJECT, Jan. 6, 2012, at 1 (Apr. 23, 2016, 4:10 PM), http://law.lclark.edu/live/files/10422-wto-amp-cites-legal-opinion.
[63] *Id*.
[64] CITES, *supra* note 61, art. II.1.
[65] *Id*.

extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.[66] Lastly, Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.[67]

CITES attempts to protect the listed species through the use of trade restrictions and thereby discourages the initial taking of the wildlife.[68] CITES contains import and export restrictions, and imposes permitting requirements for species in trade.[69] There must be a scientific finding that the trade in question will not threaten the existence of the species, if the trade is to be allowed.[70]

Thus, CITES directly impacts on international trade – that is its whole purpose. The implementation of CITES requirements certainly implicates the GATT rules. For example, when Country A and Country B are both parties to CITES and WTO, Country A's decision to deny Country B's request for an export permit because it considers that the trade would be "detrimental to the survival of the species"[71] could be a direct violation of the prohibition on quantitative restrictions in GATT Article XI. Other trade restrictions of CITES implicate GATT's MFN and NT obligations. In particular, the "split listing" of species, which might allow some countries to trade in "threatened" or "endangered" species while prohibiting others from doing so, would be directly contrary to the non-discrimination principle of the WTO. For example, certain populations of vicuña are included in Appendix I (no trade), but other populations are included in Appendix II (trade permitted).[72] Following CITES rules may mean that the United States has to reject imports

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[66] *Id.* art. II.2.
[67] *Id.* art. II.3.
[68] *See generally id.* arts. III–V.
[69] *Id*.
[70] *Id.* arts III.2(a), 3(a) and IV(a).
[71] *Id.* arts. III and IV.
[72] Wold, *supra* note 62, at 3.

of vicuña wool from an Appendix I population from Chile, but allow imports from an Appendix II population from Peru.[73] The U.S. likely violates its MFN obligation. Similarly, if Peru rejects imports of vicuña wool from an Appendix I population from Chile, but allows internal commerce in vicuña wool to continue from its own Appendix II populations, then it violates its NT obligation.[74]

B. Basel Convention

Basel Convention uses trade measures to limit the market for the transboundary movement and disposal of hazardous waste.[75] The Convention restricts trade in waste that does not comply with the agreement.[76] For example, the agreement's trade provisions encourage the management of waste in an environmentally sound manner and with prior informed consent.[77] In addition, the Basel Convention indirectly encourages the source reduction of hazardous waste by attempting to limit disposal capacity alternatives throughout the world.[78]

The Basel Convention establishes a prior informed consent procedure for trade in hazardous waste and prohibits export of hazardous waste if the importing country cannot dispose of it in an environmentally sound manner.[79] Only if it can be demonstrated that the importing nation "will manage the waste in an environmentally sound manner," waste shipments can be allowed.[80] The Basel Convention provides that a party shall not permit hazardous waste or other

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[73] *Id*.
[74] *Id*.
[75] Jonathan Krueger, *The Basel Convention and the International Trade in Hazardous Wastes*, YEARBOOK OF INT'L CO-OPERATION ON ENVTL. & DEV. 2001/02, at 44.
[76] *Id*.
[77] *Id*.
[78] *Id.* at 48.
[79] Basel Convention, *supra* note 61, art. 4.2(e).
[80] *Id*.

wastes to be traded with a non-party unless that party enters into a bilateral, multilateral, or regional agreement regarding transboundary movement of hazardous waste with the non-party.[81] In the case of transfers between parties, other conditions require the exporter to receive the prior informed consent of the importing party and any other parties through whose territory the waste will be transported.[82] In addition, a party may only export hazardous waste if it lacks the technical capacity, necessary facilities, or suitable domestic waste-disposal sites.[83] A non-party to the Basel Convention may receive refusal from the Basel party to trade in hazardous waste.[84] Thus, the Basel Convention provides incentives to non-parties to either join the Convention or enter into alternative bilateral, multilateral, or regional agreements governing the transboundary movement and disposal of hazardous waste so that they can trade in hazardous waste.[85]

On its face, this provision that discriminates against non-parties violates GATT's prohibition on quantitative restrictions. GATT makes it clear that trade bans are generally not permitted. This is in direct conflict with Article 4.5 of the Basel Convention which stipulates that "A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."[86] This discriminatory use of trade bans against non-parties is also contrary to GATT Article XIII which calls for applying any trade ban equally to all countries.[87]

C. Montreal Protocol

Montreal Protocol seeks to restrict the global market in consumption and production of

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[81] *Id.* art. 4.5.
[82] *Id.* art. 6.4.
[83] *Id.* art. 4.9(a).
[84] KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 61 (2000).
[85] *Id*.
[86] Basel Convention, *supra* note 61, art. 4.5.
[87] GATT, *supra* note 15, art. XIII:1.

Ozone Depleting Substances.[88] The agreement contains trade provisions that aim to encourage the phase-out of ozone depleting substances.[89] The Montreal Protocol reduces the release of ozone depleting substances into the atmosphere and provides an incentive for the development of benign substitutes for ozone depleting substances.[90] The Montreal Protocol establishes a regime of controlled trade for listed substances and a ban on trade in such substances with non-parties.[91] The prohibitions extend to a ban on the import from non-parties of products containing the substances, and to products manufactured with the substances.[92] Also, the Montreal Protocol allows limited trade in actual ozone depleting substances to promote economic efficiency and further regulate the global trade among parties to the Protocol.[93] The export of technology to non-parties to assist the production of the substances is discouraged.[94]

Like the Basel Convention, the Montreal Protocol creates incentives through trade measures for non-parties to join it. The Protocol's trade measures against non-parties are likely inconsistent with the GATT principles of MFN, NT, and the elimination of quantitative restrictions.

In short, facing problems of ecological degradation and global warming, the MEAs seek to protect the environment at the expense of free flow of goods across borders. Many trade-

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[88] United Nations Environmental Program, *Montreal Protocol on Substances that Deplete the Ozone Layer 2007: A Success in the Making* 5, *available at* http://ozone.unep.org/Publications/MP_A_Success_in_the_making-E.pdf.

[89] David G. Victor, *The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, EXECUTIVE REPORTS, INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS 16 (1996).

[90] Donald L. Goldberg, et al., *Effectiveness of Trade & Positive Measures in Multilateral Environmental Agreements: Lessons from the Montreal Protocol*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW 4, 7–8, available at http://ciel.org/Publications/EffectivenessofTradeandPosMeasures.pdf.

[91] *Id.* at 3.

[92] Montreal Protocol, *supra* note 61, arts. 4.3–4.4.

[93] *Id.* art. 2.

[94] *Id.* art. 4.5–4.6.

restrictive measures in the MEAs are in direct conflict with GATT's non-discrimination principles and the general prohibition on quantitative restrictions. No party has yet challenged the inconsistency of such trade-restrictive measures before the WTO dispute settlement system. However, the potential for WTO-MEA conflict abounds.

3. Legal Obligations in the GATT Implicated by MEAs

MEAs usually do not have trade implications and most WTO provisions do not have explicit environmental implications.[95] However, an overlap exists.[96] As noted above, some MEAs such as CITES contain trade provisions to limit trade in order to protect the environment.[97] When an MEA authorizes trade between its parties in a specific product, but bans trade in that same product with non-parties, then this violates the WTO's non-discrimination principle.

MEAs aim to provide incentives for non-parties to participate, and to create measures to discourage free riders.[98] However, import and export restrictions against non-parties of MEAs potentially violate WTO's MFN principle. For example, a non-party to the Montreal Protocol (on Substances that Deplete the Ozone Layer) may claim that its like product (e.g., a refrigeration unit containing ozone depleting substances) is being discriminated against by a member of the Protocol, if both are WTO Members.

Similarly, import restrictions of MEAs could go against WTO's NT principle. For example, the Montreal Protocol distinguishes products based on their production and processing methods

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[95] United Nations Environmental Programme, *Trade-related Measures and Multilateral Environmental Agreements* 1–2 (2007), *available at* http://www.unep.ch/etb/areas/pdf/MEA%20Papers/TradeRelated_MeasuresPaper.pdf.
[96] *Id.* at 2–3.
[97] *Id.* at 3.
[98] Duncan Brack & Kevin Gray, *Multilateral Environmental Agreements and the WTO*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 11, 18 (2003), *available at* https://www.iisd.org/pdf/2003/trade_meas_wto.pdf.

although WTO stipulates that a regulatory measure should be directly applied to the product itself.

As these examples illustrate, countries that are members of the WTO, but not parties to a specific MEA are more likely to challenge the provisions in the MEA. Despite such conflicts, and many other accompanying problems, neither trade nor environment can ignore one another. Indeed, some scholars point to the fact that free trade simply cannot risk being further diminished by systematic opposition from the environmentalists, the free trade coalition being already narrow enough.[99]

III. ENVIRONMENT DISPUTES IN GATT/WTO

1. Under GATT

GATT panels considered the GATT consistency of environmental measures that restrict trade a number of times. While environmental concerns never prevailed under GATT, over time, panelists became more open to accepting trade-restrictive environmental measures.

A. United States – Prohibition of Imports of Tuna and Tuna Products from Canada (1982)

This case was the first trade dispute pertinent to trade/environment interactions. Canada seized 19 U.S. tuna vessels caught fishing inside Canada's fisheries zone.[100] The United States retaliated by imposing an import ban on all types of tuna and tuna products from Canada pursuant to Section 205 of the Fishery Conservation and Management Act of 1976.[101] The GATT Panel first found that the U.S. import ban is clearly inconsistent with the obligation of the United States under

[99] DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 69–84 (1994).
[100] Report of the Panel, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 (Dec. 22, 1981), GATT B.I.S.D. (29th Supp.) at 91, ¶ 2.1 (1982) [Hereinafter *US – Tuna (1982)*].
[101] *Id.* at ¶ 4.3.

Article XI:1 not to institute quantitative restrictions.[102] The United States argued that its measure fell within the general exception in Article XX(g) for measures relating to the conservation of an exhaustible natural resource "made effective in conjunction with restriction on domestic production or consumption."[103] Canada agreed that tuna was an exhaustible natural resource.[104]

The GATT Panel first examined the preamble (chapeau) to Article XX.[105] The Panel noted the discrimination of Canada was not necessarily arbitrary or unjustifiable because the U.S. also imposed similar import bans on imports from Costa Rica, Ecuador, Mexico and Peru for similar reasons.[106] The Panel further found that the U.S. measure was not a disguised restriction on international trade because the measure was "taken as a trade measure and publicly announced as such."[107] This reasoning is significant because it tends to make the "disguised restriction on international trade" part of Article XX's chapeau hollow.[108] If publicly announcing a measure is all that is necessary to pass muster under Article XX's chapeau, this interpretation renders the chapeau almost powerless, possibly bringing pressure to interpret the individual paragraphs of Article XX more restrictively.[109]

Turning to Article XX(g), the Panel noted that for a measure to be justified under subparagraph (g), the measure had to be made effective in conjunction with restrictions on domestic production and consumption.[110] Because the U.S. provided no evidence that domestic production or consumption had been restricted, the Panel rejected the United States' claim that its

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[102] *Id.* at ¶ 4.4.
[103] *Id.* at ¶¶ 3.7–3.9.
[104] *Id.* at ¶ 3.13.
[105] *Id.* at ¶ 4.8.
[106] *Id*.
[107] *Id*.
[108] Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 47–48 (1991).
[109] *Id*.
[110] *US – Tuna (1982)*, *supra* note 100, at ¶ 4.9.

measure could be justified under Article XX(g).[111]

B. Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (1988)

The issue before the GATT Panel was whether Canada's prohibitions on the export of certain unprocessed herring and salmon were consistent with Canada's obligations under the GATT.[112] Canada did not dispute that such prohibitions were inconsistent with the terms of GATT Article XI:1 which provides that GATT Members shall not maintain quantitative restrictions.[113] However, Canada invoked Article XX(g) as a justifications for the prohibitions.[114]

The GATT Panel agreed with Canada and the United States that salmon and herring stocks are "exhaustible natural resources" within the meaning of Article XX(g).[115] Turning to examine whether the export prohibitions are "relating to" the conservation of salmon and herring stocks and whether they are made effective "in conjunction with" the restrictions on the harvesting of salmon and herring, the Panel noted that the only previous case concerning Article XX(g) was *US – Tuna (1982)*, but that the party invoking Article XX(g) did not maintain restriction on domestic production or consumption of tuna and thus Panel did not reach the interpretation of the terms "relating to" and "in conjunction with."[116]

The Panel paid particular attention to the language of Article XX. Some of the subparagraphs of Article XX state that the measure must be "necessary" or "essential" to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j))

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[111] *Id.* at ¶¶ 4.10–4.15.
[112] Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 (Nov. 20, 1987), GATT B.I.S.D. (35th Supp.) at 98, ¶ 4.1 (1988) [Hereinafter *Canada – Salmon (1988)*].
[113] *Id.* at ¶ 3.16.
[114] *Id.* at ¶ 3.24.
[115] *Id.* at ¶ 4.4.
[116] *Id.* at ¶ 4.5.

while subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources.[117] The Panel takes this as a suggestion that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures.[118] However, the Panel also noted that pursuant to the chapeau of Article XX, the purpose of including Article XX(g) in the GATT was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the GATT do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.[119] Thus, the Panel concluded that while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be "primarily aimed at" the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g).[120] Similarly, the Panel found that a trade measure could only be considered to be made effective "in conjunction with" production restrictions if it was "primarily aimed at" rendering effective these restrictions.[121]

The Panel then determined that Canada's export prohibitions were neither primarily aimed at the conservation of salmon and herring stocks nor primarily aimed at rendering effective the restrictions on the harvesting of salmon and herring.[122] This was because the export prohibitions did not limit access of domestic processors and consumers to salmon and herring supplies at all, and only limited the access of foreign processors and consumers to the unprocessed product.[123] The Panel therefore concluded that the export prohibitions were not justified by Article XX(g).[124]

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[117] GATT, *supra* note 15, art. XX.
[118] *Canada – Salmon (1988)*, *supra* note 112, at ¶ 4.6.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id.* at ¶ 4.7.
[123] *Id*.
[124] *Id*.

C. Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes (1990)

Thailand prohibited imports of cigarettes except under a license issued in accordance with its 1966 Tobacco Act.[125] Licenses have only been granted to the Thai Tobacco Monopoly and no license had been granted for 10 years.[126] Thailand had also maintained higher excise taxes on imported cigarettes than on domestic ones until just before the Panel heard the dispute.[127] Part of Thailand's defenses rested on GATT Article XX(b), which provides an exception from GATT obligations for measures "necessary to protect human, animal or plant life or health."[128] Thailand argued that its trade restrictions were "necessary" to protect its citizens from U.S. cigarettes which had additives that might make them more harmful than Thai cigarettes.[129]

Noting that Thailand had not granted licenses for importation of cigarettes during the past 10 years, the Panel found that Thailand had acted inconsistently with Article XI:1.[130] The Panel proceeded to examine whether Thai import measures affecting cigarettes were justified by Article XX(b). Agreeing to the parties and the expert from the WHO, the Panel accepted that smoking poses a serious threat to human health, thus enabling measures designed to reduce the consumption cigarettes to fall within the scope of Article XX(b).[131] The Panel found the "necessary" requirement to be a high bar, stating that the import restrictions could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measures consistent with

[125] Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp.) at 200, ¶ 6 (1990).
[126] *Id*.
[127] *Id.* at ¶¶ 8–10.
[128] *Id.* at ¶ 21.
[129] *Id.* at ¶ 14.
[130] *Id.* at ¶ 67.
[131] *Id.* at ¶ 73.

the GATT, or less inconsistent with it.[132] The Panel held that the Thai actions were not "necessary" within the meaning of Article XX(b) because Thailand could have employed various other GATT-compatible means such as requiring greater disclosure of cigarettes' composition, banning the use of certain additives, banning cigarette advertisements, controlling price and retail availability, and establishing uniform taxes that did not discriminate between imported and domestic cigarettes.[133]

D. United States – Restrictions on Imports of Tuna (1991) [Tuna – Dolphin I]

In 1972, the United States enacted the Marine Mammal Protection Act (MMPA).[134] In an attempt to reduce the incidental killing of dolphins, MMPA established a moratorium on the taking of dolphins by U.S. fishermen.[135] MMPA turned out to be a modest success. In five years, dolphin mortality related to tuna harvesting decreased from 300,000 dolphin deaths per year to about 25,000.[136] However, some U.S. fishermen sidestepped the MMPA by sailing under foreign flags.[137] This prompted Congress to amend the MMPA to require foreign exporters of tuna to have comparable standards to their U.S. counterparts.[138] On October 10, 1990, the United States, pursuant to court order, banned imports of tuna from Mexico.[139] Adversely affected, Mexico requested the GATT Panel to find that the MMPA import prohibitions were in violation GATT Articles I, III, IX, XI and XIII.[140] The United States contended that even if the MMPA measures

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[132] *Id.* at ¶ 75.
[133] *Id.* at ¶¶ 76–81.
[134] Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (2000).
[135] *Id.* § 1371 (a).
[136] Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 98 (1999).
[137] *Id*.
[138] *Id*.
[139] *See* Earth Island Institute v. Mosbacher, 746 F. Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991) (holding that the U.S. government may not allow imports of tuna from any nation that does not conform with the MMPA amendments).
[140] Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT

were otherwise inconsistent with the provisions of the GATT, they were justified under Article XX(b) or XX(g).[141]

The Panel concluded that the import restrictions were not internal regulation in accordance with Article III and were inconsistent with Article XI.[142] With regard to the United States' Article XX claims, the Panel expressed concern over the extra-jurisdictional nature of the MMPA measures.[143] On Article XX(b), the Panel examined the drafting history of Article XX(b) to conclude that the drafters focused on the use of sanitary measures to safeguard plant or animal life *within* the jurisdiction of the importing country.[144] The Panel's finding with regard to Article XX(g) was similar: "A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction."[145] That is, no country may restrict imports in any manner for the purpose of protecting the environment outside its own jurisdiction.[146] The clear pro-free trade message of the Panel upset environmental groups.[147]

The Panel's "like product" analysis similarly delivered a huge blow to the environmentalists. The Panel focused solely on final products and not on processes and production methods. The Panel found that "[r]egulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product."[148] This effectively declared that

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B.I.S.D. (39th Supp.) at 155, ¶¶ 3.1–3.3 (1991).
[141] *Id.* ¶¶ 3.33, 3.40.
[142] *Id.* ¶¶ 5.8–5.19.
[143] *Id.* ¶¶ 5.24–5.34.
[144] *Id.* ¶ 5.26.
[145] *Id.* ¶ 5.31.
[146] 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, 46–47 (1999).
[147] *Id.* at 47.
[148] *Id.* ¶ 5.15.

differences in processes and production methods are not relevant in determining "likeness."[149] In other words, products produced in an environmentally unfriendly manner cannot be treated any less favorably than products produced in an environmentally friendly manner solely on the basis of the difference in the product's process and production method.[150]

This Panel report was never adopted by the GATT Council due to the objection by the United States. Thus, while the report may provide some guidance, it does not have official legal status in the GATT.[151]

E. United States – Restrictions on Imports of Tuna (1994) [Tuna – Dolphin II]

The United States continued to ban imports of tuna harvested in violation of the MMPA.[152] The European Economic Community (EEC) and the Netherlands brought a complaint against the U.S., alleging that the import ban constituted a quantitative restriction prohibited by GATT Article XI.[153] The United States once again countered invoking exceptions under Articles XX(b) and XX(g).[154]

Before *Tuna – Dolphin II*, the prevailing view was that the GATT would be strongly biased in favor of free trade, if it ever conflicts with environmental norms.[155] However, the Panel in *Tuna – Dolphin II* case began to switch the preference a little.[156]

The Panel accepted the view that "a policy to conserve dolphins was a policy to conserve

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[149] VAN DEN BOSSCHE & ZDOUC, *supra* note 16, at 393.
[150] *Id.* at 328.
[151] Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and after the U.S.-Shrimp Case*, 20 MICH. J. INT'L L. 819, 830 n.58 (1999).
[152] Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) ¶¶ 2.5–2.15 [Hereinafter *Tuna – Dolphin II*].
[153] *Id.* ¶ 3.1.
[154] *Id.* ¶ 3.6.
[155] ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS AND LEGITIMACY 159 (2007).
[156] *Id*.

an exhaustible natural resource."[157] Thus, the Panel recognized that the U.S. efforts to protect dolphins were a valid policy. The Panel went further by rejecting the narrow interpretation of Article XX's scope by *Tuna – Dolphin I* panel.[158] Noting that the text of Article XX(b) does not specify any limitation on the location of the living things to be protected, and that the negotiating history of GATT does not clearly support *Tuna – Dolphin I* panel's conclusion, the Panel reiterated the general international law that states *do* have the power to regulate "the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory."[159] Under the same logic, the provision of Article XX(g) does not necessarily apply only within the territory of the Member invoking it.[160] Thus, *Tuna – Dolphin II* held that while Article XX exceptions allow a Member to pursue environmental goals outside the national territory, this extraterritorial application of environmental policies extend only to the Member's nationals and vessels through personal jurisdiction.[161]

Although the *Tuna – Dolphin II* Panel was more generous to environmental concerns than the *Tuna – Dolphin I* panel, it still did not embrace international environmental treaties in its analysis. The Panel stated that international environmental treaties were neither relevant as a primary means nor as a secondary means of interpretation of the GATT.[162] This sweeping approach practically rendered all international agreements existing outside of the GATT functionally incapable.[163] However, the Panel's reasoning is inconsistent with the Vienna

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[157] *Tuna – Dolphin II*, *supra* note 152, ¶ 5.13.
[158] *Id.* ¶ 5.20.
[159] *Id.* ¶¶ 5.31–5.33.
[160] *Id.* ¶ 5.20.
[161] Ahn, *supra* note 151, at 831–32.
[162] *Tuna – Dolphin II*, *supra* note 152, ¶¶ 5.19–5.20.
[163] Dominic A. Gentile, *International Trade and the Environment: What is the Role of the WTO?*, 20 FORDHAM ENVTL. L. REV. 197, 208 (2009).

Convention.[164]

As was the case in *Tuna – Dolphin I*, this panel report was never adopted due to the veto of the United States.[165]

F. United States – Taxes on Automobiles (1994)

In this case, three domestic measures maintained by the United States on automobiles were subject to complaints by the European Community.[166] First, under the Omnibus Budget Reconciliation Act, the U.S. imposed "the luxury tax" on expensive vehicles selling above $30,000.[167] Second, the Energy Tax Act applied "the gas guzzler tax" to the sale of relatively inefficient automobiles.[168] Third, the Energy Policy and Conservation Act, through the Corporate Average Fuel Economy law (CAFE), required the average fuel economy for passenger cars sold in the United States not to fall below a certain threshold.[169]

The European Community (EC) argued that all three regulations were inconsistent with Article III, and that they could not be justified under the exceptions of Article XX.[170] With regard to the "luxury tax," the Panel found that even though a large proportion of EC imports was affected by the measure, it did not mean the tax was aimed at affording protection to domestic automobiles selling for less than $30,000.[171] Since expensive imported cars are not "like" cheaper domestic cars, the Panel found the luxury tax to be consistent with GATT Article III.[172]

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[164] *Id*.
[165] *Id*.
[166] Report of the Panel, *United States – Taxes on Automobiles*, DS31/R (Oct. 11, 1994) ¶ 1.1 [Hereinafter *US – Automobiles*]
[167] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.
[168] Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174.
[169] Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871.
[170] *US – Automobiles*, supra note 166, ¶ 3.1.
[171] *Id.* ¶ 5.12.
[172] *Id.* ¶¶ 5.15–5.16.

On the issue of the "gas guzzler tax," the EC contended that because all automobiles are like products, a difference in fuel economy is not sufficient to make one automobile unlike another for the purposes of Article III.[173] Moreover, most automobiles subject to the tax were somehow of EC origin, the EC felt that the measure was targeted at EC automobiles.[174] For example, in 1990, "73.36 per cent of the total taxes paid were derived from European manufacturers, although European cars accounted for only 4 per cent of the US market. In contrast, US production accounted for only 19.91 per cent of total tax paid, although it accounted for 72 per cent of the US market."[175] Nevertheless, the Panel concluded that the gas guzzler tax was in compliance with Article III because there was no evidence that the aim or effect of the fuel economy threshold and of the regulatory distinctions changed conditions of competition affording protection to the American automobiles.[176] In particular, the Panel noted that "the amount of the tax payable at the threshold did not seem excessive."[177] Some commentators criticize this finding as exercising a high level of "judicial restraint" that would likely limit the possibility of a national treatment violation to exceptional circumstances.[178]

Concerning the CAFE regulation, the Panel noted that the U.S. separately calculated the corporate average fuel economy (CAFE) of automobiles produced in the U.S., and that of imported automobiles.[179] This allowed U.S. manufacturers which produce both low and high fuel-efficiency automobiles to average the two to achieve a high CAFE while foreign manufacturers which only produce low fuel-efficiency automobiles received a low CAFE and incurred more payment to the

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[173] *Id.* ¶ 5.19.
[174] *Id*.
[175] *Id.* ¶ 3.111.
[176] *Id.* ¶¶ 5.24–5.36.
[177] *Id.* ¶ 5.25.
[178] Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations under GATT Articles III and XX*, 16 NW. J. INT'L L. & BUS. 441, 464–65 (1996).
[179] *Id.* at 461.

U.S. government.[180] Thus, the Panel ruled that the CAFE regulation was inconsistent with Article III.[181]

Even though the United States argued that the inconsistency with Article III could be justified under Article XX(g) as a measure "relating to the conservation of exhaustible natural resources," the Panel concluded that the separate, and thus discriminatory calculation of CAFE between domestic and imported cars was not primarily aimed at the reduction of gasoline consumption and therefore could not be justified by Article XX(g).[182]

Under GATT, panels slowly moved in the direction of accepting trade-restrictive environmental measures. Even from the very first environment case, the GATT Panel agreed with both Complainant and Respondent that tuna is an exhaustible natural resource. In other words, the GATT Panel recognized that the U.S. efforts to protect tuna were a valid policy. Nevertheless, GATT panels fell short of ruling in favor of environment. GATT panels also left a lot of room for improvement as they still refused to recognize international environmental treaties in its analysis, even as a secondary means of interpretation of the GATT.

2. Under WTO

After the establishment of WTO and the Appellate Body to review panel reports, WTO moved further in the direction of embracing environmental measures.

A. United States – Standards for Reformulated and Conventional Gasoline (1996)

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[180] *Id*.
[181] *US – Automobiles*, supra note 166, ¶ 6.1.
[182] *Id.* ¶¶ 5.60–5.61.

In an attempt to improve air quality in the midst of increasing pollution in population centers, the U.S. Congress amended the Clean Air Act in 1990,[183] effectively putting the Environmental Protection Agency (EPA) in charge of coming up with a new regulation on the composition of gasoline (Gasoline Rule).[184] Now, sellers could only sell "reformulated" gasoline in nine large metropolitan areas with the worst ozone pollution and other designated areas while they could continue to sell the "conventional" gasoline in other parts of the United States.[185] The Clean Air Act mandated that reformulated gasoline be free of heavy metals such as lead and manganese.[186] With regard to conventional gasoline, the Act required it to be at least as clean as it was in 1990 (baseline standard).[187] EPA's Gasoline further clarified how to establish the baseline standard. Most domestic producers could use one of three methods in establishing an individual baseline while most foreign refiners and importers had to use a "statutory baseline" EPA established.[188]

Venezuela and Brazil claimed that the Gasoline Rule violates the national treatment provisions of GATT Article III and provisions of TBT Article 2.[189] The U.S. argued that TBT Article 2 is irrelevant and the Gasoline Rule can be justified under the exceptions in Article XX.[190]

The Panel concluded that the Gasoline Rule treated less favorably foreign gasoline, which was chemically identical to domestic gasoline by discriminatory methods of baseline

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[183] Clean Air Act, 42 U.S.C. §§ 7401–7671.
[184] Regulation of Fuel and Fuel Additives – Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80.
[185] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 2.2, WT/DS2/R (Jan. 29, 1996).
[186] *Id.* ¶ 2.3.
[187] *Id.* ¶ 2.4.
[188] *Id.* ¶¶ 6.2–6.3.
[189] *Id.* ¶ 6.4.
[190] *Id*.

calculation.[191] Moving on to an exceptions analysis under Article XX, the Panel agreed with the parties that a policy to reduce air pollution was a policy concerning the protection of human, animal and plant life or health within the meaning of Article XX(b).[192] However, the Panel ruled that the U.S. measure failed the necessity test because there were reasonably available GATT-consistent or less inconsistent alternatives such as allowing foreign refiners to calculate individual baselines based on whatever foreign data available.[193] The Panel also concluded that Article XX(d) could not save the United States because the Gasoline Rule was simply rules for determining individual baselines and did not constitute an enforcement mechanism.[194] On Article XX(g), the Panel viewed clean air as a natural resource, which could be depleted.[195] However, the U.S. measure failed the "primarily aimed at" test.[196] In fact, the Panel stated that it found no link between less favorable treatment accorded to imported gasoline and the goal of clean air.[197] In light of its findings under GATT, the Panel did not find it necessary to address Venezuela and Brazil's argument under the TBT Agreement.[198]

Claiming that the Panel erred in its finding that the rules on establishing baselines were not "related to" the conservation of clean air within the meaning of Article XX(g), the United States appealed to the Appellate Body.[199] Completely reversing the Panel's finding, the Appellate Body viewed that the baseline establishment rules as a whole were related to conserving clean air.[200]

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[191] *Id.* ¶ 6.10.
[192] *Id.* ¶ 6.21.
[193] *Id.* ¶ 6.28.
[194] *Id.* ¶ 6.33.
[195] *Id.* ¶ 6.37.
[196] *Id.* ¶ 6.40.
[197] *Id*.
[198] *Id.* ¶ 6.43.
[199] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 9, WT/DS2/AB/R (Apr. 29, 1996).
[200] *Id.* at 19.

Proceeding to determine whether the U.S. measure was made effective in conjunction with restrictions on domestic production or consumption, the Appellate Body deemed it enough that the measure imposed restrictions to both domestic and imported gasoline.[201] Unfortunately for the United States, however, the Appellate Body concluded that the Gasoline Rule did not comply with the chapeau of Article XX, which prohibits the application of an environmental measure in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction of international trade.[202] In the Appellate Body's view, the U.S. had alternative courses of action available to it such as 1) the imposition of the statutory baselines to both domestic and imported gasoline; or 2) the availability of individual baselines for all gasoline producers.[203] Doing so would have eliminated all discrimination and no restriction on international trade would have been observed.[204]

Therefore, the Appellate Body modified the Panel's reasoning with regard to subsection (g) of Article XX, but ultimately reached the same conclusion that the U.S. Gasoline Rule could not be justified by invoking Article XX. However, it is important that the Appellate Body reiterated that "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement," and that "that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements"[205] Also of significance is the fact that the Appellate Body seems to be advocating cooperative arrangements between the U.S. and foreign producers to reach the same result.[206]

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[201] *Id.* at 21.
[202] *Id.* at 23.
[203] *Id.* at 25.
[204] *Id*.
[205] *Id.* at 30.
[206] *Id.* at 27.

Some scholars see it as a sign that the Appellate Body endorses that resort to multilateral solution to transboundary environmental problems through multilateral environmental agreements is preferable to unilateral solutions.[207]

B. United States – Import Prohibition of Certain Shrimp and Shrimp Products (1998) [Shrimp – Turtle I]

Building on *US – Gasoline*, the WTO Appellate Body further developed its environmental law doctrine in *Shrimp – Turtle I* and *Shrimp – Turtle II*.[208]

In January 1997, India, Malaysia, Pakistan and Thailand requested the WTO Dispute Settlement Body to establish a Panel to determine whether a U.S. import ban of shrimp and shrimp products pursuant to Section 609 of the Endangered Species Act is in violation of the WTO obligations.[209] The U.S. legislation attempted to "level the playing field" between U.S. shrimpers who were subject to the costs of complying with U.S. environmental regulations and foreign shrimpers who were not.[210] Also, the legislation pressured foreign governments to change their domestic regulations to protect endangered sea turtles from commercial shrimping practices, in order to sell shrimp products in the U.S. market.[211] The commercial shrimp trawlers operating in sea turtle habitat were required to employ "turtle excluder devices," known as TEDs.[212] TEDs permit most sea turtles to escape from shrimp trawling nets before they are drowned.[213] All countries in whose waters shrimp and sea turtles co-exist, had to be certified by the U.S.

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[207] Gentile, *supra* note 163, at 211.
[208] HOWSE, *supra* note 155, at 159.
[209] *Id.* at 161; Endangered Species Act, 16 U.S.C. § 1531–1544.
[210] HOWSE, *supra* note 155, at 161.
[211] *Id*.
[212] *Id*.
[213] *Id*.

Department of State as having and enforcing TED legislation on commercial shrimp trawlers, if they were to be able to export shrimp to the U.S.[214] The case implicated the violation of equal treatment because the U.S. had special arrangements with some Caribbean countries due to a ruling by the U.S. Court of International Trade, but not with the Asian countries that were complainants.[215] More specifically, the United States gave western Atlantic and Caribbean countries three years to implement Section 609 requirements, but only allowed four months to other countries.[216]

The United States conceded that Section 609 amounted to an import restriction prohibited by Article XI, but tried to justify the measure regardless through Article XX.[217] Departing from the Appellate Body in *US – Gasoline*, the Panel looked at the chapeau of Article XX before examining whether the measure at issue can be justified under subparagraphs of Article XX.[218] In interpreting the chapeau of Article XX, the Panel noted that the WTO Preamble recognizes the importance of sustainable development, but concluded that environmental concerns were only secondary to the more central goals of trade liberalization and the elimination of trade barriers.[219] In this context, the Panel ruled that the U.S. measures fell beyond the scope of actions permitted under the chapeau of Article XX,[220] and did not find it necessary to consider subparagraphs of Article XX.[221] In addition, the Panel made a number of anti-environmental findings. First, even

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[214] *Id*.
[215] Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. AND POL'Y 57, 79 (1996).
[216] Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31, 40 (2000).
[217] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.15, 7.24, WT/DS58/R (May 15, 1998).
[218] *Id.* ¶ 7.28.
[219] *Id.* ¶ 7.42.
[220] *Id.* ¶ 7.62.
[221] *Id.* ¶ 7.63.

though all the parties are all parties to CITES, do not contest the need to protect sea turtles, and referred to CITES, the Panel disregarded CITES as inapplicable stating that "CITES is about *trade in endangered species* and the subject of the US import prohibition (shrimp) is not the endangered species whose protection is sought through the import ban."[222] Second, with regard to unsolicited submissions from the Center for Marine Conservation and the Center for International Environmental Law, the Panel ruled that it could not accept such submissions, foreclosing the possibility of environmental groups to present their views.[223]

The United States appealed the Panel decision on both procedural and substantive grounds.[224] Procedurally, the U.S. claimed that it was an error for the Panel to reject *amicus curiae* briefs submitted by NGOs.[225] Broadly reading Article 13 of the DSU's "right to seek information," the Appellate Body deemed the *amicus curiae* briefs acceptable.[226] Substantively, the U.S. argued that the Panel had erred in its analysis of Article XX.[227] The Appellate Body reinstated the *US – Gasoline* Appellate Body's two-tiered analysis of Article XX.[228] Unlike what the Panel did, the appropriate method for applying Article XX first examines whether the measure at issue can be provisionally justified by a particular exception listed in paragraphs (a) to (j), before moving on to appraisal of the same measure under the chapeau of Article XX.[229]

Thus, the Appellate Body turned to the first tier of the analysis of Section 609 under the terms of Article XX(g). The Appellate Body first concluded that sea turtles were exhaustible

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[222] *Id.* ¶ 7.58.
[223] *Id.* ¶ 7.8.
[224] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 9–28, WT/DS58/AB/R (Oct. 12, 1998) [Hereinafter *Shrimp – Turtle I (AB)*].
[225] *Id.* ¶ 9.
[226] *Id.* ¶¶ 102–10.
[227] *Id.* ¶ 111.
[228] *Id.* ¶ 118.
[229] *Id*.

natural resources.[230] In interpreting the term "exhaustible natural resources" in Article XX(g), the Appellate Body acknowledged that the generic term is not "static" in its content or reference but is rather "by definition, evolutionary."[231] The Appellate Body found it pertinent to note that modern international conventions and declarations make frequent reference to natural resources as embracing both living and non-living resources.[232] Here, the Appellate Body overturned the Panel's decision to disregard CITES and adopted CITES as an interpretational tool to conclude that sea turtles were in fact an endangered species.[233] Some observers have taken this part of the Appellate Body's ruling to declare that the existence of an MEA protecting a certain endangered species could, *prima facie*, bring it within the Article XX exemption in the GATT as a legitimate environmental purpose.[234] Next, the Appellate Body determined that the measure was "related to" the conservation of sea turtles.[235] The measure passed the "primarily aimed at" test because the use of TEDs would be an effective tool for the preservation of sea turtles.[236] Then, the Appellate Body found the measure to have been applied "in conjunction with restrictions on domestic production or consumption" because the Endangered Species Act also requires all U.S. shrimpers to use approved TEDs.[237]

The Appellate Body concluded that while the U.S. measure was provisionally justified under Article XX(g), it did not meet the conditions set out in the chapeau of Article XX.[238] Specifically, the Appellate Body condemned the United States for failing to conduct bilateral or

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[230] *Id.* ¶ 134.
[231] *See* HOWSE, *supra* note 155, at 233.
[232] *See* KELLY, *supra* note 9, at 45.
[233] Gentile, *supra* note 163, at 213 n.128.
[234] Elizabeth DeSombre & J. Samuel Barkin, *Turtles and Trade: The WTO's Acceptance of Environmental Trade Restriction*, 2 GLOBAL ENVTL. POL. 12, 16 (2002).
[235] *Shrimp – Turtle I (AB)*, *supra* note 224, ¶ 142.
[236] *Id.* ¶ 140.
[237] *Id.* ¶¶ 144–45.
[238] *See* KELLY, *supra* note 9, at 45–47.

multilateral negotiations with affected countries to reach a cooperative multilateral solution.[239] That the United States seriously negotiated with some countries to produce the Inter-American Convention for the Protection and Conservation of Sea Turtles, but not with others constituted unjustifiable discrimination within the meaning of the chapeau of Article XX.[240] Also, the Appellate Body found that the U.S. measures were too rigid and inflexible to the point of denying basic fairness and due process and constituting "arbitrary discrimination" within the meaning of the chapeau.[241]

The Appellate Body decision is not necessarily a loss for environmentalists because it ruled that environmental measures are no longer *per se* inconsistent with the objectives of the GATT/WTO regime.[242] The Appellate Body elaborated that even the use of extra-jurisdictional measures may be justified as long as there is a "sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g)."[243] Furthermore, although the Appellate Body found the manner in which the U.S. measure was applied to be unjustifiable because the measure was a rigid extraterritorial extension of U.S. law to other countries, and it wholly disregarded the conditions prevailing in other countries, the Appellate Body still determined that the means are reasonably related to the ends in that the Section 609 was not disproportionately wide in its scope and reach in relation to its policy objective.[244]

C. United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to

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[239] Gentile, *supra* note 163, at 213.
[240] *Shrimp – Turtle I (AB)*, *supra* note 224, ¶¶ 171–72.
[241] *Id.* ¶¶ 181–84
[242] Gentile, *supra* note 163, at 215.
[243] *Id.*; *Shrimp – Turtle I (AB)*, *supra* note 224, ¶¶ 133.
[244] *See* KELLY, *supra* note 9, at 46.

Article 21.5 of the DSU (2001) [Shrimp – Turtle II]

Despite the Appellate Body ruling in *Shrimp – Turtle I*, the United States continued to maintain its commitment to sea turtle preservation.[245] Instead of changing its applicable law, it changed the manner in which it applied the law. That is, it began to recognize sea turtle-protective measures that are "comparable in effect" to those of the United States.[246]

Pursuant to the *Shrimp – Turtle I* ruling, the U.S. issued Revised Guidelines for the Implementation of Section 609 ("Revised Guidelines") in 1999.[247] Under the Revised Guidelines, the import prohibitions no longer apply to shrimp harvested using TEDs comparable in effectiveness to those required by the U.S. or shrimp harvested in any other manner that does not pose a threat of the incidental taking of sea turtles.[248]

Nonetheless, taking the case before DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) Article 21.5 Panel, Malaysia argued that the steps taken by the U.S. did not remove the elements of "unjustifiable discrimination" and "arbitrary discrimination."[249] Malaysia also argued that *Shrimp – Turtle I* ruling imposed on the United States a duty to negotiate an agreement with shrimp exporting countries, but failed to do so.[250] The United States countered that it made reasonable efforts to negotiate an agreement and did

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[245] Christopher C. Joyner & Zachary Tyler, *Marine Conservation versus International Free Trade: Reconciling Dolphins with Tuna and Sea Turtles with Shrimp*, 31 OCEAN DEV. & INT'L L. 127, 139 (2000).
[246] Meinhard Doelle, *Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change through the World Trade Organization*, 13 REV. EUR. CMTY. & INT'L ENVTL. L. 85, 91 (2004).
[247] Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999).
[248] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 2.23–2.24, WT/DS58/RW (June 15, 2001) [Hereinafter *Shrimp – Turtle II (Panel)*]
[249] *Id.* ¶ 3.1.
[250] *Id.* ¶ 5.1.

modify the guidelines to comply with *Shrimp – Turtle I* ruling.[251]

The *Shrimp – Turtle II* Panel noted that the United States did not amend Section 609, but rather issued revised implementing guidelines.[252] Therefore, the Panel concluded that the findings of the *Shrimp – Turtle I* Appellate Body that Section 609 is provisionally justified under Article XX(g) remained valid.[253] Moving on to the interpretation of the chapeau, the Panel concluded that while the U.S. did not have the obligation to *conclude* an agreement in order to comply with Article XX, it had an obligation to make *serious good faith efforts* to reach an agreement before resorting to a unilateral measure.[254] Subsequently, the Panel found that the U.S. efforts since 1998 met the standard[255] because it 1) communicated with four original complainants to explore a regional convention for the conservation of sea turtles; 2) held a symposium on sea turtle conservation; and 3) organized a conference to develop an international agreement.[256] On the issue of the insufficient flexibility of the measure, the Panel now found it sufficiently flexible that the United States no longer required the exporting countries' programs to be essentially the same as the U.S. program and that the U.S. acknowledged that other programs may be comparable.[257] This finding, coupled with the United States' offering of technical assistance to develop the use of TEDs in third countries, led the Panel to conclude that Section 609 is not applied so as to constitute a disguised restriction on trade.[258]

Malaysia challenged the Panel's decision on the ground that the Panel erroneously confused an obligation to *conclude* an international agreement with a mere obligation to

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[251] *Id.* ¶ 5.2.
[252] *Id.* ¶ 5.41.
[253] *Id*.
[254] *Id.* ¶ 5.67.
[255] *Id.* ¶ 5.87.
[256] *Id.* ¶ 5.79.
[257] *Id.* ¶ 5.123.
[258] *Id.* ¶ 5.143.

negotiate.[259] Malaysia also disagreed that the Revised Guidelines are sufficiently flexible.[260] The *Shrimp – Turtle II* Appellate Body upheld the Revised Guidelines as sufficiently flexible to meet the standards of the chapeau.[261] Like the Panel, the Appellate Body found it dispositive that the new measure took into account special circumstances in the exporting country and offered to provide the necessary assistance to affected countries.[262] On the issue of the obligation to pursue negotiations, the Appellate Body again found for the United States.[263] The Appellate Body reaffirmed that there is no obligation to conclude an agreement, and that showing serious efforts in good faith to negotiate is sufficient.[264]

D. EC – Measures Affecting Asbestos and Asbestos-Containing Products (2001)

In 1996, France banned, with limited exceptions, the processing, sale, import, and other uses of asbestos in order to protect workers and consumers.[265] Adversely affected by the import ban, Canada brought a complaint before the WTO Panel. Mainly, Canada claimed that the import ban is incompatible with the Agreement on Technical Barriers to Trade, the national treatment obligation in GATT Article III, and the prohibition on quantitative restrictions in Article XI.[266] The European Communities, representing France, contended that the TBT Agreement is not applicable and that the ban can be justified as a measure necessary to protect human health within

[259] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 113, WT/DS58/AB/RW (Oct. 22, 2001).
[260] *Id*.
[261] *Id.* ¶ 144.
[262] *Id.* ¶¶ 144–48.
[263] *Id.* ¶ 134.
[264] Gentile, *supra* note 163, at 216.
[265] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 2.3–2.5, WT/DS135/R (Sept. 18, 2000).
[266] *Id.* ¶¶ 8.3–8.4.

the meaning of Article XX(b).[267]

First, the Panel found that the asbestos ban was not governed by the TBT Agreement because the ban is not a "technical regulation" within the meaning of that agreement.[268] With respect to GATT Article III, the Panel engaged in the analysis of "likeness." Considering that it is not relevant to take into account "risk"[269] and "consumer tastes and habits" in the like product analysis,[270] the Panel determined that non-asbestos alternatives to asbestos and asbestos-containing products are "like products" within the meaning of Article III.[271] Then, since the measure does not place an identical ban on "like products," the Panel concluded the existence of *de jure* discrimination in violation of Article III's national treatment obligation.[272] However, the Panel concluded that the French measure was justified under the chapeau and paragraph (b) of Article XX.[273] The Panel noted that a policy that seeks to reduce exposure to a risk is a policy designed to protect human life or health.[274] Facing daunting scientific evidence that exposure to asbestos can cause serious illness, including lung cancer, mesothelioma, and asbestosis, the Panel concluded that the French policy of prohibiting asbestos fell within the meaning of Article XX(b).[275] Following the well-established "necessity" test promulgated in *Thailand – Cigarettes*, which calls for no alternative measure consistent or less inconsistent with GATT,[276] the Panel was satisfied that there was no reasonably available alternative to banning asbestos.[277] Under the

[267] *Id.* ¶¶ 8.6–8.7.
[268] *Id.* ¶¶ 8.34–8.73.
[269] *Id.* ¶ 8.132.
[270] *Id.* ¶ 8.139.
[271] *Id.* ¶ 8.150.
[272] *Id.* ¶¶ 8.155, 8.157.
[273] *Id.* ¶ 9.1.
[274] *Id.* ¶ 8.186.
[275] *Id.* ¶¶ 8.186–8.194.
[276] *Id.* ¶ 8.198.
[277] *Id.* ¶ 8.222.

chapeau of Article XX, the Panel deemed that the EC established that the French measure does not constitute arbitrary or unjustifiable discrimination because the measure applies equally to asbestos products originating in any country, including France.[278] Emulating the Appellate Body in *US – Gasoline*, the Panel noted that the French measure was publicly announced and that it was applied unequivocally to international trade, leading to the conclusion that the measure did not constitute a disguised restriction on international trade.[279]

Environmentalists immediately shot down the Panel ruling as a case that "effectively demonstrates the limits of the WTO's dispute resolution system."[280] While they welcomed the Panel ruling as the first health-based trade ban to be upheld in the GATT/WTO, they found the free-trade obsessed Panel's logic to be toxic.[281] In particular, it was hard to follow how the Panel maintained that non-asbestos alternatives to asbestos and asbestos-containing products are "like products."[282] Although France ultimately prevailed, thanks to the overwhelming evidence of asbestos toxicity,[283] the environmentalists remained skeptical as to the use of the WTO dispute settlement system as the forum for adjudicating trade-environment conflicts. Yet, for them, the Appellate Body's report should be more comforting.

Canada appealed with respect to the Panel's interpretation of the TBT Agreement and the Article XX exception.[284] The EC cross-appealed as to the Article III national treatment.[285] First,

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[278] *Id.* ¶¶ 8.228–8.229.
[279] *Id.* ¶¶ 8.234, 8.239.
[280] *See*, *e.g.*, Daniel Pruzin & Peter Menyasz, Safety *and Health Environmental Groups Criticize WTO Ruling on Asbestos Ban*, 17 INT'L TRADE REP. (BNA) 1432 (2000); Jake Weksman, Aimee Gonzales & Elisabeth Tuerk, *The EC/Canada Asbestos Case: Will the WTO "Choke" on Asbestos?*, CTR. FOR INT'L ENVTL. LAW 2 (June 11, 2001), http://d2ouvy59p0dg6k.cloudfront.net/downloads/asbestos.pdf.
[281] Weksman, Gonzales & Tuerk, *supra* note 280, at 1.
[282] *Id*.
[283] *Id.* at 2.
[284] David A. Wirth, *International Decisions: European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, 96 AM. J. INT'L L. 435, 436 (2002).
[285] *Id*.

with regard to the TBT Agreement, the Appellate Body rejected the Panel's interpretation that the challenged measure did not establish technical standards for a product.[286] Nevertheless, the Appellate Body found it impossible to engage in the analysis of the TBT Agreement because the Panel failed to develop sufficient facts.[287] Notably, the Appellate Body reversed the Panel's much criticized ruling on GATT Article III. The Appellate Body first reproached the Panel for not evaluating "all of the relevant evidence."[288] Considering carcinogenicity or toxicity to be a defining aspect of the physical properties,[289] the Appellate Body concluded that alternatives that do not contain asbestos are not "like products."[290] The Appellate Body added that a mere finding that a product is "like" another does not suffice to establish an inconsistency with Article III as there must also be less favorable treatment of imported products.[291] Lastly, on Canada's claims on Article XX, the Appellate Body upheld the Panel's finding that the measure is "necessary to protect human … life or health."[292] In the process, the Appellate Body engaged in a balancing test in analyzing the word "necessary" in Article XX(b).[293] The more compelling the values promoted by the government, the more the measure can be trade-restrictive.[294]

While the Panel report attracted severe criticisms from environmental organizations, some commentators praised the Appellate Body for "acting with judicial caution" and for "giving itself ample room to craft a balance between internal and external legitimacy."[295]

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[286] *EC – Asbestos (AB)*, *supra* note 32, ¶ 75.
[287] *Id.* ¶¶ 82–83.
[288] *Id.* ¶ 113.
[289] *Id*.
[290] *Id.* ¶ 141.
[291] *Id.* ¶ 100; Wirth, *supra* note 284, at 436.
[292] *Id.* ¶ 192.
[293] Padideh Ala'i, *Transparency and the Expansion of the WTO Mandate,* 26 AM. U. INT'L L. REV. 1009, 1026 (2011).
[294] *Id*.
[295] Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in THE EU AND THE WTO: CONSTITUTIONAL AND LEGAL ASPECTS 283,

3. Aftermath

So, did the *Shrimp – Turtle I* & *II* solve the WTO-MEA conflict? Some say it did because the Appellate Body stated that *bona fide* trade restrictions in MEA will be upheld.[296] In declaring so, the extraterritorial reach of the U.S. did not seem to detain the Appellate Body. Instead, the Appellate Body mentioned that "it is not necessary to assume that requiring from exporting countries, compliance with, or adoption of, certain policies prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX."[297] This ruling implies that requiring other WTO Members to adopt a comparable regulatory program may not be inconsistent *per se* with the WTO obligation, if serious efforts were made to reach an international agreement with states whose WTO rights might be affected by an environment policy measure. This represents a fundamental shift in the WTO jurisprudence. On the other hand, some commentators were not as optimistic. In their minds, the *Shrimp – Turtle I* ruling failed to clarify how a WTO Member may act unilaterally to protect an endangered species.[298] They find it troubling that the Appellate Body would see the United States' failure to seek multilateral solutions as an important factor in determining Section 609 unjustifiably discriminatory.[299] Critics point that nothing in Article XX requires multilateral effort,[300] or reflects due process.[301]

It cannot be denied that the Appellate Body in *Shrimp – Turtle I* & *II* has provided a much

328 (Grainne de Burca & Joanne Scott eds., 2001).
296 DeSombre & Barkin, *supra* note 234, at 17.
297 *Shrimp – Turtle I (AB)*, *supra* note 224, ¶¶ 121.
298 Bret Puls, *The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy*, 8 MINN. J. GLOBAL TRADE 343, 379 (1999).
299 *Id.* at 375.
300 *Id*.
301 Axel Bree, *Article XX GATT – Quo Vadis? The Environmental Exception after the Shrimp/Turtle Appellate Body Report*, 17 DICK. J. INTL'L L. 99, 128 (1998).

more generous interpretation of the environmental exemptions in the WTO rules. However, the trade-environment tensions have not been resolved by this decision. Certain limits still remain in the WTO. First, the WTO members may still challenge trade restrictive measures in MEAs as *Shrimp – Turtle I* was not a direct clash between the WTO and an MEA. As the membership and scope of WTO expand, along with the number of MEAs, the probability of legal challenge in the WTO will inevitably increase. Second, the WTO dispute resolution mechanism still remains the dominant avenue for the resolution of trade and environmental conflicts. Rather than leaving it to the parties to MEAs to waive trade rules for the sake of global environmental protection, the WTO may judge trade restrictions in the MEAs. This means the party which wishes to invoke environmental exemption bears the burden of proof. The party must show that its measure is necessary and that it is the least trade restrictive means. This is a difficult standard to meet.

Nevertheless, it should be noted how the Appellate Body reiterated the importance of concerted efforts at tackling the environmental issues, before bringing a case to the WTO dispute settlement system.[302] Currently existing MEAs have been directly referred to, as the basis for interpretation of "exhaustible natural resources" of Article XX(g), on the grounds that the meanings of the WTO texts are not fixed but are evolving.[303]

Compared to GATT panels, WTO panels and appellate body proved much more hospitable to environmental concerns. A unilateral environmental measure by the U.S. and another one by France even prevailed under the WTO. WTO appellate body not only looked to MEAs for guidance, but it in fact cited to some. Nonetheless, it remains true that none of the GATT/WTO cases have

[302] *See* KELLY, *supra* note 9, at 47.
[303] *See* HOWSE, *supra* note 155, at 233.

dealt with a direct provision of an MEA. What is a feasible way of harmonizing a potential WTO-MEA clash?

IV. HARMONIZATION OF ENVIRONMENT AND TRADE

1. Outside the WTO Framework

The current clash between the free trade regime and the environmental regime is not a question about putting priority at either economic or environmental interests. The two regimes are in different stages of maturation.[304] That is, they have unequal interests in solving the disputes at the moment. The WTO has the most highly judicialized dispute settlement system, whereas MEAs are relatively poorly coordinated and integrated, without one institutional basis.[305] The MEAs do not share commonalities in leading principles, compliance, dispute settlement procedures, monitoring and reporting requirements, and so on.[306] This is why the environment-trade clash cannot be simply solved by changes in the rulings of the WTO Dispute Settlement Body. The dispute settlement of MEAs and WTO differ vastly in their approaches to resolving the legal conflicts arising within their regimes.[307] Not only that, the ways of dispute settlement differ among MEAs.[308]

As mentioned above, the WTO plays the central role in setting the norms, principles and procedures for the trade regime. But there is no such centralization within the environmental regimes, since MEAs have separate organizational bases.[309] There is no general agreement that

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[304] Gabrielle Marceau & Alexandra Gonzalez-Calatayud, *The Relationship between the Dispute Mechanisms of MEAs and those of the WTO*, *in* TRADE AND ENVIRONMENT, THE WTO, AND MEAS: FACETS OF A COMPLEX RELATIONSHIP 71–90 (2001)
[305] *Id*.
[306] *Id*.
[307] *Id*.
[308] *Id*.
[309] *See, e.g.*, Ford Runge, *A Global Environmental Organization and the World Trading System*, 35 J.

sets the norm on principles, procedure and rules in environmental policy-making.[310] Organizations like the United Nations Environmental Program (UNEP), United Nations Conference on Environment and Development (UNCED), and Environment for Europe Program have tried to build some commonalities.[311] However, they lag far behind the WTO.[312]

At the global level, there have been discussions about the Global Environmental Organization ("GEO").[313] If there is one organizational forum for all MEAs, then not only can the diverse regimes and agreements be coordinated, but also can the power of WTO be counterbalanced.[314] Daniel Esty originally leaned towards a GEO, but more recently he has been arguing for a restructuring of WTO as the most strategic and feasible option.[315] In fact, major structural reform or integration between environment and trade is not much of a possibility.[316] Rather, harmonizing the various environmental regimes seems more feasible at the moment.[317] The maturation of environmental regimes has resulted in their growing power and influence *vis-à-vis* trade, and it is most likely that this trend will continue for some time.[318] Although there are many differences among MEAs, the MEAs also have many common grounds. For example, MEAs often ask member states—even developing ones—to develop and improve scientific and administrative knowledge regarding the environment.[319] If a single organization is responsible for

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WORLD TRADE 399, 399–426 (2001) [hereinafter GEO].

310 *Id*.

311 *Id*.

312 *Id*.

313 *Id*.

314 Daniel Esty, *The Value of Creating a Global Environmental Organization*, 6 ENVTL. MATTERS ANN. REV. 13–14 (2000).

315 *See, e.g.*, Daniel Esty, *Bridging the Trade-Environment Divide*, 15 J. ECON. PERSPECTIVES 113, 113–30 (2001).

316 *Id*.

317 *Id*.

318 *See, e.g.*, Arthur Mol, *Global Institutional Clashes: Economic versus Environmental Regimes*, 10 INT'L J. FOR SUSTAINABLE DEV. & WORLD ECOLOGY 303, 303–18 (2003).

319 *See generally* Joel Eisen, *From Stockholm to Kyoto and Back to the United States: International*

carrying forward various environmental agendas, it can have more influence by merging fragments of information.[320] The WTO has been reluctant to expand its mandate to encompass environmental issues.[321] Thus, some view that the Global Environmental Organization should be formed to play an active role in this arena.[322]

However, introducing the GEO will likely lead to the following problems:[323]

First, today's environmental problems include everything from climate change, ozone depletion, endangered species and air pollution to biodiversity, water pollution and disforestation. In addition, environmental problems are not isolated issues but are closely linked to other areas such as trade, development and investment. Therefore, the notion that one big international organization can deal with all these problems risks being an abstract concept in a vacuum.

Second, many existing international organizations including the WTO are already handling the conflict between trade and environment.[324] This means adding one more international organization may just put in place yet another bureaucratic organization, simply complicating the matter.

Third, new norms developed by the GEO may actually fall below the level of current environmental norms created by different MEAs. This may occur because in order to have a critical mass of countries to agree on a rule, the GEO will have to concede in key areas whereas each

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Environmental Law's Effect on Domestic Law, 32 U. RICH. L. REV.1435, 1435–502 (1999).

[320] David M. Driesen, *Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration*, 30 SYRACUSE J. INT'L L. & COM.353, 366 (2003).

[321] GEO, *supra* note 309, at 407–08.

[322] *Id*.

[323] Carlos Calderin, *The Emergence of a Responsible Green World Trade Organization*, 8 UC DAVIS J. INT'L L. & POL'Y 35, 65–71 (2002); GEO, *supra* note 309, at 413–17.

[324] In addition to abovementioned UNEP and UNCED, there are international organizations and NGOs such as Organization for Economic Cooperation and Development (OECD), World Bank, World Meteorological Organization, Global Environment Facility, World Resources Institute, World Wildlife Fund, and Center of International Environmental Law.

individual MEA may more ambitiously push for environmental protection.

Fourth, one particular problem is that not all WTO Members will join the GEO. Many developing countries still suspect that there are protectionist interests behind trade measures citing the environment as a reason. If the GEO ends up with only developed countries, then it will be impossible to resolve the WTO-MEA divide.

Fifth, introduction of the GEO may increase forum shopping behavior. Developed countries will likely prefer GEO while developing countries will pick WTO as the forum that better reflect their interests.

Thus, in order to resolve the regime clash in a relatively clear and cost-saving manner, letting the WTO handle environmental issues is more desirable. Even though critics argue that the WTO's original purpose is to promote free trade, the WTO's mandate has significantly expanded since the inception of GATT in 1948.[325] The GATT originally regulated trade in goods, but the WTO has expanded to regulate services, intellectual property, subsidies, etc. The GATT 1947 has been amended to recognize environmental issues, WTO's dispute settlement system has adjudicated a number of environment-related trade disputes, and the WTO created the Committee on Trade and Environment ("CTE") to identify and understand the relationship between trade and the environment in order to promote sustainable development.[326] Consequently, it is narrow-minded to consider the WTO unfit to handle environmental matters just because it was originally created only for free trade in commodities.

Moreover, in terms of efficiency and effectiveness, selecting the WTO as a forum is an outstanding choice. The WTO already exists, requiring no additional cost for set up. WTO is

[325] Calderin, *supra* note 323, at 71.
[326] *See* BIRNIE, BOYLE & REDGWELL, *supra* note 14, at 761–63.

constantly adding members to its already comprehensive list, and it has a very well respected dispute settlement system that members *do* comply with. However, the GEO, even if established, will not likely be as successful because it will not be able to provide tangible benefits right away.[327]

In conclusion, the MEA-WTO regime clash should be handled within the WTO framework.

2. Within the WTO Framework

At least up to this point, there has been no actual clash between the WTO and an MEA.[328] This allows some scholars to claim that there is no need to waste resources on and worry about a hypothetical, non-existent problem.[329] In fact, many countries supported this view in a CTE meeting.[330] Brazil, China and India refute EU's argument that it is necessary to verify the relationship between MEAs and the WTO.[331] They further argue that the WTO and MEAs are already mutually recognizing one another, given no dispute has arisen from a specific trade provision of an MEA.[332] In addition, Argentina pointed out that restricting trade is only one of many measures MEAs adopt and that merely about 20 out of more than 200 MEAs have trade-related measures.[333]

However, notwithstanding these obstacles, trade-environment linkage is important for the foregoing reasons. First, the conspicuous legal imbalance between MEAs and WTO makes such

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[327] Calderin, *supra* note 323, at 67–70.
[328] Bradly Condon, *Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?*, 9 TULSA J. COMP. & INT'L L. 533, 566–67 (2002).
[329] *Id*.
[330] Committee on Trade and Environment, *Note by the Secretariat: Report of the Meeting Held on 5–6 July 2000*, WT/CTE/M/24 (Sept. 19 2000) [Hereinafter July 2000 CTE Meeting].
[331] *Id.* ¶ 30.
[332] *Id*.
[333] *Id*.

linkage inevitable. Second, WTO's expanding mandate means incorporating one more area is not an insurmountable hurdle. Third, taking advantage of the WTO's strong legalism is both efficient and effective.

A. Legal Imbalance

The WTO system is virtually unique in international law, with its combination of compulsory jurisdiction, legally binding results, and sanctions for non-compliance.[334] In case of a dispute, the Dispute Settlement Body ("DSB") encourages Members to enter into informal negotiations in an effort to reach a mutually agreeable solution.[335] The party claiming a violation of a provision of the WTO Agreement must assert and prove its claim.[336] In turn, the party invoking in defense a provision that is an exception to the allegedly violated obligation bears the burden of proof that the conditions set out in the exception are met.[337] Panel reports are adopted within sixty days of their issuance, except when a Member initiates an appeal or when the other Members form a consensus not to adopt the report.[338] If a Member ignores the Panel's recommendations, the complaining Member may seek compensation, either in the area of trade directly related to the dispute or in another trade sector if necessary.[339]

In contrast, the international environmental regime lags far behind the WTO system.[340]

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[334] *See generally* John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 109–25 (2004).
[335] World Trade Organization, *Understanding the WTO: Settling Disputes*, *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [hereinafter Understanding the WTO].
[336] World Trade Organization, *Legal issues arising in WTO dispute settlement proceedings*, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s6p1_e.htm#fnt1
[337] *Id*.
[338] *See* Understanding the WTO, *supra* note 335.
[339] *Id*.
[340] United Nations Environmental Programme, ENVIRONMENT AND TRADE: A HANDBOOK 18–19, (International Institute for Sustainable Development, 2005), *available at* https://www.iisd.org/sites/default/files/pdf/2005/envirotrade_handbook_2005.pdf.

Unlike the WTO DSB that almost exclusively relies on adjudication, MEAs use different tools.[341] First, MEAs typically focus on dispute avoidance rather than dispute settlement.[342] They use "sunshine" methods, such as reporting, monitoring, on-site visits, and transparency to induce compliance.[343] MEAs also use positive incentives, such as financial or technical assistance, training programs and access to technology.[344] Second, after disputes arise, MEAs tend to rely on cooperative and facilitative means, rather than coercive means, to induce treaty compliance.[345] Among the multilateral environmental treaties concluded after World War II, more than half of the treaties do not provide for institutions for dispute settlement at all.[346] On the other hand, supplementary texts show more stringent dispute settlement procedures as compared to main treaty texts, more than a half of them having binding arbitration.[347]

The WTO mandate is also expanding.[348] The realm of WTO has evolved from trade in goods, to trade in services, intellectual property rights, and even government procurement policies.[349] Similarly, MEAs are developing trade measures that are increasing in amount and types. For example, the Biodiversity Convention will likely develop rules relating to intellectual property rights.[350] Therefore, a clarification of the relationship is necessary before a way for

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[341] *Id*. MEAs widely recognize that "coercing countries into action is not a sound basis for international environmental policy."

[342] *Dispute Avoidance and Dispute Settlement in International Environmental Law: Conclusions by the International Group of Experts*, *available at* http://content.iospress.com/download/environmental-policy-and-law/epl29-2-3-19?id=environmental-policy-and-law%2Fepl29-2-3-19.

[343] *See, e.g.*, Panos Merkouris and Malgosia Fitzmaurice, *Environmental Compliance Mechanisms*, OXFORD BIBLIOGRAPHIES ONLINE (2012).

[344] *Id*.

[345] *See, e.g.*, Scott Barrett and Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements*, 3 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 349, 349–76 (2003).

[346] Bernhard Boockmann and Paul W. Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, 6 INT'L ENVTL. AGREEMENTS 113, 121 (2006).

[347] *Id*.

[348] *See generally* Ala'i, *supra* note 293, at 1012–16.

[349] *Id*.

[350] Catherine Monagle and Aimee T. Gonzales, *Biodiversity & Intellectual Property Rights: Reviewing Intellectual Property Rights in Light of the Objectives of the Convention on Biological Diversity*,

collaboration and reinforcement between WTO and MEA objectives can be found.

The legal imbalance between WTO and MEAs is significant. The compulsory dispute settlement system for breach of WTO norms may provide an incentive for states to comply with the WTO norm, rather than the MEA norm.[351] In other words, there are two main ways in which MEA-WTO conflict can arise. First, it can arise through a specific conflict between the rules. Second, it can also arise simply from the fact that WTO is so much stronger than MEAs. This second avenue explains why it is desirable to take advantage of the superior WTO legal system and handle the MEA-WTO conflict within the WTO framework.

B. Evolution of Interpretation of Article XX

The WTO treaty does not include a general conflict clause setting out its relationship with other norms of international law.[352] However, the WTO provides some limited guidance on how to resolve conflict between the WTO and MEAs.[353] First, the WTO created CTE, which endorsed "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature."[354] Second, the WTO's preamble calls for "the optimal use of the world's resources . . . seeking . . . to protect and preserve the environment."[355]

Pointing out that the jurisdiction of WTO panels is limited, but the applicable law before them is not, Joost Pauwelyn suggests that sometimes non-WTO rules can be part of the applicable

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available at http://www.ciel.org/Publications/tripsmay01.PDF.

[351] JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 434 (2003).

[352] *Id.* at 343.

[353] *Id.* at 345.

[354] Committee on Trade and Environment, *Report*, ¶ 171, WT/CTE/1 (Nov. 12, 1996).

[355] Preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

law before WTO panels.[356] However, Pauwelyn cautions that non-WTO rules should only be applicable when the disputing parties have all accepted those rules in the first place.[357] For example, in *Shrimp – Turtle I & II*, instead of simply referring to MEAs, Pauwelyn's approach would actually apply such MEAs.[358] More specifically, if the U.S. entered into an international agreement with complaining countries, the U.S. would be able to use the non-WTO treaty as a defense against a claim of WTO violation.[359] Thus, at least in some situations, under the current system, certain trade-restrictive environmental measures may prevail. In fact, Pauwelyn argues that there is no need to expand the mandate of the WTO to take into account other non-trade concerns.[360]

Unfortunately, Pauwelyn's approach arguably fails when some of the WTO Members do not embrace MEAs. In the *Shrimp – Turtle* context, if India, one of the complainants, does not agree to the U.S.-led agreement, reference to the non-WTO rule would be off the table.[361] Therefore, in many instances, GATT Article XX is still relevant unlike Pauwelyn's suggestion to the contrary. GATT Article XX comes in when an MEA imposes an obligation on a party to restrict trade with a non-party. When both the party and the non-party are WTO Members, the trade restriction goes against WTO rules. Certainly, the party to the MEA cannot invoke the MEA as a legal justification for the breach of the WTO rule because the non-party cannot be held by the provisions of the MEA.[362] However, the party could still justify its action under exceptions provided by GATT Article XX.[363]

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[356] PAUWELYN, *supra* note 351, at 472–74.
[357] *Id.* at 486.
[358] *Id*.
[359] *See id*.
[360] *Id.* at 492.
[361] *See id*. at 486.
[362] *Id.* at 104.
[363] *Id*.

A Panel is called upon to assess whether a particular Member's action in compliance with a MEA constitutes a violation of MFN, NT, Quantitative Restriction, or other WTO obligations. A Panel may also offer its interpretation of the applicability of the Article XX exceptions. In particular, a Panel report could clarify the "arbitrary and unjustified discrimination" standard in the chapeau of Article XX and the "necessary" and "primarily aimed at conservation" standards of Articles XX(b) and (g). Evolving interpretation of Article XX exceptions may allow widely accepted MEAs to restrict trade for environment.[364]

In the *Shrimp – Turtle I* case, the Appellate Body referred to several MEAs when interpreting the term "exhaustible natural resources."[365] This referral effectively left countries room for adopting trade-related environmental measures and acknowledged that multilateral measures are superior to unilateral measures.[366] In the *Shrimp – Turtle II* case, the existence of an MEA was used to help determine whether an import ban was arbitrary or discriminatory. Here, the Panel stated: "… [a] Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory program deemed comparable to its own."[367] The logic of this statement, which was reaffirmed by the Appellate Body, would appear to allow considerable scope for trade-related environmental measures, including MEA trade measures. The decision of *Shrimp – Turtle II* case, therefore, suggests that

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[364] Horst Gunter Krenzler, *Globalization and Multilateral Rules*, 4 INT'L TRADE L. & REG. 144, 146 (1998)

[365] *See* KELLY, *supra* note 9, at 46.

[366] Larry A. Dimatteo, et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns,* 36 VAND. J. TRANSNAT'L L. 95, 111–13 (2003); Tanyarat Mungkalarungsi, *The Trade and Environment Debate*, 10 TUL. J. INT'L & COMP. L. 361, 381–83 (2002); Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, 34–49 (1999); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 357–64 (1999).

[367] *Shrimp – Turtle II (Panel)*, *supra* note 248, ¶ 5.103.

we can fully achieve environmental protection while retaining the current GATT regime.

But it is politically important to find an effective clarification about MEAs specifically in Article XX. Despite the important rulings on Article XX, there is no doctrine of *stare decisis* in WTO.[368] This would mean that the Appellate Body may move to another direction in the future. It should be said that there is a lack of coherence and predictability with regard to trade measures in MEAs. Article XX does not explicitly distinguish between measures taken to address environmental impacts within or outside the territory of a WTO Member. Moreover, Articles XX (b) and (g) are simply not enough. For example, do we know if ozone layers count as "exhaustible natural resources?"

In addition, developing countries do not like the idea of expanding the scope of Article XX exceptions to allow trade-restricting environmental measurers.[369] They feel that they are entitled to pollute because developed countries were able to pollute in the course of their development.[370] Moreover, even if the Appellate Body in the *Shrimp – Turtle* case took more affirmative stance on multilateral, trade-restricting environmental measures, it did not explicitly verify the relationship between MEAs and the WTO.[371] Since the WTO has traditionally been very passive in acknowledging non-trade values, it is still unclear whether trade restrictions of MEAs will be accepted.[372]

Lastly, this method relies on WTO panel decisions instead of talks between Members. Switzerland, Canada, Japan and the EU expressed that the WTO-MEA clash should not be up to

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[368] *See generally* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 845–956 (1999).
[369] Doaa Abdel Motaal, *Multilateral Environmental Agreements (MEAs) and WTO Rules: Why the 'Burden of Accommodation' Should Shift to MEAs*, 35 J. WORLD TRADE 1215, 1218–20 (2001).
[370] *Id*.
[371] Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea: Justice in Trade and Environmental Disputes*, 25 ECOLOGY L.Q. 189, 206–07 (1998).
[372] *Id*.

WTO panel decisions.[373]

C. Waiver?

The potential adoption of a waiver has often been discussed as a means to clarify the relationship between MEAs and the WTO.[374] A waiver would be granted to allow derogations from WTO obligations when applying measures of MEAs.[375] A waiver may be specifically aimed at a certain agreement. To secure a waiver for the MEAs, a Member must demonstrate "exceptional circumstances" and generally obtain three-fourths of the Members' support.[376] Request for a waiver is to be submitted to the Ministerial Conference and to be decided upon by consensus within 90 days. If the request is not considered within 90 days, three-fourths of the Members' support will be required.[377] Waivers must state the terms and conditions governing their application and the specific date of termination. All waivers, regardless of length of time, are to be reviewed annually by the Ministerial Conference.[378]

Leading scholars in the field such as John Jackson, the main architect of the WTO, contend that adopting waivers for specific, widely applied MEAs can be a desirable short-term solution.[379] This is a persuasive option because waivers enable the resolution of the MEA-WTO clash within

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[373] July 2000 CTE Meeting, *supra* note 330, ¶ 6; Committee on Trade and Environment, *Submission by Switzerland on Clarification of the Relationship Between the WTO and Multilateral Environmental Agreements*, WT/CTE/W/168 (October 19, 2000); Committee on Trade and Environment, *Submission by Switzerland on the Relationship Between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements (MEAs)*, WT/CTE/W/139 (June 8, 2000).
[374] *See, e.g.*, John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1227–78 (1992) [Hereinafter *Congruence or Conflict*].
[375] *Id.* at 1271.
[376] GATT, *supra* note 15, art. IX(3).
[377] *Id.* art. IX(3)(a).
[378] *Id.* art. IX(4).
[379] *Congruence or Conflict*, *supra* note 374, at 1244.

the existing WTO framework.[380] In fact, The North American Free Trade Agreement ("NAFTA") employed this option, and its text includes waivers for various MEAs.

Waivers have mainly two advantages.[381] First, since WTO Members will deal with each waiver *after the fact*, that is after each problem arises, there will be concrete validity.[382] No standard can account for every single situation and thus amending the GATT provisions *before the fact* poses a unique challenge. However, with the adoption of waivers, there is no need for this. Second, having three-fourths of the Members' support establishes true respect for the particular MEA at issue.[383]

Nevertheless, this option is not without shortcomings.[384] One shortcoming of the waiver option is the cumbersome procedural hurdles.[385] Moreover, a waiver will be viewed by non-parties to an MEA as a *de facto* acceptance of the MEA.[386] If the waiver applies only to certain MEAs, there are no assurances for future MEAs to be protected by waiver.[387] Further, criteria involved in deciding the appropriateness of a waiver may differ from case to case.[388] This uncertainty creates an atmosphere of unpredictability. The text of GATT Article IX ambiguously stipulates that waivers can be granted in "exceptional circumstances."[389] This standard itself is very ambiguous and can easily lead to confusions.

In fact, WTO has in the past tried to reconcile conflicting international norms through

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[380] Condon, *supra* note 328, at 564.
[381] *Id*.
[382] *Id*.
[383] *Id*.
[384] Thomas J. Schoenbaum, *International Trade and Protection of the Environment: the Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 283 (1997).
[385] *Id*.
[386] *Id*.
[387] *Id*.
[388] *Id*.
[389] GATT, *supra* note 15, art. IX.

waivers.[390] One prime example is the TRIPS waiver applicable to developing and least developed countries. As the initial ten-year transitional period was to expire on January 1, 2005, the limitations TRIPS would pose on access to essential medicines drew much attention and criticism.[391] Much debate centered on the tension between the promotion of public health on the one hand and the protection of intellectual property rights on the other hand.[392] The problem was exacerbated in developing and least-developed countries due to HIV/AIDS, tuberculosis, malaria, and other epidemics.[393] After long and controversial discussions, WTO Members, in August, 2003, adopted a waiver that mitigates the tension between patent obligations and the human right to health care by modifying certain legal rules of the TRIPS Agreement.[394] The TRIPS waiver shows that it is possible to achieve some norm change in favor of public health within the WTO.[395]

Moreover, history shows that a successful waiver can be a stepping stone for a permanent norm change. The idea for giving preferences to developing countries in spite of the MFN principle emerged from the first United Nations Conference on Trade and Development ("UNCTAD") in 1964.[396] Subsequent negotiations at UNCTAD resulted in "unanimous agreement" in favor of the establishment of preferential arrangements.[397] GATT Contracting Parties reacted positively with a waiver for preferential tariff schemes in 1971.[398] As with other waivers, this waiver was to expire after ten years, but GATT Contracting Parties permanently enshrined this waiver in the 1979 GATT

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[390] Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 621 (2009).
[391] *Id.* at 625.
[392] *Id*.
[393] *Id.* at 626.
[394] *Id.* at 627.
[395] *Id.* at 629; *see also* Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 317–58 (2005).
[396] Gene M. Grossman & Alan O. Sykes, *A Preference for Development: The Law and Economics of GSP*, 4 WORLD TRADE REV. 41, 41 (2005).
[397] *Id*.
[398] *Id*.

Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, commonly known as the "Enabling Clause."[399] The Enabling Clause is now an integral part of the WTO.[400] The history of the Enabling Clause is a good example of non-traditional trade values at work. While the classical liberal economic view sees the global economy more or less working through the invisible hand power of markets,[401] an alternative view of the global economy sees it as having been structured by colonialism,[402] and thus is also concerned about equality. The theory underpinning the waiver leading to the Enabling Clause is based on this alternative view. Thus, WTO, if not the predecessor GATT, is not only interested in a specific economic outlook, but also in *social justice*.

D. Amending the GATT 1994

It takes two-thirds of the WTO Members to amend various WTO Agreements. Currently, that means 108 of the total 162 Members.[403] At first appearance, amending the text of GATT does not seem more challenging than the adoption of waivers because the latter requires three-fourths of the Members on board.[404] Conversely, the aftermath of the 2003 TRIPS waiver may suggest the difficulty of making a permanent change to the WTO Agreements. In December 2005, WTO Members approved changes to the WTO's TRIPS Agreement making the 2003 waiver

399 VAN DEN BOSSCHE & ZDOUC, *supra* note 16, at 330.
400 *Id*.
401 *See, e.g.*, ADAM SMITH, WEALTH OF NATIONS 233–34 (1982 ed.).
402 *See generally* Terry Boswell, *Colonial Empires and the Capitalist World-Economy: A Time Series Analysis of Colonization, 1640-1960*, 54 AM. SOCIOLOGICAL REV. 180, 180–96 (1989).
403 Peter Ungphakorn, *Analysis: WTO Amendment on Access to Medicines Faces EU Conundrum*, INTELLECTUAL PROPERTY WATCH, Apr. 14, 2016, http://www.ip-watch.org/2016/04/14/analysis-wto-amendment-on-access-to-medicines-faces-eu-conundrum/
404 Ryan L. Winter, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLO. J. INT'L ENVTL. L. 223, 248 (2000).

permanent.[405] As of May 2016, the required two thirds have not accepted the amendment.[406] However, the WTO is finally close to achieving the first ever amendment to its rules as only eleven more acceptances are needed to reach 108,[407] signaling that amendments are indeed a possible avenue for addressing the MEA-WTO conflict.

Also, some commentators view that amending the GATT provisions is the only real solution, which will eventually come through as developing and developed countries make mutual concessions.[408] Given the cost of setting up the GEO or any other new forum, utilizing the already existing WTO is desirable.[409] Particularly, the WTO provides its Members regular negotiation sessions through continuous "rounds." Therefore, I believe amending the GATT 1994 is the best approach. There are two main approaches to amending the GATT:

i. MEA-Specific Exemption

First, through the MEA-specific exemption, GATT can list specific MEAs to which the WTO will afford special exceptions. This is the approach taken by NAFTA Article 104. NAFTA lists major MEAs such as CITES, Montreal Protocol, and Basel Convention.[410] NAFTA stipulates that in the event of any inconsistency between NAFTA and the listed MEAs, trade obligations specified in the MEAs will prevail.[411] Here, NAFTA left some room for further amendment as

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[405] Press Release, World Trade Organization, Members OK Amendment to Make Health Flexibility Permanent (Dec. 6, 2005), https://www.wto.org/english/news_e/pres05_e/pr426_e.htm.
[406] *Members Accepting Amendment of the TRIPS Agreement*, WORLD TRADE ORGANIZATION (May. 6, 3:20 AM), https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.
[407] Ungphakorn, *supra* note 403.
[408] Mungkalarungsi, *supra* note 366, at 385.
[409] Calderin, *supra* note 323, at 65.
[410] North American Free Trade Agreement, U.S.-Can.-Mex., art. 104.1, Dec. 17, 1992, 32 I.L.M. 289 (1993) (establishing free trade among Canada, the United States, and Mexico).
[411] *Id*.

new MEAs can be added in the future.[412]

ii. Criteria-Specific Exemption

Second, through the criteria-specific exemption, the WTO will afford exceptions to MEAs that meet some specifically identified criteria. There is no longer the need to list specific MEAs. This allows for a broad range of exceptions and more flexible interpretation and application of such exceptions.

The criteria-specific approach is better suited to address the regime clash. In terms of practicality, coming up with a list of MEAs all the WTO Members can agree on is a big challenge. Moreover, regional MEAs or MEAs with a small membership base will likely be left out under the MEA-specific approach.

iii. Amendment to Article XX

In amending the GATT 1994, adding a new paragraph to Article XX exceptions is the best and most feasible option.[413] It is also a constructive way of changing the WTO perspective.[414] In fact, the European Union has argued before the WTO Committee on Trade and the Environment that Article XX should be amended to allow for the recognition that WTO should permit certain trade-restrictive measures if such measures are allowed under MEAs.[415] Given that WTO DSB has not addressed the question of what happens when a WTO rule and a MEA rule directly conflict, an amendment to Article XX would be a clear way to protect environmental values enshrined in

[412] *Id.* art. 104.2.
[413] Schoenbaum, *supra* note 384, at 284.
[414] Joyner & Tyler, *supra* note 245, at 143.
[415] *Id*.

the MEAs.[416] It is also noteworthy that the UNEP, the premier international agency in international environmental law, is focusing on improving enforcement mechanisms in the existing environmental regime, leaving the amendment strategy as a feasible, short-term answer until the environmental regime gets teeth.[417] In addition, the amendment strategy ensures the desired flexibility by not imposing "any affirmative obligations on governments to adopt […] environmental protections."[418]

A new paragraph would automatically fall under the requirements in the chapeau such as "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade." Thanks to the clarification given by the Appellate Body in the *Shrimp – Turtle I* case, it is relatively clear that future panels will apply the so-called two-tiered analysis.[419]

With this in mind, my proposal for a new paragraph is as follows:

"in multilateral environmental agreements."

The amendment could have stated, "relating to multilateral environmental agreements." The "relating to" language would have been too broad to garner enough support among developing-country Members because it would have enabled unilateral measures somehow related to the goals of the MEAs. Conversely, the current "in multilateral environmental agreements" language is more narrowly drawn and more conservative. This kind of provision does not necessarily undermine the goals of the trading system. This is especially true because many of the

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[416] Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 390 (2004).
[417] *Id.* at 391.
[418] Chantal Thomas, *Trade-Related Labor and Environment Agreements?*, 5 J. INT'L ECON. L. 791, 814 (2002).
[419] First, a country allegedly violating GATT provisions must set forth that its measure falls under one of the listed exceptions under any of the paragraphs in Article XX. Then, the country needs to meet additional requirements spelled out in the introductory phrase (chapeau) of Article XX.

same WTO members are parties to various MEAs. MEAs are usually open to accession of all interested states. When MEAs adopt trade restrictions, such measures are reasonably related to the problem dealt with and conform to international norms and customs. MEAs also seek to address serious environmental harms of both regional and global scope.

V. CONCLUSION

The conflict of MEAs and WTO is a question of whether the trade-related provisions in the MEAs should be governed by the WTO when brought to the WTO dispute settlement system by a Member of the WTO. As of yet, there has not been any case of dispute resolution directly concerning specific trade obligations of MEAs before the WTO Panel. Nevertheless, the issue has become a matter of great concern for decades. The potential for WTO-MEA conflict abounds. MEAs make use of trade restrictions for purposes other than directly prohibiting the trade of environmentally harmful products, including measures creating incentives for non-parties to participate and measures aimed to discourage free riders. Potential inconsistencies between MEA provisions and the WTO rules can occur in relation to the MFN, NT, Quantitative Restrictions and Article XX.

In the *Shrimp – Turtle* case, after an examination of whether the domestic U.S. law legislated for the protection of turtles was consistent to the WTO obligations, the Appellate Body ruled that there is no *per se* rule of impermissibility in the text of Article XX. This opened the door for MEAs, since even the unilateral environmental measures protecting certain endangered species could *prima facie* be legitimized as exception under Article XX. There is no doubt that the Appellate Body ruling of the *Shrimp – Turtle* case has provided a much more generous interpretation of the environmental exemptions in the WTO rules. However, the limits of this ruling

are that the probability of WTO-MEA conflicts will increase as the WTO expands in scope, and that the WTO dispute settlement process still remains the dominant mechanism.

Most of the cases raised before the GATT/WTO Panels, which were related to environmental protection, have more often than not suffered from criticisms. The environmentalists perceive the WTO as forsaking environmental interests for the sake of protecting the free trade. The WTO is fully aware of the nexus between trade and environment. This is evidenced in the preamble of the WTO Agreement, which refers to the concept of sustainable development. But from the perspective of the environmentalists, the WTO's initiatives for protecting the environment are only meager and unsatisfactory. Many suggestions have been made to this date, for ways to resolve this potential conflict within the WTO, such as broadening the interpretation of Article XX, revising the WTO provisions, or extending and utilizing the waiver clause.

The Appellate Body in the *Shrimp – Turtle* cases mentioned that it must consider not only scientific evidence in case of environmental disputes, but also relevant principles and norms from international environmental law and policy, when interpreting the provisions of the WTO Agreements. That is, environmental values and interests are to be considered within the WTO. However, the MEA regime differs from the trade regime, in that it has not yet reached consensus on environmental norms and principles, due to its dispersed and decentralized nature. In this sense, the formation of a global environmental institution has been suggested, so that environmental concerns would not be subordinated under the international trade rules. However, major structural reforms may not be a feasible option. Instead, the efficiency and effectiveness of WTO dispute settlement system point to the WTO as a logical forum for the regime clash.

The conflict between the trade and environment regimes is not new, and came into sharp

focus after GATT rulings on the *Tuna – Dolphin* cases. Others followed, like the *Shrimp – Turtle* cases. The regime clash is common in other issue areas as well. However, what makes the clash between trade and environment special is that the WTO has been the major forum for solutions. Due to the imbalance of regimes, criticisms have been made about the one-sided perception of the WTO in favor of trade. However, criticizing the WTO cannot be the remedy. We must not overlook the practicability of amending the GATT Article XX. The most desirable and feasible solution is to carefully draft and use expansive languages in amending Article XX to account for existing MEAs and to prevent prejudicing future MEAs.