

# MULTILATERAL FAILURE: A COMPREHENSIVE ANALYSIS OF THE SHRIMP/TURTLE DECISION

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## I. INTRODUCTION

In the mid-1980s, renowned biologist Edmund O. Wilson infamously opined that the continued loss or reduction of biological diversity in our ecosystems would result in a more egregious impact on the state of our current world than energy depletion, economic collapse, limited nuclear war, or even conquest by a totalitarian government.<sup>1</sup> In explaining this shocking assertion, Wilson pointed to the fact that, while certainly catastrophic on many levels, the international community could still rebound from the damaging effects of these events within a few generations.<sup>2</sup> In contrast, declared Wilson, the derelict and apathetic extinction of species “is the folly [for which] our descendants are least likely to forgive us.”<sup>3</sup>

Since Wilson uttered these foreboding words nearly twenty years ago, the world has lost between 540,000 and 3,000,000 different species of plant and animal life.<sup>4</sup> This astonishing appraisalment is only compounded by the international community’s lack of unity toward tempering environmental destruction, as well as effectuating environmental protection. While there is an urgent need for national, international, and local measures to conserve and protect species and ecosystems, the body of both national and international law that has emerged to date has been both diffuse and too narrow in scope.<sup>5</sup>

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1. ROBERT GOODLAND ET AL., ENVIRONMENTAL MANAGEMENT IN TROPICAL AGRICULTURE 207 (1984) (quoting Edmund O. Wilson).

2. *Id.*

3. *Id.*

4. Environmental commentator Virginia Dailey estimates that the “world is losing between 27,000 and 150,000 species per year, approximately seventy-four species every day, and an astonishing three species every hour.” Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 TRANSNAT’L L. & POL’Y 331, 332 (2000).

5. Edith Brown Weiss & John H. Jackson, *The Framework for Environment and Trade Disputes*, in RECONCILING ENVIRONMENT AND TRADE 1-2 (Edith Brown Weiss & John H. Jackson eds., 2001). See, e.g., The Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, app. I, 27 U.S.T. 1087, 1118; 993 U.N.T.S. 243, 257 [hereinafter CITES]. CITES prohibits commercial trade in species threatened with extinction

In response to this growing environmental crisis, the United States enacted legislation aimed at protecting the environment and environmental resources.<sup>6</sup> By utilizing trade regulation as its primary vehicle of motivation toward compliance, however, the effects of this new legislation soon created ripples felt across borders.<sup>7</sup> These events have led to tremendous discord in the international community and courts alike. Yet, to date, all such environmental laws have been challenged internationally before, and subsequently denied by, the trade authorities under the General Agreement on Tariffs and Trade (GATT).<sup>8</sup>

Is the United States wrong to seek international environmental goals through unilateral measures? In the post-World War II era, both sides can probably appreciate the concern for and preference against such policy.<sup>9</sup> Therefore, the more salient question is: Why did the United States feel it had to act in such a way, and in its alternative, how should the country plan to act in the future?

In addressing these and related issues, this Article focuses on the recent World Trade Organization (WTO) case *United States—Import Prohibition of Certain Shrimp and Shrimp Products*,<sup>10</sup> a landmark decision that also marks perhaps one of the most complicated and convoluted legal analyses ever rendered. While the *Shrimp/Turtle* decision is not lacking for criticism and commentary from the environmental and trade communities, most legal comments thus far have exhaustively focused on the perceived overbroad, or depending on one's point of view, overly narrow, and substantively incorrect

and controls trade in those whose survival could be threatened if trade in them were not controlled. The Convention, however, only controls trade in those species that countries have agreed to list, and only in countries that are party to the Convention. *Id.*

6. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037-38 (codified as Endangered Species Act of 1973, 16 U.S.C. § 1537 (1994)). See generally Dailey, *supra* note 4, at 332.

7. *Id.*

8. See Dailey, *supra* note 4, at 333.

9. In 1929, there was a severe worldwide depression. In response, the United States enacted the 1930 Smoot Hawley Tariff Act, which provided for the raising of national tariffs. This legislation also served as a form of retaliation for the imposition of rising tariffs by other nations. After World War II, the United States and other involved nations:

[L]ooked back at the period between 1920 and 1940 and realized that they had made serious mistakes in their economic policies, which were a major cause of the disasters that led to the War . . . . These included the policies leading to the Great Depression, the harsh reparations policy towards Germany following World War I, and the many protectionist measures that States took which choked off international trade.

Weiss & Jackson, *supra* note 5, at 4. Consequentially, "in December 1945, the same year the United Nations was established, the United States invited other countries to enter into negotiations for a multilateral agreement to mutually reduce tariffs." *Id.*

10. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm) [hereinafter *Shrimp/Turtle*].

interpretation of the WTO's Article XX Chapeau.<sup>11</sup> Such comments are narrow-sighted and myopic in overall goals and ambition. The WTO, as the original drafter and facilitator, will interpret their international trade rules as they have intended and see fit. Therefore, perhaps a more important argument would be that the WTO, as an arbiter of international law and jurisdiction, failed to properly heed pertinent authority and customary international law in deciding *Shrimp/Turtle* and other decisions.

This Article contends that there must be an affirmation that trade-related environmental measures authorized under internationally recognized environmental principles and customary law are consistent with WTO rules. In particular, the application of sustainable development as a legal concept was conveniently ignored in the Appellate Body's *Shrimp/Turtle* ruling. Such "oversights" have evidenced the need for a more neutral forum and arbiter of international trade-environment issues. Part II outlines the plight of sea turtles in the world, paying specific attention to the remedial measures utilized by the U.S. under Section 609. Part III discusses the *Shrimp/Turtle* decision and the grounds for the Appellate Body's controversial ruling. Part IV attends to the concerns of the international trade community and possible arguments for why, while confusing and contradictory, the Appellate Body may have come to the right conclusion. Finally, Part IV concludes with a discussion of why unilateral measures may in fact be necessary in some instances and why critics have failed in their lack of discussion of international law and principles. Part IV will call for a more neutral arbiter of future trade-environment cases.

## II. THE SEA TURTLE DILEMMA

"Despite its smooth, elegant motion under water, the sea turtle has created a tremendous wake in the realms of environmental protection and free trade."<sup>12</sup>

The conflict underlying the *Shrimp/Turtle* case concerns a 1989 amendment to the United States Endangered Species Act of 1973 and the so-called Section 609 that generally prohibit the importation of shrimp and shrimp products where harvesting methods are or can be employed that do not sufficiently protect the sea turtles.<sup>13</sup> Discussed in more detail later, Section 609 generally provides that the importation ban will not apply to harvesting countries that are

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11. See Marlo Pfister Cadeddu, *Turtles in the Soup? An Analysis of the GATT Challenge to the United States Endangered Species Act Section 609 Shrimp Harvesting Nation Certification Program for the Conservation of Sea Turtles*, 11 GEO INT'L ENVTL. L. REV. 179 (1998).

12. Jackson F. Morrill, *A Need for Compliance: The Shrimp Turtle Case and the Conflict Between the WTO and the United States Court of International Trade*, 8 TUL. J. INT'L & COMP. L. 413, 413 (2000).

13. Axel Bree, *Article XX GATT—Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report*, 17 DICK J. INT'L L. 99 (1998).

certified by the U.S. government.<sup>14</sup> Certification, however, will only be granted to "either those countries with a fishing environment that does not pose a threat of incidentally taking sea turtles or to those harvesting nations that adopt a regulatory program that is comparable to or as effective as the regulatory program of the United States."<sup>15</sup> In particular, the U.S. domestic program mandates the use of turtle excluder devices (TEDs), which in the actual application of the regulation became the de facto standard requirement for granting certification.<sup>16</sup> In 1996, the countries of India, Malaysia, and Thailand filed their first complaint with the WTO, pleading that the legislation be overturned as indicative of unfair trade practices.<sup>17</sup> The battle lines had been firmly drawn.

### A. *Factual Background*

"Found in most warm water ocean environments of the world, sea turtles are long-lived air-breathing marine reptiles."<sup>18</sup> As adults, sea turtles spend most of their lives at sea, only venturing to come ashore when females in each population periodically beach to lay their eggs.<sup>19</sup> As a result, despite their amicable appearances and relatively widespread appeal, very little is known about sea turtles.

#### 1. *Sea Turtles and Shrimp Trawling*

In sharp contrast, "[t]he facts about sea turtles killed by shrimp trawling are well documented and generally uncontested."<sup>20</sup> Shrimp trawling is practiced extensively in the tropical and subtropical coastal habitats frequented by sea turtles.<sup>21</sup> Typically, the trawls are submerged long enough that most turtles incidentally caught in the nets will drown.<sup>22</sup>

Indeed, shrimp trawling is largely recognized as the most wasteful commercial fishery in the world.<sup>23</sup> "In the Gulf of Mexico alone, shrimpers kill and waste approximately 2.5 billion pounds of fish a year, of which 70 percent would have been commercially valuable upon further maturation."<sup>24</sup> Chief

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14. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 609.

15. Bree, *supra* note 13, at 105.

16. *Id.*

17. *Id.*

18. Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 760 (2001).

19. *Id.*

20. Lakshman Guruswamy, *The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation*, 30 ENVTL. L. REP. 10261 (2000).

21. Gaines, *supra* note 18, at 762.

22. *Id.*

23. Guruswamy, *supra* note 20.

24. *Id.*

among the superfluous by-catch are sea turtles, with the estimated annual loss worldwide approaching a staggering 150,000 turtles.<sup>25</sup> As migratory creatures, sea turtles occupy an important role in the biodiversity of the ocean, and they have even been characterized as an indicator species.<sup>26</sup> Therefore, their mortality represents a grave and present danger to many different ecosystems.<sup>27</sup>

The sea turtles' destruction has certainly not gone without notice. Internationally, all species of sea turtles are listed in Appendix I, the most protective listing under the Convention on International Trade in Endangered Species (CITES).<sup>28</sup> Additionally, six multinational species are listed in the Convention on Migratory Species of Wild Animals<sup>29</sup> and all seven species are on the International Union for the Conservation of Nature (IUCN) Red List.<sup>30</sup> Nationally, most countries have enacted endangered species legislation that protects the animals.<sup>31</sup> The five species present in the waters of the United States, for example, are listed as endangered or threatened under the

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25. Bret Puls, Note, *The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy*, 8 MINN J. GLOBAL TRADE 343, 346 (1999).

26. Guruswamy, *supra* note 20. Indicator species provide a unique and helpful analysis of the biological condition in an ecosystem. "While indicator species is a term that is often used, it is somewhat inaccurate. Indicators are actually groups or types of biological resources that can be used to assess environmental condition." *Id.* Nevertheless, the consistent monitoring of indicator species has proven to be an invaluable tool for the international community. It has often been used as an early warning of pollution or degradation in an ecosystem, as well as a sign of negative environmental trends. U.S. ENVTL. PROT. AGENCY, BIOLOGICAL INDICATORS OF WATERSHED HEALTH, at <http://www.epa.gov/bioindicators/html/indicator.html> (last updated Feb. 15, 2005).

27. *Id.*

28. See CITES, *supra* note 5.

29. Bonn Convention on the Conservation of Migratory Species of Wild Animals, Nov. 1, 1979, 19 I.L.M. 15 (entered into force Nov. 1, 1983).

30. See A. B. Meylan & P. A. Meylan, *Introduction to the Evolution, Life History, and Biology of Sea Turtles*, in IUCN/SSC Marine Turtle Specialist Group Publication No. 4, Research and Management Techniques for the Conservation of Sea Turtles 3 (K. L. Eckert et al. eds., 1999). IUCN, through its Species Survival Commission (SSC), has for four decades been assessing the conservation status of species, subspecies, varieties and even selected subpopulations on a global scale in order to highlight taxa threatened with extinction, and therefore promote their conservation. The IUCN Red List of Threatened Species provides taxonomic, conservation status and distribution information on taxa that have been evaluated using the IUCN Red List categories and criteria. The main purpose of the IUCN Red List is to catalogue and highlight those taxa that are facing a higher risk of global extinction (i.e., those listed as Critically Endangered, Endangered and Vulnerable). However, the IUCN Red List also includes information on taxa that are categorized as Extinct or Extinct in the Wild, on taxa that cannot be evaluated because of insufficient information (i.e., are Data Deficient), and on taxa that are either close to meeting the threatened thresholds or would be threatened were it not for an ongoing taxon-specific conservation program (i.e., Near Threatened). International Union for the Conservation of Nature and Natural Resources, 2004 IUCN Red List of Endangered Species, at <http://www.redlist.org> (n.d.) (last visited Apr. 3, 2005).

31. Hannah Gillelan, *Considering the Biology of the Sea Turtles in the WTO Dispute Settlement Process*, in RECONCILING ENVIRONMENT AND TRADE 477 (Edith Brown Weiss & John H. Jackson eds., 2001).

Endangered Species Act.<sup>32</sup> Despite all of the efforts, though, at least five species of sea turtles are in imminent danger of extinction, largely due to the continued practices of the shrimping industry.<sup>33</sup>

## 2. *The United States Responds*

Concerned by the decline in the sea turtle population due to shrimp trawling, in 1981, Congress instructed the National Marine Fisheries Service (NMFS) to begin an extensive research project to develop alternative methods of shrimp trawling that would not dramatically increase the cost to shrimpers while still protecting the sea turtles.<sup>34</sup> This research culminated in the development of the Turtle Excluder Device (TED). The TED is a metal grid of bars attached to a shrimp trawling net. It has an opening at either the top or the bottom, which creates a hatch allowing sea turtles and other large animals incidentally caught in the nets to escape while keeping the shrimp inside.<sup>35</sup> However, despite their efforts to distribute TEDs to shrimp fishermen and to instruct them how to properly employ the devices, the NMFS was unable to induce enough fishermen to voluntarily use the TEDs to significantly affect the turtle mortality rates due to concerns over a reduction in the catch.<sup>36</sup>

Therefore, in response to the NMFS's failed attempt to induce shrimpers to voluntarily adopt the use of TEDs, the U.S. Department of Commerce initiated a series of steps designed to increase compliance. First, it imposed strict regulations on the United States domestic shrimp fleet, eventually mandating the use of TEDs.<sup>37</sup> Soon after, motivated largely out of concern that the new requirements would weaken their competitive position vis-à-vis shrimpers from countries not using TEDs, American shrimpers protested vehemently against the TED regulation.<sup>38</sup> At the same time, because of the turtles' migratory nature, "sea turtle experts and environmentalists warned that the United States measures [would], by themselves, [prove] insufficient to

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32. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 609.

33. Puls, *supra* note 25, at 346 (quoting a recent statement signed by more than 160 scientists from twenty-four different nations). In addition, according to John McCosker, the Chairman of the Aquatic Biology Department at California Academy of Science, "each species of sea turtles protected under United States law faces a very high risk of extinction in the wild." Dailey, *supra* note 4, at 333.

34. Renata Benedini, *Complying with the WTO Shrimp-Turtle Decision*, in *RECONCILING ENVIRONMENT AND TRADE* 409-415 (Edith Brown Weiss & John H. Jackson eds., 2001). "TEDs, costing between \$50 and \$400, provide 'a simple, inexpensive solution' that may reduce turtle casualties by at least 97 percent." Puls, *supra* note 25, at 346 (citation omitted).

35. Benedini, *supra* note 34, at 415. "Testing of the first TED concluded in late 1980." The final product, when employed in tests, was shown to "successfully exclude 97 percent of the sea turtles entering trawl nets." Cadeddu, *supra* note 11, at 184. In addition, the TED "also reduced bycatch by some 78 percent during the day and 50 percent at night." *Id.*

36. *Id.*

37. Gaines, *supra* note 18, at 762-63.

38. *Id.* at 763.

arrest sea turtle population decline around the world.”<sup>39</sup> As a result, the commercial and environmental interests at home converged to support Congress’ enactment in 1989 of Section 609 of the U.S. Endangered Species Act, a provision with extraterritorial reach that would become known as the Sea Turtle Act.<sup>40</sup>

## B. Section 609

### 1. A “Carrot” and a “Stick”

Section 609 was drafted to contain a “carrot” and a “stick” that would together serve to extend sea turtle protection beyond the limited confines of U.S. waters and its exclusive economic zone.<sup>41</sup> As Sanford Gaines of the University of Pennsylvania explains:

The carrot, Section 609(a), calls upon the departments of state and commerce to initiate negotiation of agreements with other countries “for the protection and conservation of sea turtles,” specifically including all governments with jurisdiction over commercial fishing operations that “may affect adversely such species of sea turtles.” The stick comes in Section 609(b), which prohibits, after May 1, 1991, the import of wild-caught shrimp “which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles.”<sup>42</sup>

In a controversial twist, however, Section 609 allowed for an exception to the importation ban alluded to in 609(b). Exporting nations were deemed to be exempted from the prohibition of 609(b) if “certified” by the President based on “documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States” and an average rate of incidental take of turtles comparable to the U.S. average.<sup>43</sup> Congress otherwise implemented a unilateral ban on the importation of shrimp products from non-complying countries.<sup>44</sup>

Section 609(b) clearly provided for more aggressive efforts to prevent the sea turtle’s potentially imminent extinction. Thus, “[t]he unilateral trade ban

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39. *Id.*

40. § 609 103 Stat. at 1037-38.

41. Gaines, *supra* note 18, at 763.

42. *Id.* at 763-64.

43. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 609; *see generally* Gaines, *supra* note 18 (discussing the statutory analysis in detail).

44. Morrill, *supra* note 12, at 417.

measures adopted by Congress in Section 609(b) served as the catalyst for both national and international litigation."<sup>45</sup>

## 2. *The Proper Scope of Section 609*

Over the next decade, several different sets of guidelines were introduced to feel out and properly implement the turtle protection legislation.<sup>46</sup> In 1991 and 1993, the first two sets of guidelines issued by the State Department were promulgated under Section 609.<sup>47</sup> These guidelines included two major provisions. First, in addressing the comparability of foreign regulatory programs, the guidelines mandated the use of TEDs on all shrimping vessels where there was a likelihood of intercepting sea turtles.<sup>48</sup> The only exceptions applied to vessels less than twenty-five feet in length, which were allowed to comply by reducing towing times.<sup>49</sup> Secondly, the State Department determined that Congress intended that the scope of Section 609 be limited in application to the Caribbean and western Atlantic region.<sup>50</sup>

Although the scope of the guidelines was expanded to affect the trawling practices of fishermen both domestically and abroad, according to some environmental groups, its limited Caribbean/western Atlantic application still ran contrary to the ESA's goal of protecting sea turtles.<sup>51</sup> In 1995, environmental NGOs challenged before the U.S. Court of International Trade (CIT) the decision of the State Department to limit the statute's coverage.<sup>52</sup> The CIT held that the prior guidelines were not a proper enforcement of Section 609.<sup>53</sup> The Court further directed the State Department to summarily prohibit the import of shrimp from *any* country in the world utilizing commercial shrimping practices that endanger those protected species of sea turtles.<sup>54</sup> In 1996, in response to the CIT's decision, the State Department made sweeping changes to the guidelines, and extended the import ban on shrimp and shrimp products throughout the world.<sup>55</sup>

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45. *Id.* at 418.

46. *See* Dailey, *supra* note 4, at 363.

47. *Id.*

48. *Id.*

49. *Id.* The guidelines also prohibited the retention of any incidentally caught sea turtles, and they required the resuscitation of any such turtles that were unconscious at the time of retrieval. *Id.*

50. *Id.*

51. Benedini, *supra* note 34, at 416.

52. *See* Earth Island Inst. v. Christopher, 942 F. Supp. 597 (Ct. Int'l Trade 1996), *vacated on other grounds*, Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998).

53. *Christopher*, 942 F. Supp. at 599; *see* Dailey, *supra* note 4, at 364.

54. *Christopher*, 942 F. Supp. at 599; *see* Dailey, *supra* note 4, at 364.

55. Dailey, *supra* note 4, at 364.



### 3. Article XX Exceptions

While such trade restrictions are generally deemed unacceptable under GATT,<sup>56</sup> the “stick” of Section 609(b) was thought to fall under the environmental exceptions of Article XX. The relevant text of Article XX is brief and worth setting forth in full:

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

(b) necessary for the protection of human, animal, or plant life or health; . . . [or]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . .<sup>57</sup>

Article XX thus offers general exceptions from international trade obligations for trade measures employed in the pursuit of certain specified goals or purposes.<sup>58</sup>

However, several countries (specifically India, Malaysia, Pakistan, and Thailand) did not view the United States’ actions or goals as particularly laudable, and on October 8, 1996, following the decision of the Court of International Trade and the revised 1996 guidelines, the complainants made a formal request for consultations through the WTO.<sup>59</sup> The complainants alleged that the U.S. restrictions on the importation of shrimp violated Articles I:1, XI:1, and XIII:1 of GATT 1994. In addition, the complainants argued that Section 609 did not qualify under the exceptions of Article XX(b) or XX(g). On February 25, 1997, the WTO Dispute Settlement Body referred the matter to a dispute settlement panel, and the battle was officially underway.<sup>60</sup>

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56. Compare GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 1623 (1991) (explaining that such environmentally based trade measures might open the door to “green” protectionism), with GATT Dispute Panel Report on U.S. Restrictions on Import of Tuna, June 16, 1994, 33 I.L.M. 839 (1994) (reaffirming the earlier panel’s ruling, but basing its decision on somewhat different grounds).

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

58. See generally Gaines, *supra* note 18, at 740.

59. *Id.* at 768.

60. *Id.*

### III. THE *SHRIMP/TURTLE* DECISION

#### A. *The Panel Report*

In the *Shrimp/Turtle* dispute, the complainant countries were clearly annoyed by the perception that U.S. certification regulations were being used to strong-arm other nations' domestic policies. In particular, the Asian delegations addressed the concern that Section 609 was arbitrary and that countries should not be allowed to impose unilateral measures affecting trade regardless of the environmental grounds.<sup>61</sup> On April 6, 1998, the complainants' desires came to fruition.<sup>62</sup> On that date, the WTO dispute panel issued its final report, holding that the importation ban imposed by the United States under Section 609 could not be justified and, in fact, operated as a restriction on trade prohibited by that article.<sup>63</sup>

Succinctly stated, the panel ultimately examined the measure with regard to the chapeau of Article XX, which prohibits application of measures that would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."<sup>64</sup> Believing that the exceptions in Article XX were limited and conditional, the panel found that Section 609 did indeed violate the chapeau of Article XX, and therefore found no need to address whether the measure fell under any of the exceptions.<sup>65</sup> On July 13, 1998, the

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61. Puls, *supra* note 25, at 356.

62. *Shrimp/Turtle*, *supra* note 10, at para. 112. The Appellate Body paraphrased and further cast light upon the panel's reading of the chapeau:

[I]f an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those Agreements would be threatened.

This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements.

*Id.* "Indeed, as each of these requirements would necessitate the adoption of a policy applicable not only to export production . . . but also domestic production, it would be impossible for a country to adopt one of those policies without the risk of breaching other Members' conflicting policy requirements for the same product and being refused access to these other markets." *Id.*

63. *Id.* The panel determined that because Section 609 banned the importation of shrimp and shrimp products from any country not meeting the United States's rigid criteria, it constituted an impermissible "prohibition or restriction" under Article XI:1. The panel failed to see the need to address the WTO complainants' arguments that Section 609 also violated Articles I:1 and XIII:1 since it had already found that it violated Article XI:1. Benedini, *supra* note 34, at 447.

64. *Shrimp/Turtle*, *supra* note 10.

65. See Benedini, *supra* note 34, at 447.

United States notified the WTO of its decision to appeal certain issues of law and legal interpretations in the Panel Report.<sup>66</sup>

### B. The Appellate Body's Report

In its first report following its establishment as an arbiter of international trade law under the Uruguay Round negotiations, the World Trade Organization Appellate Body rather simplistically concluded:

WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.<sup>67</sup>

Two-and-a-half years and one U.S. appeal later, the Appellate Body issued its most complex and comprehensive decision considering the parameters of trade-disrupting environmental measures, the *Shrimp/Turtle* report.<sup>68</sup> Following the Appellate Body's decision, however, there still remains

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66. See *Shrimp/Turtle*, *supra* note 10, at para. 8.

67. Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 19 (Apr. 29, 1996), cited in Paul O'Brien, *Unilateral Environmental Measures After the WTO Appellate Body's Shrimp-Turtle Decision*, in RECONCILING ENVIRONMENT AND TRADE 267 (Edith Brown Weiss & John H. Jackson eds., 2001).

68. *Shrimp/Turtle*, *supra* note 10. The *Shrimp/Turtle* dispute was not the first case under the WTO/GATT dispute settlement system concerning the validity of environmental measures, however. In *Tuna/Dolphin I*, the Body held that extraterritorial enforcement of any regulation is contrary to GATT policies, regardless of whether or not falling under any of the Article XX exceptions. GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 144 (1993). "Ignoring the text of the GATT treaty, the panel based its decision on an intuition that trade measures to protect the environment might somehow open the door to 'green' protectionism." Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 493 (2002). In *Tuna/Dolphin II*, the WTO backed off from its somewhat rigid stance, however, by reopening the possibility that countries may enforce environmental regulations abroad, but only if doing so will not infringe upon the sovereignty of other member countries. GATT Dispute Panel Report on United States Restrictions on Import of Tuna, 33 I.L.M. 839 (1994). Widely criticized, the *Tuna/Dolphin* rulings were never adopted as legally-binding dispute settlements by GATT's membership. As Robert Howse explains:

Before the *Tuna/Dolphin* rulings, the prevailing view was that Article XX of the GATT decided any conflicts between free-trade rules and environmental norms in favor of the latter. The *Tuna/Dolphin* panels tried to switch the preference in favor of the latter. Worse still, they approached the question solely from the perspective of effects on liberalized trade. Traditionally, the GATT demonstrated respect for regulatory diversity and progressive government. But after *Tuna/Dolphin*, environmentalists—and others with concerns about how the

no clear or defined guidance concerning the autonomy of WTO members to act unilaterally with regard to environmentally protective measures.

### 1. Procedural Overview of the Appellate Body Report

Initially, the Appellate Body established the proper sequence for carrying out an analysis under Article XX. In contrast to the Panel's "chapeau-down" approach, the Appellate Body held that the structure and logic of Article XX analysis requires an initial determination of whether or not the violating measure qualifies under one of the specific exceptions in Article XX(a) through (j).<sup>69</sup> Only then can the application of the broad language of the chapeau be used to strike down the measure.<sup>70</sup> Therefore, the *Shrimp/Turtle* case posed for the WTO the fundamental question of how the general exceptions, as articulated under Article XX, qualify for and fit into the overall purposes of a multilateral trading system.

### 2. Substantive Analysis

#### a. Article XX(g)

Having determined that the Panel's "chapeau-down" approach was incorrect, the Appellate Body subsequently considered, per the agreement of the parties, whether Section 609 was justified under any of the exceptions of

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trading system balances competing values—saw the GATT as a regime dedicated to the triumph of free trade over all other human concerns.

Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 493-94 (2002). Furthermore, the later panel decision in *Reformulated Gasoline* voiced approval for certain allowed environmental trade measures, but still looked unfavorably upon the unilateral nature of the particular challenged measure. Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm) (last visited Apr. 3, 2005). "It is against this backdrop that the United States embargo on shrimp and shrimp products harvested without the use of TEDs came to the WTO Dispute Panel and to the Appellate Body." Puls, *supra* note 25, at 371.

69. *Shrimp/Turtle*, *supra* note 10, at para. 117. See generally Bree, *supra* note 13.

70. Bree, *supra* note 13, at 106. The Appellate Body reiterated this point:

In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the 'manner' in which measures sought to be justified are 'applied.' In [*Reformulated Gasoline*], we pointed out that the chapeau of Article XX 'by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. . . . What the panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the design of the measure itself. . . . The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau.

*Shrimp/Turtle*, *supra* note 10, paras. 115-16.

Article XX—in particular, XX(g).<sup>71</sup> Noting the global effort and interest in the protection of living natural resources, the Appellate Body proceeded on these grounds, positing that measures to conserve exhaustible natural resources, whether living or nonliving, may fall within Article XX(g).<sup>72</sup> Under its Article XX(g) analysis, the Appellate Body concluded that sea turtles were an exhaustible natural resource<sup>73</sup> and that Section 609's aim was sufficiently related to the legitimate policy of sea turtle preservation.<sup>74</sup>

Thus, having found Section 609 to be within the meaning of Article XX(g), the Appellate Body proceeded to the most controversial step of all—deciding whether Section 609 satisfied the requirements of the chapeau of Article XX.

*b. The Infamous Chapeau of Article XX*

The Appellate Body's analysis of Article XX(g) is notable for both the legalistic methods it applied and the results it yielded.<sup>75</sup> Fulfillment of the requirements of Article XX(g), however, provides only for a provisional justification of compliance.<sup>76</sup> All examined regulations must also stand up to the mandate of the introductory clauses, or chapeau, of Article XX.<sup>77</sup>

The chapeau interjects two general requirements into the otherwise absolute provision that “nothing in this Agreement” shall prevent the adoption

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71. Article XX(g) was used because of the less harsh language it entailed. Instead of the “necessary” language of (b), (g) only specified that the measure be “related to” the protection of natural resources. Benedini, *supra* note 34, at 447.

72. *Shrimp/Turtle*, *supra* note 10, at para. 127.

73. According to the complainants, this definition of “exhaustible natural resources” represented the understanding common at the time that the original GATT was drafted in 1947. *Shrimp/Turtle*, *supra* note 10, at para. 128. The incorporation of GATT into the WTO framework in 1994 created a new interpretive context that the Appellate Body was bound to follow. Primarily, the Appellate Body referred to the textual interpretation of Article XX in finding that the term “exhaustible” does not exclude “renewable” resources like living animals. *Id.* The Appellate Body noted that the treaty must be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” *Id.* Therefore, the Body concluded the language of the treaty is not “static,” but “by definition evolutionary.” *Id.* Moreover, the Body acknowledged that the 1982 U.N. Convention on the Law of the Sea, the 1992 Agenda 21, the 1992 Biodiversity Convention, and the Convention on the Conservation of Migratory Species of Wild Animals include “living,” “biological,” or “natural” resources in their scope. *Id.* See generally Bree, *supra* note 13.

74. *Shrimp/Turtle*, *supra* note 10, at para. 142. The “related to” analysis focuses on the necessary relationship between the general structure and design of Section 609 and the conservation of sea turtles. The rationality test of sub-paragraph (g) is much broader than the necessity test of sub-paragraph (b), which requires that the only action that will be justified under (b) is the imposition of the least-trade-restrictive alternative. In contrast, the rationality test requires only “a close and genuine relationship of ends and means.” The Appellate Body found that Section 609 did, in fact, have a sufficient relationship to the legitimate policy of conserving sea turtles. Dailey, *supra* note 4, at 367.

75. Bree, *supra* note 13, at 115.

76. *Id.* at 115-16.

77. *Id.* at 116.

of measures to achieve the policy goals enumerated in Article XX(a) through (j).<sup>78</sup> Specifically, it requires that measures not be applied in a manner which would constitute: (1) a means of arbitrary or unjustifiable discrimination between two countries where the same conditions prevail, or (2) a disguised restriction on international trade.<sup>79</sup>

While, in general, the parties to the *Shrimp/Turtle* dispute, the WTO, and environmental groups agree that the chapeau is designed to prevent the abuse of Article XX exceptions, the exact meaning and application intended by the ambiguous language of the dual requirements is a point of major contention.<sup>80</sup> It is here that the Appellate Body characterized its analysis as a balancing test—striking a balance “between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of other Members.”<sup>81</sup> In particular, the debate in the *Shrimp/Turtle* case examined the much-disputed question of whether and under what conditions the invocation of the environmental exception for unilateral trade restricting measures would constitute such an abuse.<sup>82</sup>

### *i. Unjustifiable and Arbitrary Discrimination*

The Appellate Body first examined Section 609 with regard to the prohibition against unjustifiable or arbitrary discrimination.<sup>83</sup> This is where Section 609 ran afoul of Article XX.<sup>84</sup> In its holding that the unilateral legislation did unjustifiably and arbitrarily discriminate, the Appellate Body elicits several factors that led to this conclusion.<sup>85</sup>

According to the Appellate Body, the “most conspicuous flaw” in the application of Section 609 was its coercive effect.<sup>86</sup> While the statutory language of Section 609 did not mandate a change in policy by foreign governments, the Appellate Body believed that the practical application of the statute had removed any ostensible degree of flexibility toward compliance.<sup>87</sup> In particular, the Appellate Body pointed to the 1996 guidelines that had described only one manner in which a regulatory program could be considered comparable to the U.S. program.<sup>88</sup> “The Appellate Body found this ‘rigid and unbending standard’ in the application of Section 609 unacceptable, implying

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78. GATT, *supra* note 57.

79. *Id.* See also Bree, *supra* note 13, at 106.

80. Bree, *supra* note 13, at 106.

81. *Shrimp/Turtle*, *supra* note 10, at para. 156; see O'Brien, *supra* note 67, at 301.

82. Bree, *supra* note 13, at 116-17.

83. *Shrimp/Turtle*, *supra* note 10, at para. 160.

84. *Id.* See generally Dailey, *supra* note 4, at 372.

85. O'Brien, *supra* note 67, at 301.

86. *Shrimp/Turtle*, *supra* note 10, at ¶165; see also O'Brien, *supra* note 67, at 301.

87. O'Brien, *supra* note 67, at 301.

88. *Id.*

that measures must take into account different conditions in the territories of other Members.”<sup>89</sup>

The second and perhaps most substantively important aspect of the debate was what the Appellate Body referred to as the unilateral character of the measure’s application.<sup>90</sup> Many legal pundits believe this was essentially the defining swing-vote in Section 609’s analysis.<sup>91</sup> Indeed, the Appellate Body strongly criticized the

failure of the United States to engage . . . [the appellees, as well as] other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.<sup>92</sup>

As support for the appropriateness of such multilateral action, the Appellate Body cited to a series of international environmental and WTO environment related items, as well as to Section 609 itself.<sup>93</sup>

In addition, the Appellate Body bolstered its preference for multilateral negotiation by citing to the Inter-American Convention for the Protection and Conservation of Sea Turtles, a multi-national convention negotiated by the United States with some of the affected countries for the protection and conservation of sea turtles.<sup>94</sup> In its report, the Appellate Body extolled the Convention as a model for available multilateral alternatives.<sup>95</sup> Ironically, the Body used the United States’s one multilateral success under Section 609 as an exhibit of the perceived greater failure in producing similar agreements with other Members.

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89. *Id.* (quoting the *Shrimp/Turtle* decision, *supra* note 10). It was unjustified, as the Appellate Body suggests, because other measures more acceptable to the exporting country might have achieved the legitimate conservation objective of the United States. Furthermore, the scheme as applied barred imports of shrimp caught with TEDs merely because they were caught in waters of countries not certified by the United States. Taken together, these two features of the scheme’s application led to a conclusion of unjustified discrimination. The Appellate Body feared that the scheme’s paramount concern was influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimpers. *Shrimp/Turtle*, *supra* note 10.

90. *Shrimp/Turtle*, *supra* note 10, at para. 163

91. *See, e.g.*, Bree, *supra* note 13.

92. *Id.* at 142 (explaining and analyzing the Report of the Appellate Body and its stated decision criteria).

93. *Shrimp/Turtle*, *supra* note 10.

94. Inter-American Convention for the Protection and Conservation of Sea Turtles, opened for signature Dec. 1, 1996, 37 I.L.M. 1246 [hereinafter IAC].

95. *Shrimp/Turtle*, *supra* note 10, at para. 167.

Finally, the Appellate Body detected that differential treatment was being given to various countries desiring certification.<sup>96</sup> The Body specifically referred to disparities in the length of phase-in period and in the transfer of TED technology to specific countries.<sup>97</sup>

## ii. *Disguised Restriction on International Trade*

The Appellate Body did not specifically address the issue of whether the statute, in fact, constituted a "disguised restriction on international trade."<sup>98</sup> Therefore, the Appellate Body declared that it was enough that the measure be held inconsistent with Article XX because Section 609 constituted both unjustifiable and arbitrary discrimination.<sup>99</sup>

## C. *Unilateral Environmental Measures in the Wake of the Shrimp/Turtle Decision*

Perhaps recognizing the political sensitivity of striking down an environmentally-friendly statute in favor of trade, the Appellate Body concluded its decision in *Shrimp/Turtle* with a recitation of what it did not decide: "We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should."<sup>100</sup> In paragraph 121, the Appellate Body even went so far as to indicate that unilateralism may, in fact, be a common aspect and application of Article XX(g) justifiable measures.<sup>101</sup>

96. *Id.* at para. 173.

97. *Id.* Under the 1991 and 1993 guidelines, fourteen countries in the Caribbean and western Atlantic region had a phase-in period of three years, whereas all other states had only four months to implement the mandatory use of TEDs. The Appellate Body rejected the United States's explanation that the longer implementation period was justified by the undeveloped character of TED technology in 1991, while in 1996 improvements had made a shorter period possible. Moreover, the Body observed that "[f]ar greater efforts to transfer technology successfully were made to certain exporting countries," specifically the fourteen Caribbean and western Atlantic countries, than to other exporting countries. *Id.* See also Bree, *supra* note 13, at 115.

98. Dailey, *supra* note 4, at 374.

99. *Id.*

100. *Shrimp/Turtle*, *supra* note 10, at para. 185, quoted in O'Brien, *supra* note 67, at 301.

101. *Id.* The language and substance of paragraph 121 in the decision is worth quoting:

In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX . . . . It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain



However, the practical application of such an assertion is open for debate. While the Appellate Body's decision in *Shrimp/Turtle* appears to open the door to unilateral national environmental measures under Article XX(g), that "open door only leads to a second and more tightly guarded gateway, the Article XX chapeau."<sup>102</sup> Therefore, the arguments of earlier cases condemning unilateral measures under Article XX seem to have merely transferred bases from the interpretation of the exceptions to the interpretation of the chapeau. Was the Appellate Body correct? Can or should sovereign States be able to unilaterally effectuate environmental goals through the channels of trade? Opinions on this matter have led to a groundswell of legal comments and theory.

#### IV. THE ANATOMY OF A TRADE-RESTRICTIVE ENVIRONMENTAL MEASURE

Often overlooked in judicial decisions is the reaction of the party in whose favor the case has been decided. Yet the mere possibility that unilateral trade measures may be allowed in the future has the international trade community up in arms.<sup>103</sup> However, it is important to note that most analyses of the *Shrimp/Turtle* decision come from journals and publications not-so-coincidentally entitled with such names as "Journal of Environmental Law" and "Environmental Law Reporter."<sup>104</sup>

Therefore, was the Appellate Body's interpretation of the chapeau in *Shrimp/Turtle* as egregious as advertised? Was the United States the good and noble Defender of Wildlife it was portrayed to be? Such matters warrant a closer look.

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policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Art. XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

*Id.* at para. 121.

102. Gaines, *supra* note 18, at 743.

103. A fairly representative criticism is that of Jagdish Bhagwati of Columbia University:

I have some sympathy for [the] view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters. I was astounded that the appellate court, in effect, reversed long-standing jurisprudence on process and production methods in the *Shrimp-Turtle* case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.

Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 60-61 (Roger B. Porter et al. eds., 2001); see also Claude E. Barfield, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 37-70 (2001).

104. See, e.g., Guruswamy, *supra* note 20; Cadeddu, *supra* note 11.

### A. Trade and the Environment

To fully appreciate the nature of the WTO's current predicament over Article XX, one must recall the contentious decade of trade versus environment debate preceding the *Shrimp/Turtle* decision.<sup>105</sup> "In 1991, a dispute settlement panel report [unwittingly] thrust trade law abruptly into the realm of environmental policy, and, in so doing, placed environmental issues squarely on the agenda of international trade policy and development."<sup>106</sup> The resulting aftershock from the report created ripples throughout the environmental and trade communities alike.<sup>107</sup> Environmentalists portrayed the world trade system as "GATTzilla," while trade advocates predicted a period of veiled trade restrictions and "green" protectionism that threatened to revert the international community back to the chaos that embroiled the 1930s.<sup>108</sup>

Still, optimism fueled the hope that the worlds of trade and environment could find a common ground that would be mutually beneficial to both of their interests.<sup>109</sup> The GATT soon had created a Group on Environmental Measures and International Trade (EMIT), later restructured in 1995 as the Committee on Trade and Environment (CTE).<sup>110</sup> In addition, the Organization for Economic Cooperation and Development studied issues viewed as germane to the trade versus environment debate through a series of meetings of an ad hoc group called the Joint Session of Trade and Environment Experts.<sup>111</sup> Academic studies and conferences addressing trade and the environment proliferated.<sup>112</sup>

These ten years of regular intergovernmental meetings since *Tuna-Dolphin I* effectively deepened our understanding of the issues; however, they still have yielded only minimal progress in official negotiations toward new trade-environment policy approaches.<sup>113</sup> While many WTO Members continue to claim that there should be no policy contradiction "between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other,"<sup>114</sup> the reality, of course, is that this is much more difficult in practice. The violent street demonstrations at the 1999 Seattle meeting of WTO trade ministers, repeated since in many other cities, symbolize the deep mutual suspicion and clash of values that exist between trade and the environment.<sup>115</sup>

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105. Gaines, *supra* note 18, at 752.

106. *Id.* See GATT, *supra* note 57.

107. Gaines, *supra* note 18, at 752.

108. *Id.* at 752.

109. *Id.* at 753.

110. *Id.*

111. *Id.*

112. *Id.* at 753-54.

113. *Id.* at 754.

114. Bree, *supra* note 13, at 102.

115. See Gaines, *supra* note 18, at 756.

Conflicts over trade and the environment continue to arise and need to be resolved. Given the absence of official negotiations toward new policy approaches, governments in most such cases have had no option but to resort to the dispute settlement process of the GATT/WTO. Not surprisingly, most of these cases have met with very little success toward their environmentally-based objectives. Nevertheless, while some critics contend the *Shrimp/Turtle* case has made unprecedented inroads into state sovereignty (actually, the sovereignty of the United States, to be more exact) and the conservation and protection of the environment, the final decision of the Appellate Body may merit some support.

*B. Were the United States' Efforts Genuinely Environmentally Motivated?*

Harnessing memories from their first year of law school, many lawyers will recall a standing case entitled *Lujan v. Defenders of Wildlife*.<sup>116</sup> The moniker "Defenders of Wildlife" conjures up a sort of haughty imagery. What kind of organization would call itself the Defenders of Wildlife? Who, in fact, were the Defenders of Wildlife? To listen to some of the critiques of *Shrimp/Turtle*,<sup>117</sup> this venerable title had vested in the United States of America, attained as a result of its visionary environmental legislation—Section 609. Nonetheless, were the United States's efforts in *Shrimp/Turtle* genuinely environmentally motivated, and should it matter if they were not?

After all, "according to a recent status report to the WTO, the United States has 'redoubled its efforts . . . to negotiate an agreement with the governments of the Indian Ocean region towards the protection of sea turtles in that region.'"<sup>118</sup> The report further stated that several governments as well as NGOs had already been approached in an effort to get the negotiations process underway toward a more effective multilateral treaty.<sup>119</sup> These findings beg the question: Why was this option not implemented from the very beginning?

In fact, the global shrimp industry is one of the highest-valued seafood industries in the world, and the United States is one of the largest consumers of shrimp, typically importing about 75 percent of the shrimp that it consumes.<sup>120</sup> Therefore, it may be, as one author contends, that the United States, by imposing restrictions on imported shrimp, hoped to limit foreign competition in favor of its domestic shrimp industry.<sup>121</sup>

Suspicion in the neutral eye is inevitable. The facts materialize themselves as the classic case of protectionism. As Peter Chessick describes,

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116. 504 U.S. 555 (1992).

117. See, e.g., Guruswamy, *supra* note 20.

118. Benedini, *supra* note 34, at 447.

119. *Id.*

120. Peter Chessick, *Explaining U.S. Policy on Shrimp-Turtle: An International Business Diplomacy Analysis*, in RECONCILING ENVIRONMENT AND TRADE 497 (Edith Brown Weiss & John H. Jackson eds., 2001).

121. *Id.* at 501.

"[a]fter the domestic TEDs regulations were in place, unhappy Trawlers in the Gulf of Mexico, forced to put TEDs in their nets, found themselves trawling alongside Mexican Trawlers who were subject to no such requirements, yet who could sell their presumably larger catches for the same price."<sup>122</sup> So, perhaps not so coincidentally, in 1989, less than two years after the Department of Commerce first required the use of TEDs by U.S. shrimpers, Congress passed the amendment to the Endangered Species Act known as Section 609.<sup>123</sup> In fact, when Section 609 was finally implemented in 1991, the State Department issued guidelines that directed efforts to enforce subparagraph (b)'s restrictions on only 14 of the 85 countries exporting shrimp to the U.S., and those efforts led to further actions against only one country: Mexico.<sup>124</sup>

Furthermore, Section 609 itself was proposed by members of Congress from states bordering on the Gulf of Mexico, which is by far the greatest source of domestic shrimp (and shrimpers) in the United States.<sup>125</sup> The environmental lobby had very little influence on the development of the legislation, and it did not become deeply involved in the Section 609 debate until the 1991 guidelines were released.<sup>126</sup>

### C. The International Trade Community's Argument

So, after the dust settled, who was the real "winner" and who was the real "loser" in the *Shrimp/Turtle* case? The answer may not be patently obvious. After all, government representatives from Thailand and India have asserted that, from their point of view, the United States really "won" due to what they perceived as the Appellate Body's broad reading of the Article XX exceptions.<sup>127</sup> "As with so many matters in the law, the practical result for the parties to the case is, for many purposes, secondary to its significance as legal discourse and potential precedent."<sup>128</sup>

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122. *Id.* at 515.

123. *Id.*

124. *Id.* at 499.

125. "Section 609 was actually an amendment to a much larger appropriations bill, and was sponsored by several Congressmen from the Gulf states, led by Senator John Breaux from Louisiana." *Id.* at 515.

126. See *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade, 1996), vacated on other grounds, *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1354-55 (Fed. Cir. 1998). These interests were demonstrated in the Earth Island Institute lawsuit filed against the State Department. *Id.* The plaintiffs argued that the geographically limited scope and enforcement set forth by the guidelines was, in fact, contrary to the language of Section 609. *Id.* at 1355. Joining the Earth Island Institute in the action were the American Society for the Prevention of Cruelty to Animals, the Humane Society for the Prevention of Cruelty to Animals, the Sierra Club, and, interestingly, the Georgia Fishermen's Association, Inc. *Id.* at 1354-55. One author noted that the Georgia Fishermen's Association was the only shrimping organization that joined in the lawsuit. See Chessick, *supra* note 120, at 516.

127. Gaines, *supra* note 18, at 749.

128. *Id.*

Specifically, the international trade community protests the *Shrimp/Turtle* holding in the sense that it leaves the door cracked open for countries to unilaterally impose extraterritorial trade restrictions based on individual, domestic agendas—perhaps more importantly—without necessitating changes to the WTO rules.<sup>129</sup> As Alan Oxley, former Australian Ambassador to the GATT and former Chairman of the GATT Contracting Parties, exclaimed:

This judgment of the Appellate Body follows the example set by the most activist of the U.S. Supreme Court judges. It has interpreted WTO provisions to permit restrictions which the membership of the WTO has previously indicated, overwhelmingly and emphatically, they do not support. . . . There is now an urgent need to quarantine or, better, reverse, the opening for widespread imposition of trade restrictions on environmental grounds which the AB has now legitimized.<sup>130</sup>

Given the Appellate Body's corresponding interpretation of the chapeau, however, such fears may be more alarmist than real. Nevertheless, through all of the discussion, accusations, and conjecture, one cannot help but wonder: Regardless of the complete purity of motive, should unilateral measures ever be allowed if a salient, environmental reason for such measures can be legitimately shown to exist?

#### *D. Unilateral Measures May Be Necessary*

There are essentially two types of environmental trade measures: multilateral and unilateral. This distinction is paramount because the WTO has consistently favored the use of multilateral environmental trade measures over

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129. ALAN OXLEY, INT'L TRADE STRATEGIES LTD., IMPLICATIONS OF THE DECISIONS IN THE WTO SHRIMP TURTLE DISPUTE (Feb. 2002), <http://www.worldgrowth.org/pages/PDFs/shrimp-turtle.pdf> (last visited Apr. 3, 2005). Aside from unilateralism, Oxley makes additional arguments of what he views as dangerous precedents to which the Appellate Body opened the door:

- Article XX(g) can have extraterritorial reach
- A trade restriction can be imposed on a product if the way it is processed has negative environmental consequences as determined by the importer;
- International declarations and conventions, regardless of whether or not they have widespread support or adherence, create legitimate grounds to trigger the use of the exceptions under Article XX;
- Non-trade elements of the Preamble, e.g., "sustainable development," now diminish the standing of the international trade responsibilities of the WTO as its primary purpose.

*Id.* at 4.

130. *Id.* at 3-4.

unilateral environmental measures that propose the same goals.<sup>131</sup> These sentiments were echoed in recent comments by Renato Ruggiero, former Director-General of the WTO:

We both want a strong, rules-based trading system as well as a strong and effective environmental system, and we both want the two systems to support one another. The question is how do we arrive at these objectives. We will not arrive there through unilateralism, through discriminatory actions and protectionism, with each nation free to impose its standards and priorities on the other following its own perceptions of the problem. On the contrary, we will only arrive at our shared objectives through consensus, through negotiations.<sup>132</sup>

Indeed, international environmental law and policy has expressed a preference for multilateral treaties and negotiations, as well.<sup>133</sup> The reasons are really quite obvious. Attending to such global threats as species extinction, multilateral cooperation, and parity is seen as more effective and equitable than unilateral measures, which can slant the playing field in the direction of Northern power and open the door to serious abuses. After all, in the current state of the world, the line between economics and environment is often blurred, and the color of environmental trade measures is very rarely black or white.

Despite this pronounced desirability for multilateral treaties, and the fact that the United States may not have been as genuinely environmentally motivated as it was portrayed to have been, there are problems with pursuing a

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131. The Appellate Body has acknowledged that the task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions of the GATT, so that neither of the competing rights will cancel out the other. *Shrimp/Turtle*, *supra* note 10; *see also* Puls, *supra* note 25, at 345.

132. Benedini, *supra* note 34, at 434.

133. *See* Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416 (1972), *available at* <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503> (last visited Apr. 3, 2005). For a descriptive analysis of the drafting of the provisions of the Declaration, *see* Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973); *see also* Article 2.19, Agenda 21, UN Doc. A/CONF.151/426 (1992). At the same time, Principle 12 of the Rio Declaration calls for states to cooperate to promote an "open international economic system that would lead to growth and sustainable development in all countries." AMERICAN MODEL UNITED NATIONS INTERNATIONAL, POSITION PAPERS BY COMMITTEE, ANUM 2004 – POLICY STATEMENTS FOR THE ECOSOC COMMISSION ON SUSTAINABLE DEVELOPMENT, *at* [http://www.amun.org/amun\\_ppr\\_bycomm.php?comm=ESComm](http://www.amun.org/amun_ppr_bycomm.php?comm=ESComm) (n.d.) (last visited Apr. 8, 2005). However, it further provides that unilateral measures aimed at extra-territorial environmental problems are to be avoided, and "environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." *Id.*

negotiated multilateral solution to environmental threats. In the absence of an international judicial system that provides a comprehensive and neutral dispute resolution body able to blindly cover conflicts such as the *Shrimp/Turtle* dispute, unilateral measures may be necessary to protect a species' already delicate status.

### 1. *No Time for Multilateral Inefficiencies*

Environmental threats present somewhat unique phenomena. In general, by the time the environmental threats gain public attention, the situation has attained advanced status, and the need for a cogent solution has become critical.<sup>134</sup> Therefore, there is often little room for error and no time to waste. Curiously, these are exactly the results multilateral negotiations threaten to produce.

International negotiations are usually long, complex, expensive, and highly politicized processes.<sup>135</sup> As Robert Howse observed:

In a world where bargaining imposes transaction costs, cooperative solutions will be affected by background legal rules that establish rights or entitlements on which the parties can rely in the absence of negotiated agreement. It is possible that a rule that is highly restrictive of unilateral trade measures to protect the environment will lead to strategic behavior, and exacerbate hold-out problems, thereby increasing transaction costs and reducing the likelihood of cooperative solutions to global environmental problems.<sup>136</sup>

Perhaps more importantly, by the time the countries can find an agreement that is copasetic to all parties, the species in question may be extinct.

### 2. *Absence of an Impartial Forum*<sup>137</sup>

Similarly, unilateral measures may become necessary due to the absence of an impartial forum. As mentioned earlier, the lack of an international judicial system with a less specialized purpose and a more comprehensive and

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134. Benedini, *supra* note 34, at 436.

135. *Id.*

136. Howse, *supra* note 68, at 492.

137. At least one author has proposed the United Nations Convention on the Law of the Sea (UNCLOS) as a more impartial alternative to the WTO. See Guruswamy, *supra* note 20, at 10274 ("In light of all the shortcomings of GATT/WTO tribunals as a forum for trade and environment disputes, it is useful at this point to emphasize the importance and viability of UNCLOS as another international forum for such cases."). See generally United Nations, Division for Ocean Affairs and the Law of the Sea, *Oceans and Law of the Sea*, at <http://www.un.org/Depts/los/index.htm> (last visited Apr. 3, 2005).

neutral dispute settlement body has led to conflict and divergent policies within the international community. Was the Appellate Body wrong in concluding that the United States may have discriminated against certain countries in the *Shrimp/Turtle* case under the guise of environmental protection? Probably not. Nevertheless, would a more neutral arbiter have come to a different decision? This question is a more difficult one to answer, but this Article argues "yes."

*a. The "T" Stands for Trade*

The simple fact remains: The GATT/WTO regime is first and foremost a trade organization.<sup>138</sup> Its Dispute Panels and Appellate Body consist almost exclusively of trade experts and free trade advocates.<sup>139</sup> Nevertheless, without a fully evolved international court system, environmental measures disputed for their effect on trade must still come before a WTO Dispute Panel and, if appealed, before a WTO Appellate Body.<sup>140</sup> Needless to say, this process hardly presents the image of impartiality.

So, why would a more neutral arbiter have decided any differently? For one thing, the Appellate Body ignored pertinent customary international law, not the least of which was the principle of sustainable development, and in so doing, showed little understanding for how environmental policy works.

*b. The Appellate Body Exhibited Ignorance to the Principle of Sustainable Development*

Most negative critiques of the *Shrimp/Turtle* decision have focused on the perceived incorrect interpretation and application of GATT Article XX and its exceptions. As discussed above, however, the WTO owes its existence and devotes its loyalty to the insurance of fair trade. Therefore, it is to be expected, as well as encouraged, that the WTO interpret their rules and regulations in this light. After all, outside of the gambit of *Shrimp/Turtle*, the WTO performs necessary and laudable functions. Who is more privy to the meaning and intent of such rules and regulations than the original drafter and facilitator? Where the Appellate Body treads more clumsily, though, is in its display of ignorance toward pertinent customary international law, particularly the concept of sustainable development. Indeed, it is this ignorance that represents the less forgivable offense and better displays the need for a more impartial forum.

Professor Birnie has indicated that the *Gabčíkovo-Nagymaros* case shows us that "a treaty may also have to be interpreted and applied in light of customary international law, including new environmental law."<sup>141</sup> While

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138. Puls, *supra* note 25, at 351.

139. *Id.*

140. *Id.* at 350-51.

141. PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 80 (2d ed. 2002).



Birnie acknowledges that how courts resolve the potential for conflict between simultaneously applicable principles or norms in international disputes is essentially a matter of judicial technique, she also points out that the case law of the International Court suggests that where possible it “prefers an integrated conception of international law to a fragmented one.”<sup>142</sup> “Apart from highlighting the formative role of international courts in determining the applicable law, this conclusion points again to the [tenuous practice] of viewing any part of international law in isolation from the whole.”<sup>143</sup>

Admittedly, contentious debate surrounds whether or not the principle of sustainable development has risen to the level of customary international law. Nevertheless, at least one court and more than a few legal commentators have espoused its status as such.<sup>144</sup> Even so, in referencing and applying sustainable development throughout the body and preamble to its constitutive agreement, the WTO may have incorporated the principle into GATT and, moreover, possibly raised its status concerning *Shrimp/Turtle* to that of the binding law of treaties.

The guidelines for interpreting treaties are given in the Vienna Convention on the Law of Treaties.<sup>145</sup> Article 31(1) stipulates that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>146</sup> The Convention later specifies the need that the treaty be interpreted as a whole, “including its preamble and annexes.”<sup>147</sup> Therefore, in seeking to understand and apply the meaning of a GATT provision, for example, it may not be enough to look only to the text of the particular provision.<sup>148</sup>

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142. *Id.*

143. *Id.* at 80-81.

144. *See, e.g.,* Dailey, *supra* note 4, at 347-48.

[I]n the last twenty years, the principle of sustainable development has become accepted as a rule of customary international law. . . . The multilateral consensus supporting the rule of sustainable development has been broad and consistent for the last twenty years. The state practice and *opinio juris* supporting the principle of sustainable development are sufficiently strong to create an international legal obligation on the part of nations to exploit their resources in a manner that is sustainable.

*Id.* Dailey even alludes to the fact that a former Director-General of the GATT, Peter Sutherland, recognized the fact that because sustainable development “has become a customary rule of law, [it] must be addressed by the GATT.” *Id.* at 344; *see also* Case Concerning the Gabčíkovo-Nagymaros Project, 37 I.L.M. 162 (1998), available at [http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs\\_ijudgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm) (last visited Apr. 3, 2005).

145. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. *See generally* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1984).

146. Vienna Convention, *supra* note 145, at 691-92.

147. *Id.* at 692.

148. *Id.*

This is where the Appellate Body's analysis of *Shrimp/Turtle* and viability as a neutral and fair arbiter of trade-environment disputes breaks down. In its preamble, "the WTO [purports to have] a commitment to 'an open, non-discriminatory and equitable multilateral trading system on the one hand,' and to 'protection of the environment, and promotion of sustainable development on the other.'"<sup>149</sup> Yet, the Appellate Body never whole-heartedly addresses or applies these dual principles whereas a non-trade organization probably would have.

It is a paradox that can only be explained by the need for a more impartial forum. Commentator Virginia Dailey characterizes the frustration: "In the trade-environment cases, the Panels and the Appellate Body have repeatedly lamented the lack of an international standard to apply, but their actions ignore a well-established, overarching international environmental standard—the principle of sustainable development—that exists with or without a treaty on point."<sup>150</sup>

## V. CONCLUSION

In 2001, one of the *Shrimp/Turtle* complainants, Malaysia, challenged the corrective measures the United States had taken in response to the Appellate Body's decision.<sup>151</sup> Following three years of some of the harshest and most scathing criticism any international law decision has ever faced, the Appellate Body was ready to clarify and expand upon its original *Shrimp/Turtle* ruling. This second Appellate Body panel found that the United States had brought its turtle-friendly trade measures into compliance with Article XX, and it further underscored those aspects of its original ruling that were alleged to constitute a fundamental departure from the more polarizing *Tuna/Dolphin* rulings.<sup>152</sup> Nevertheless, whether the 2001 panel's ruling represented an attempt to clarify its stance concerning the use of unilateral trade measures, or whether it merely represented an attempt to vitiate the critical attacks of the 1996 panel's rulings and maintain its legitimacy as arbiters of environmentally important trade decisions, remains to be seen. Indeed, the curious eye gazes toward the future.

Regardless of future holdings, in concluding that Section 609 violated the conditions established by the chapeau, the Appellate Body unduly privileged trade considerations, showed little understanding of how customary international law or environmental policy works, and gave little hope that the

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149. Gaines, *supra* note 18, at 739 (emphasis added) (quoting Preamble of the (Marrakesh) Ministerial Decision on Trade and Environment, April 15, 1994, GATT/MTN.TNC/MIN(94)/1/Rev.1).

150. Dailey, *supra* note 4, at 379.

151. Report of the Appellate Body on *United States—Import Prohibitions of Certain Shrimp & Shrimp Products*; Recourses to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (October 22, 2001), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm).

152. *Id.*

WTO will ever tolerate any real-world unilateral measures related to the protection and conservation of the environment. In so doing, the decision in *Shrimp/Turtle* joins a long line of disputes settled in the WTO (and under the predecessor GATT) in which the trade organization has rejected Article XX exceptions for national environmental measures that may restrict trade. Meanwhile, the sea turtles go unprotected.

