

GETTING AROUND THE GATT:
*PASSING GATT-LEGAL LEGISLATION TO PROTECT MARINE LIVING
RESOURCES*

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INTRODUCTION

Since the beginning of time, man has struggled to conquer nature. We have heroized fictional Stammers of nature like Moby Dick and real-life characters like Steve the Crocodile Hunter. We hang trophies of our superiority from the walls of our homes—animal heads and furs adorn our walls, reminding us that we are indeed the rulers of the animal kingdom. But as global population explodes and so-called progress requires us to destroy wooded lands in the name of big parking lots and new strip malls, we should concern ourselves more with preparing for what we will do once we have destroyed what we purport to rule—our environment.

Marine resources are an integral part of our environment, and many marine animals are in dire need of our protection. For example, several species of sea turtle and dolphin have been pushed to the brink of extinction by shrimp and tuna harvesting. A troubling problem facing sea turtles, dolphins, and other marine resources is that marine animals, which are by-and-large part of the global commons, belong to everyone and no one at the same time. Thus, unlike endangered species that may live within the territory of a responsible nation willing to protect it, endangered species of the sea are not and cannot easily be protected by any one nation. Thus, protection of marine animals becomes difficult—countries are generally unable under international law to police marine animal destruction in the same way they would be able to within the borders of their own countries. As such, arguably the most effective method of deterrence is to punish those countries which destroy marine resources under international law.

Overall, perhaps the most appropriate way to “punish” a country is through economic sanctions. On a global scale, this is done by imposing trade sanctions—for example, banning imports of shrimp and tuna products that are caught or processed using techniques that kill large quantities of the marine animals. Trade sanctions can be carried out in several ways. “They can be aimed at: the item itself (for example, a turtle), products made from the item (for example, tortoise shell eyeglasses), or products derived from a process that entails the item (for example, shrimp caught in ways that kill turtles).”¹ For purposes of this paper, we shall focus on the third (the most common) type: imposing sanctions on products derived from processes that harm marine living resources.

International trade is controlled by the General Agreement on Tariffs and Trade of the World Trade Organization² (GATT/WTO) which makes a rhetorical reference to the environment in the preamble, but “calls for the advance of free trade effectively unrestrained by environmental concerns.”³ To be valid, environmentally-protective legislation must meet a high standard under the GATT; and GATT dispute-settlement precedent shows that the bulk of environmentally-protective import bans have been “struck down” for being unduly restrictive on trade. What follows is an examination of how trade sanctions to protect marine living resources may be validly imposed under the GATT. The paper will (1) look at the GATT and its relevant covered

¹ Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TULANE ENVTL. L. J. 299, 330 (1994). CITES already addresses the first two methods for species internationally recognized as endangered—trade of the species or products made from the species is prohibited.

² See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994) 33 I.L.M. 1125 [hereinafter WTO Agreement].

³ Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environmental Disputes*, 25 ECOLOGY L. Q. 189, 190 (1998).

agreements; (2) discuss the infamous “tuna/dolphin” and “shrimp/turtle” cases⁴ that were brought before the Dispute Settlement Body (DSB) of the GATT; (3) highlight mistakes made by the United States in implementing the environmentally-protective legislation and make recommendations on how to create “GATT-legal” laws based on those mistakes; and (4) suggest a few environment-friendly alternatives to GATT dispute settlement.

I. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The World Trade Organization was adopted in 1995 after the conclusion of the Uruguay Round of Negotiations, which lasted from 1986 to 1994. It incorporated The General Agreement on Tariffs and Trade which was originally concluded in 1947⁵ and revised, with little change in 1994 except for the addition of its annexes. These changes were encompassed in so-called “covered agreements” such as the Dispute Settlement Understanding, the Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, and various others.⁶ The GATT/WTO has been touted as the “central international economic institution,”⁷ of the global economy and “the most important event in recent economic history.”⁸

The GATT/WTO has indeed been an important development tool for the global economy, but it is widely viewed as anti-environment.⁹ One common criticism is that the GATT/WTO framework only incorporates the law found in its covered agreements and disregards other sources of international law: “The law applied by GATT/WTO is confined to that found in its own treaties and does not recognize any broader corpus of general international law, let alone [International Environmental Law].”¹⁰ As such, important multilateral environmental treaties, which in some situations nearly all WTO Members may be a party to, are not recognized by the WTO Dispute Settlement Body as part of the GATT. For example, in *Tuna/Dolphins II*,¹¹ the United States and the European Economic Community raised arguments under non-GATT treaties that they were party to. The panel dismissed incorporation of these treaties into the dispute settlement process: “[T]he agreements cited by the parties to the dispute . . . were not concluded among the contracting parties to the General Agreement . . . they [do] not apply to the interpretation of the General Agreement or the application of its provisions.”¹² Thus, treaties that

⁴ The three cases are:

(i) GATT Panel Report on United States Restrictions on Imports of Tuna, Sep. 3, 1991, 30 I.L.M. 1594, GATT Doc. No. DS21/R - 39S/155 GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphins I*].

(ii) GATT Panel Report on United States Restrictions on Imports of Tuna, June 16, 1994, 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphins II*].

(iii) Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 37 I.L.M. 832, WTO Doc. No. WT/DS58/AB/R (1998) [hereinafter *Shrimp/Turtles*].

⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁶ The WTO In Brief, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm.

⁷ L. Bierman *et al.*, *The General Agreement on Tariffs and Trade from a Market Perspective*, 17 U. Pa. J. Int’l Econ. L. 821 at 845 (1996).

⁸ *Id.*

⁹ See generally *e.g.*, LAKSHMAN GURUSWAMY ET. AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER* (2d ed. 1999).

¹⁰ Guruswamy, *supra* note 3, at 198.

¹¹ See *supra*, note 4.

¹² *Tuna/Dolphins II* at 50, par. 5.19.

the disputing parties wished to be bound by carried no persuasive force with the panel because the treaties were negotiated outside of the GATT framework.

This principle was solidified after the creation of the WTO in 1994. The GATT 1994 incorporated a new dispute-settlement mechanism called the Dispute Settlement Understanding (DSU).¹³ Article 3.2 of the DSU provides that any agreements negotiated outside of WTO rounds will not be recognized by the Dispute Settlement Body (DSB) even if countries wish to be bound by those agreements.¹⁴ In so ordering, the DSU has painted its Dispute Settlement Body into a corner, rendering GATT Dispute Settlement unable to operate outside the rigid confines of the GATT-covered agreements, despite the official wishes of its Members. This runs contrary to common sense—nations generally wish to be bound by treaties they make, but GATT/WTO effectively disallows its Members from being bound by those treaties. Disputes are settled according to the WTO's agenda, which disregards the environment in favor of free trade and "global prosperity."¹⁵ Thus, the GATT will protect the environment only if its covered agreements order it to. But few of the covered agreements provide any environmental protection at all. Perhaps this is because the agreements were drafted largely by traders and businessmen with a money-making bias. In the GATT, environmental concerns take a back seat to business interests.

ARTICLE XX EXCEPTIONS

The GATT *does*, however, allow for the implementation of trade measures to protect the environment in limited circumstances. These are covered in the GATT Article XX exceptions.¹⁶

¹³ Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], April 15, 1994 Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement]. Annex 2; *reprinted in* 33 I.L.M. 1226 (1994).

¹⁴ Article 3.2 provides in pertinent part: "[The DSU] serves to preserve the rights and obligations of Members *under the covered agreements*, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements.*" (emphasis added).

¹⁵ Note that in contrast to other international tribunals, GATT dispute settlement is unable to consider principles of equity. *See* Article 3.2, last sentence. GATT dispute settlement tribunals are much more rigid than their international counterparts. Compare the GATT with the International Court of Justice which provides the following in Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law
- (c) the general principles of law recognized by civilized nations
- (d) subject to the provisions of Article 59 [ICJ decisions are not binding], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto

Statute on the International Court of Justice, October 24, 1945, 1976 Y.B.U.N. 1052; at LAKSHMAN D. GURUSWAMY, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 30 (2d ed. 1999). Other tribunals, like the International Tribunal for the Law of the Sea are equally as flexible.

¹⁶ The GATT Article XX "*General Exceptions*" provide in pertinent part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised*

In the context of protection of marine living resources, Article XX (b) (“necessary to protect . . . animal . . . health”), (d) (“necessary to secure compliance with the laws . . . which are not inconsistent with the [GATT]”), and (g) (“relating to the conservation of exhaustible natural resources”), are the most commonly raised exceptions in the context of marine resource protection. Though the exceptions appear to be somewhat broad on their face, the DSB traditionally construed them narrowly. Lately, the exceptions have carried more environmentally-protective weight, and it seems that the WTO is increasingly placing greater importance on the environment. In addition to the Article XX exceptions, some of the GATT 1994 covered agreements, such as the TBT, could play an important part in protecting marine living resources in the future.

THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Commentators have recognized a GATT-covered agreement that could potentially further environmentalist objectives in a major way—the Agreement on Technical Barriers to Trade (TBT).¹⁷ A technical barrier to trade allows a country to use a product’s “technical standards” (i.e., processing or production methods) as a basis for implementing trade measures.¹⁸ The agreement was intended to give Members a line of attack in imposing trade measures against other Members whose products were the same, but whose production or processing methods were harmful in some way.¹⁹ Thus the TBT, in theory, allows a country to restrict imports of a product based on its technical standards.²⁰ Prior to the TBT, GATT panels only allowed a Member to focus on the product itself.

Moreover, the TBT theoretically “shifts the burden of proving a measure’s necessity to the complaining party”²¹ A complaining government must show that “another measure is reasonably available . . . and that the alternative is significantly less trade-restrictive.”²² Furthermore, the TBT provides that a “legitimate objective” of a technical regulation may be “animal or plant life or health, or the environment.”²³ Finally, the TBT preamble provides that “no country should be prevented from taking measures necessary . . . for the protection of human, animal or plant life or . . . the environment”²⁴ TBT Article 2.2 and its preamble should be

restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

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

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

¹⁷ Agreement on Technical Barriers to Trade, GATT B.I.S.D. (26th Supp.) at 8 (1995) [hereinafter TBT Agreement]. See generally, Mike Meier, *GATT, WTO and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 241 (1997).

¹⁸ TBT Agreement, Annex 1 § 1.

¹⁹ TBT Agreement, Article 2.2 and Annex 1 § 1.

²⁰ Christine M. Cuccia, *Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Regulating Methods of Harvesting*, 13 B. U. INT’L L. J. 481, 500 (19xx).

²¹ *Id.* at 502.

²² *Id.*

²³ TBT Agreement, Article 2.2.

²⁴ TBT Agreement, preamble.

helpful because unlike other environmental treaties, the TBT is one of the GATT's covered agreements.

In interpreting the "purpose" of a treaty, its annexes must be considered.²⁵ Since the TBT is a GATT annex, GATT disputes must take the TBT into consideration where relevant. The "purpose" also expressly includes "[a treaty's] preamble."²⁶ The TBT is an annex to the GATT Agreement, and thus is part of the GATT. Thus, the TBT and its preamble should be controlling in disputes where a technical barrier to trade is at issue. Unfortunately, this has not been the case. Although the TBT supposedly supersedes the GATT 1994, it has not been widely invoked or examined, and some commentators hint that the TBT has been misconstrued to be even more narrow than the GATT Article XX exceptions.²⁷

II. THE CASES

Probably the three most noteworthy cases in this area to date underwent GATT dispute settlement in the 1990s. Each of these cases created widespread fervor both in the United States and abroad. These three cases are briefly discussed below.

TUNA/DOLPHINS I

The 1991 GATT Panel Report on United States Restrictions on Imports of Tuna,²⁸ ("Tuna/Dolphins I") was rendered prior to the formation of the WTO and GATT 1994. The case was brought by Mexico against the United States before a GATT 1947 Panel. The United States legislation at issue was the Marine Mammal Protection Act (MMPA),²⁹ which was enacted in 1972. In pertinent part, the MMPA regulated the harvesting of tuna by United States fishermen (i.e., imposed limits on the number of dolphins that could be killed while fishing for tuna) and banned imports of fish or products from fish caught with commercial fishing technology that incidentally killed or injured dolphins in a number that exceeded United States standards.³⁰ After the United States found Mexico to be incidentally killing dolphins using purse-seine nets³¹

²⁵ Under the Vienna Convention Article 31, a treaty is to be interpreted in light of its object and purpose. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 at LAKSHMAN GURUSWAMY ET. AL. SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 61 (2D ed. 1999). *See also*, Tuna/Dolphins II at 50, par. 5.18.

²⁶ *Id.*

²⁷ Mike Meier, *GATT, WTO and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 278 – 279 (1997).

²⁸ *See supra*, note 4.

²⁹ Marine Mammal Protection Act, P.L. 92-522, 86 Stat. 1027 (1972), as amended, P.L. 101-627 at 104 Stat. 4467 (1990); codified 16 U.S.C. § 1361.

³⁰ Tuna/Dolphins I at par. 2.4

³¹ Similar to drift nets, purse seine nets are operated from boats in deep waters, usually with one end of the net towed around a school of fish while the other end remains fastened to the main vessel. The nets have a steel cable that runs through rings at the bottom that is pulled upwards, preventing fish from escaping by diving downwards. They are used primarily for fish that school near the surface and can operate from a single boat or by two vessels. Fish that are commonly caught with purse seines are sardines, cod, mackerel, salmon, tuna, and herring. More fish are caught worldwide with purse seines than any other method.

at a rate that exceeded the United States standard, the United States enacted legislation banning all imports from Mexico of yellowfin tuna that was caught using purse-seine nets.³²

Shortly thereafter, Mexico brought a claim before a GATT panel alleging violations on the part of the United States of GATT Articles I (Most-Favored Nation), III (National Treatment), XI (Illegal Quantitative Restriction), XIII (Unjustifiable Quantitative Restriction), and XX (arbitrary or unjustifiable discrimination and disguised restriction on international trade).³³ The United States countered that its actions were justified under the GATT Article XX exceptions (b) “necessary to protect . . . animal . . . life or health” and (g) “relating to the conservation of natural resources,” and that there were no alternative measures reasonably available to the legislation enacted against Mexico to protect the dolphins.³⁴ Mexico responded that the United States could have attempted multilateral negotiations prior to the sanction.³⁵ Mexico also asserted disgruntlement over the United States’ conservation policies—that (1) Mexico was not and could not be certain what the United States standard would be at all times and that (2) the United States should not be allowed to impose its conservation policies on Mexico.³⁶

The Panel recommended that the United States not be allowed to impose a ban on imports of yellowfin tuna from Mexico. In so doing, the Panel addressed the Article XX exception arguments individually. The United States’ Article XX(b) claim was hastily dismissed. The Panel disagreed with the United States argument that the import ban served the sole purpose of protecting dolphin life outside of its jurisdiction, and that it was “necessary” under XX(b) because there was no alternative measure reasonably available.³⁷ The Panel agreed with Mexico’s argument that XX(b) could not apply outside of United States jurisdiction and that the ban was not “necessary” because alternative means were available to the United States, namely “international co-operation between the countries concerned.”³⁸

In so doing, the Panel called on the drafting history of Article XX(b)³⁹ and found that not only could a XX(b) measure not apply outside the jurisdiction of the country which imposed it, but also that XX(b) pertained only to sanitary measures, not tuna harvesting techniques (focus on product, not process).⁴⁰ The panel also noted that the United States should have negotiated an “international cooperative arrangement” prior to imposing the import ban. But this statement seems suspect—GATT panels only recognize treaties covered in GATT agreements. Had the United States negotiated a treaty prior to the import ban, and subsequently, Mexico brought the claim before a GATT panel, the treaty which the United States negotiated would probably not have been recognized by the GATT panel. This theory is supported by the Panel’s statement made in its closing remarks: “The Panel wished to underline that its task was limited to the examination of this matter ‘in the light of the relevant GATT provisions’”⁴¹ This suggests that even if there were some outside agreement between the United States and Mexico regarding dolphin-unsafe tuna harvesting techniques, the Panel would not have recognized it. The Panel

³² Tuna/Dolphins I at pars. 2.7-2.8.

³³ *Id.* at pars. 3.1-3.5

³⁴ *Id.* at pars. 3.6-3.9.

³⁵ *Id.* at pars. 3.1-3.5.

³⁶ Tuna/Dolphins I at pars. 5.1-5.6.

³⁷ *Id.* at par. 5.24.

³⁸ *Id.*

³⁹ *Id.* at par. 5.26.

⁴⁰ *Id.*

⁴¹ Tuna/Dolphins I, at par. 6.1.

concluded that the United States legislation was based on “unpredictable conditions” which could not be regarded as “necessary” under XX(b).⁴²

The Panel also dismissed the United States’ Article XX(g) (relating to the conservation of natural resources) argument. The United States argued that the measures taken under the MMPA were primarily aimed at the conservation of dolphin, and “that the import restrictions . . . [were] ‘primarily aimed at rendering effective restrictions on domestic production or consumption’ of dolphin.”⁴³ Mexico responded that the measures were not justified under XX(g) because, they could not be applied extraterritorially. The panel once again sided with Mexico: “[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.”⁴⁴ The panel also felt that the U.S. measure was inconsistent with sound global economic policy: “if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”⁴⁵

This policy argument is short-sighted: it neglects the fact that dolphins are migratory, and as such, belong to “the global commons.” The dolphins at issue were owned by the United States just as much as they were owned by Mexico insofar that they migrated to U.S. territory. Dolphins that were destroyed in Mexican waters or on the high seas could not possibly swim back to U.S. territory. Thus, Mexico, in effect, was killing U.S. dolphins. Under the Panel’s policy argument, if one responsible nation is prohibited from protecting dolphins from slipshod fishing techniques then *all nations* are prohibited from protecting dolphins insofar that those wander outside the responsible nation’s jurisdiction. As such, one nation could potentially destroy the world dolphin population if unchecked by its neighbors. Therefore the Panel recommendation caused dolphins to slip through the cracks of environmental protection. Belonging to no one, they became a classic loser in the “tragedy of the commons.”⁴⁶

TUNA/DOLPHINS II

Essentially, the same arguments were raised in the 1994 GATT Panel Report on United States Restrictions on Imports of Tuna,⁴⁷ (“Tuna/Dolphins II”). However, the complaint in this case was brought by the European Economic Community (EEC) and the Netherlands, neither of whom had suffered any actual harm from the United States legislation. Preliminarily, the Panel determined that the possibility of harm was enough for a country to bring a claim before a GATT panel.⁴⁸ The EEC based its claim on violations of Articles III (National Treatment) and XI (Quantitative Restrictions). The United States, raised a defense similar to that raised in Tuna/Dolphins I—that its actions were justified under Articles XX(g) (necessary to conserve exhaustible natural resources), XX(b) (necessary to protect animal life) and XX(d) (necessary to secure compliance with laws not inconsistent with GATT). Although this Panel’s reasoning was

⁴² *Id.* at par. 5.28.

⁴³ *Id.* at par. 5.30.

⁴⁴ *Id.* at par. 5.31.

⁴⁵ *Id.*

⁴⁶ The United States (or rather, the dolphins) did win a small victory—the Panel decided that tuna carrying the “Dolphin Safe” label did not violate GATT (national treatment): “Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the . . . label.” *Id.* at pars. 5.41-5.42.

⁴⁷ *See supra*, note 4.

⁴⁸ Tuna/Dolphins II, at par. 5.6.

slightly more environment-friendly, its recommendation was basically the same as in Tuna/Dolphins I—the United States lost.

In contrast to Tuna/Dolphins I, this Panel determined that Dolphin were an exhaustible natural resource and could be protected extrajurisdictionally. In support of this determination, the Panel noted that the Article XX did not provide that natural resources *could not* be protected extrajurisdictionally.⁴⁹ However, the United States' claim under Article XX(g) still failed for two main reasons. First, the panel determined that “relating to” under Article XX(g) meant “primarily aimed at,”⁵⁰ a seemingly higher burden than the plain language of Article XX(g) suggests. Second, the panel determined that the United States legislation forced policy change on other countries which would impair the objectives of the General Agreement.⁵¹ Since measures taken to force other countries to change their policies could not be construed as “primarily aimed . . . at the conservation of a natural resource,”⁵² the United States legislation did not fall within the Article XX(g) exception. Thus, the United States failed on the Article XX(g) claim because the Panel determined that its legislation was primarily aimed at forcing policy change on other countries, not at the conservation of dolphins. Accordingly, this type of action did not preserve the basic objectives of GATT.

The Article XX(b) exception claim met a similar fate—the Panel construed the word “necessary” in Article XX(b) to be absolute (i.e., that no alternative existed).⁵³ Though protection of dolphins “fell within the range of policies covered by Article XX(b)”⁵⁴ (not just to sanitary measures as in Tuna/Dolphins I), the United States legislation was not *absolutely necessary* to the protection of dolphins; rather, it called for conservation policy change in other countries. Once again the panel determined, forcing policy change on other countries impaired the purpose of GATT. The Panel stated:

If Article XX (b) were interpreted to permit contracting parties to deviate from the basic obligations of the General Agreement by taking trade measures to implement policies *within their own jurisdiction* . . . the objectives of the General Agreement would be maintained. If however Article XX (b) were interpreted to permit contracting parties to impose trade embargoes so as to *force other countries to change their policies within their jurisdiction*, including policies to protect living things, and which required such changes to be effective, the objectives of the General Agreement would be seriously impaired.⁵⁵

Since the United States legislation was not valid under Articles XX (g) and (b), the Panel determined that the Article XX(d) claim did not need to be addressed and that none of the invoked exceptions had to be discussed in light of the Article XX chapeau.⁵⁶

This case presented new perspectives on the environment within the GATT realm. In contrast to the Panel's determination in Tuna/Dolphins I—which held that animals could not be protected under the Article XX exceptions extrajurisdictionally,⁵⁷ the Panel in this dispute provided that natural resources *could* be protected extrajurisdictionally.⁵⁸ Moreover, though

⁴⁹ *Id.* at pars. 5.15-5.16.

⁵⁰ *Id.* at par. 5.22.

⁵¹ *Id.* at par. 5.26.

⁵² *Id.*

⁵³ *Id.* at par. 5.35.

⁵⁴ Tuna/Dolphins II, at par. 5.33.

⁵⁵ *Id.* at par. 5.38 (emphasis added).

⁵⁶ *Id.* at pars. 5.40-5.41.

⁵⁷ *See* Tuna/Dolphins I, at par. 5.28.

⁵⁸ Tuna/Dolphins II, at pars. 5.15-5.16.

Tuna/Dolphins I provided that Article XX(b) could only be applied to sanitary measures,⁵⁹ this Panel determined that the Article XX(b) exception could be extended beyond sanitary measures, and could relate to the protection of dolphins.⁶⁰ Finally, the Panel noted in its Concluding observations that the “protection and preservation of the environment”⁶¹ was a “widely recognized”⁶² premise of sustainable development. The Panel in Tuna/Dolphins I made no such suggestion in its concluding remarks⁶³ or anywhere else in its recommendation.

SHRIMP/TURTLES

This Appellate Report “represent[s] an evolutionary improvement and breakthrough for the treatment of conservation measures within the GATT.”⁶⁴ It represents a first-time acceptance of environmental trade sanctions by the WTO, and is an important step in “reconciling free trade and environmental protection.”⁶⁵ The facts of *Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products*,⁶⁶ (“Shrimp/Turtles”) resemble the facts (in form) of Tuna/Dolphins I and Tuna/Dolphins II, but the dispute was decided after creation of the WTO. In this dispute, the United States banned imports of shrimp from countries that did not use Turtle Excluder Device Technology⁶⁷ pursuant to Section 609 of Public Law 101-162⁶⁸ (“Section 609”). India, Malaysia, Pakistan, and Thailand brought a claim before a GATT Panel pursuant to Articles III, XI, and XX claiming that the United States measures were an unfair burden on trade. The United States claimed that Section 609 was justified under GATT Articles XX (g) and (b).

The Panel Report recommended in favor of the Southeast Asian countries, and the United States appealed. As to the Article XX exceptions, the Appellate Body rejected the Panel’s approach that exhaustible natural resources could only be non-living resources and decided in favor of the United States—sea turtles were found to be an exhaustible natural resource. In support of its determination, the Appellate Body reasoned that since living species were susceptible to extinction, they were finite, and thus exhaustible.⁶⁹ The Appellate Body also stated that the GATT should be interpreted in light of contemporary issues pursuant to the Vienna Convention, and offered that when the GATT 1947 was drafted (which was nearly identical to the GATT 1994), endangered species were not an issue.⁷⁰ Protection of the environment was recognized as a premise of sustainable development,⁷¹ and sea turtles were

⁵⁹ See Tuna/Dolphins I, at par. 5.26.

⁶⁰ Tuna/Dolphins II, at par. 5.33.

⁶¹ *Id.* at par. 5.42.

⁶² *Id.*

⁶³ See Tuna/Dolphins I, at pars. 6.1-6.4.

⁶⁴ Joseph Robert Berger, *Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 Colum. J. Envtl. L. 355, 358 (1999).

⁶⁵ *Id.* at 356.

⁶⁶ See *supra*, note 4.

⁶⁷ Shrimp/Turtles at A Turtle Excluder Device is a grid of bars with an opening is fitted into the neck of a shrimp trawl. Shrimp slip through the bars and are caught in a bag, but turtles hit the grid bars at the mouth of the trawl and are ejected through the opening. According to The National Marine Fisheries Service, TEDs exclude up to 97% of sea turtles with minimal loss of shrimp. (ADD SOURCE)

⁶⁸ 16 U.S.C. § 1537.

⁶⁹ Shrimp/Turtles, at par. 127.

⁷⁰ *Id.* at pars. 131-32.

⁷¹ *Id.* at par. 152.

further qualified as exhaustible because they were recognized as endangered by *all* the countries involved in the dispute.

Since sea turtles were found to be an exhaustible natural resource, the Appellate Body then turned to the jurisdictional issue.⁷² They first determined that natural resources could be protected extrajurisdictionally: if the exhaustible natural resource migrated to the country enacting the legislation that imposed the trade sanction, that country could protect the exhaustible natural resource outside of its territory. The Appellate Body applied an “effects test” to give the United States extraterritorial authority to protect sea turtles—sea turtle-protective measures *could* be applied outside the jurisdiction of the United States when the appellees’ actions had a damaging effect on sea turtles that migrated United States territory.⁷³

The Appellate Body then looked to the language of Article XX(g) to determine whether Section 609 sufficiently “related to” the conservation of sea turtles.⁷⁴ Rather than construing the language “relating to” to mean “primarily aimed at” as the Panel in Tuna/Dolphins II did,⁷⁵ the Appellate Body merely stated that a “close and genuine relationship” between the means (the legislation) and the ends (protection of sea turtles) must be found.⁷⁶ Because Section 609 was narrowly constructed (i.e., it was not a simple blanket prohibition on importation of shrimp regardless of harvesting techniques), the Appellate Body found a sufficient link between Section 609 and the protection of Sea Turtles under the Article XX(g) exception. Since the requirements were the same for domestic and foreign producers of shrimp, the Appellate Body determined that the legislation was made effective “in conjunction with” restrictions on domestic “production or consumption.”⁷⁷ Thus, Section 609 fell within the Article XX(g) exception.

The Appellate Body then turned to the chapeau, skipping the Article XX(b) analysis. The Appellate Body reasoned that because Section 609 met the Article XX(g) requirement, it fell within the exceptions, and consequently Article XX(b) exception warranted no discussion: “Having found that Section 609 does come within the terms of Article XX(g), it is not, therefore, necessary to analyze the measure in terms of Article XX(b).”⁷⁸ The Appellate Body then stated: “Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses – the ‘chapeau’ – of Article XX”⁷⁹ The Appellate Body proceeded to analyze the Article XX(g)-qualified legislation in light of the Article XX chapeau. After dismissing the United States’ argument that the policy goal of a measure is enough to qualify it under the Article XX chapeau,⁸⁰ the Appellate Body focused mainly on the “ordinary meaning of the words of the chapeau,”⁸¹ which provided three standards for an exception to be valid: the legislation must not be arbitrary, unjustifiable, or a disguised restriction on international trade.⁸²

⁷² *Id.* at pars. 131-32.

⁷³ *Id.*

⁷⁴ *Id.* at pars. 125-134.

⁷⁵ *See* Tuna/Dolphins II, at par. 5.26.

⁷⁶ Shrimp/Turtles, at pars. 135-6.

⁷⁷ *Id.* at par. 145.

⁷⁸ *Id.* at par. 146.

⁷⁹ *Id.* at par. 147.

⁸⁰ The United States had argued that if the legislation met the Article XX(g) exception it necessarily complied with the chapeau requirement. The Appellate Body reasoned that “[t]o accept the argument of the United States would be to disregard the standards established by the chapeau.” (*id.* at 57).

⁸¹ *Id.* at par. 150.

⁸² *Id.* at par. 150.

The Appellate Body first determined that Section 609 was unjustifiably discriminatory for several reasons. First, because it forced other Members to adopt essentially the same policy as the United States to the disregard of conservation measures that might be equally or more stringent than the United States.⁸³ Second, the legislation disregarded the fact that a country might use “illegal” harvesting techniques where no endangered sea turtles were found. Third, Section 609 excluded some shrimp caught using methods identical to the United States simply because it had not been “caught in waters of *countries that have not been certified by the United States*.”⁸⁴ Fourth, once again, the United States failed to multilaterally negotiate treaties for the protection of sea turtles to the Appellate Body’s liking: “[T]he United States negotiated seriously with some, but not with other Members (including the appellees), that exported shrimp to the United States.”⁸⁵ Finally, the legislation allowed certain Caribbean countries a “phase-in” period that was not afforded to the appellees. Since the countries that received the “phase-in” were similarly situated to those who did not, the legislation was discriminatory against the appellees.⁸⁶ The Appellate Body also found the rigid and inflexible⁸⁷ Section 609 to be arbitrarily discriminatory for basically the same reasons it found the legislation to be unjustifiable. Accordingly, the Appellate Body determined that these flaws in the legislation made the United States appear to be more concerned with influencing Members to adopt the same regulatory regime as the United States than to conserve the resource. Because of this, the sanctions were unjustifiable and arbitrary because different standards were applied to similarly situated countries. Thus, the Appellate Body found that although Section 609 served legitimate environmental purposes, it was “applied in a manner that constitute[d] arbitrary or unjustifiable discrimination between countries where the same conditions prevail[ed]”⁸⁸

Subsequent to the Appellate Body’s recommendation, the United States changed its legislation to conform with the Article XX chapeau requirements. The United States and other marine-resource-protective countries won a large victory when the provisions of the United States legislation were again challenged in the 2003. This marked the first and only time in GATT history that a marine resource was protected through unilateral trade sanctions.⁸⁹

III. PROBLEMS WITH U.S. ENVIRONMENTAL LEGISLATION AND RECOMMENDATIONS FOR GATT-LEGAL LEGISLATION

The WTO is a global order. It stresses a collective effort to achieve global prosperity. Consensus is an important aspect of WTO decision-making, and WTO members are strongly discouraged from acting unilaterally. Dispute settlement bodies frequently recognize this underlying precept, and the United States’ environmentally-protective legislation was generally struck down as violative of GATT because it did not conform to the underlying goals and

⁸³ *Id* at par. 161-62.

⁸⁴ *Id* at par. 165.

⁸⁵ *Id* at par. 172.

⁸⁶ *Id* at par. 175.

⁸⁷ *Id* at par. 177.

⁸⁸ *Id* at par. 186.

⁸⁹ See Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, Oct. 22, 2001, WT/DS58/AB/RW (1998), available at [http://www.worldtradelaw.net/reports/wtoab/us-shrimp\(ab\)\(21.5\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-shrimp(ab)(21.5).pdf).

precepts of the WTO. In the WTO's global order, the United States, in its attempts to protect marine living resources has been afforded no special treatment as it arguably has in other international contexts. This paper does not purport to state *how* these problems might be fixed (i.e., how GATT-legal trade sanctions might be rendered), but it does recognize basic flaws in U.S. trade sanctions that were consistently detected by GATT Dispute Settlement Bodies. In order to “get around the GATT” (and impose GATT-legal trade sanctions on other WTO Members to protect marine living resources), the United States (and any other WTO Member), at a bare minimum, should avoid three major recurring flaws that render sanctions illegal in the WTO realm. These flaws go against the policy of national sovereignty, free trade, global prosperity, and global consensus, all of which are important WTO objectives.⁹⁰

MULTILATERAL NEGOTIATIONS

First in both prevalence and chronology is the failure to adequately enter multilateral negotiations prior to imposing unilateral sanctions, which GATT dispute settlement bodies strongly encourage. In all three disputes discussed in this paper, the dispute settlement bodies chided the United States for not making a more concerted effort to negotiate multilaterally prior to imposing unilateral trade sanctions. A serious attempt must be made to negotiate a treaty prior to taking unilateral action: first, with the country causing the harm, and second, with countries that might be willing to join the United States in trade sanctions against countries which harm marine resources. It would seem that if the multilateral negotiations were successful, and an agreement was reached, that the need to bring the dispute before a GATT Panel would be unnecessary. Thus, as an example, if the United States wished to protect a marine resource in the eastern tropical pacific, it might first negotiate with the Members causing the harm. If no agreement could be reached, the United States could then try to negotiate with other members to join in imposing trade sanctions on the country harming the marine resource at issue. The failure to enter into earnest multilateral negotiations will antagonize the DSB, and thus a ruling against the unilateral action under Article XX⁹¹ will be more likely. Moreover, mere multilateral negotiations are not enough;⁹² in order to ensure conformity with the DSB's notion of multilateral negotiations, the negotiations must be extended to *all* potentially affected, similarly situated countries (not just a few of them) *and* those countries who might consider joining in trade sanctions against the marine-life-damaging country. If earnest attempts at negotiations are not made, the dispute settlement body will likely find that the country has failed to meet the Article XX chapeau burden—that is, the sanctions are arbitrary and unjustifiable.

POLICY-CHANGING LEGISLATION

A second flaw is that the United States legislation was often “policy changing.” Policy-changing legislation might be manifest in two ways—first, legislation that requires other countries to implement protective techniques that are the same as or substantially similar to those used in the United States; and second, legislation that requires members to know what the United States standard is and accordingly adhere to it. In the three discussed disputes, the United States enacted legislation that disallowed other countries from developing their own techniques and/or technology for protecting the marine resources at issue. The legislation also compelled the countries to adhere to United States conservation policies. This being the case, the dispute

⁹⁰ WTO Agreement, Preamble.

⁹¹ Tuna/Dolphins I; Tuna/Dolphins II; Shrimp/Turtles.

⁹² In Shrimp/Turtles, the Appellate Body complained that the United States' efforts at multilateral negotiation were not sincere enough.

settlement bodies consistently found that the United States' attempt to force another country to conform to its standards impaired the purpose of (and consequently was violative of) the GATT Agreement. In order to avoid this result, at least three points should be considered by the country enacting the trade-restrictive legislation: First, the legislation must consider the possibility that countries have the capacity to implement their own environmentally-protective techniques; second, the legislation must not compel the countries to conform to United States standards; third, the legislation must not be any more "trade restrictive than necessary"—some countries which the import ban is imposed against might not even have within its borders the natural resource to be protected. If nevertheless a country such as this is blacklisted because it is not expressly certified (as in Shrimp/Turtles), the DSB will look upon the legislation in a disfavorable light. Blanket prohibitions on imports of products that may harm a resource are looked upon with extreme disfavor by the DSB as well. The specifics of the sanction should be set forth in a manner that contains the smallest degree of sanction necessary to protect the resource. And perhaps most importantly, this "minimum sanction" must be applied uniformly to countries similarly situated to avoid being arbitrary and unjustifiable.

CHAPEAU CRITERION

The final flaw is that the United States imposed trade sanctions arbitrarily and unjustifiably as per the Article XX chapeau. Given the recent disputes involving marine living resources, so long as the requirements for one exception (e.g., Article XX(g) or Article XX(b)) are met, that exception will qualify the legislation for discussion in light of the Article XX chapeau. At that juncture, the DSB will determine whether the chapeau criterion—unjustifiable, arbitrary, and disguised restriction on trade—are met. By the same token, even if *all* of the Article XX exceptions are met, if none of them meet the chapeau criterion, then the sanction will not succeed. Furthermore, in order to meet the chapeau criterion, trade sanctions must be applied uniformly—countries cannot impose a standard that is more stringent than that imposed upon itself.⁹³ Also, countries cannot dole out sanctions that are more stringent than those imposed on countries similarly situated. In Shrimp/Turtles for example, a special phase-in period was granted to Caribbean countries, but not to several Southeast Asian countries that brought the claim. Because these countries were similarly situated, the appellate body determined that the discrimination was arbitrary and unjustifiable—the United States should have allowed the same or similar phase-in period for the Caribbean and Southeast Asian countries or no phase-in period at all.

IV. ALTERNATIVES TO IMPOSING GATT-FRIENDLY SANCTIONS

If a trend for the recognition of trade sanctions to protect marine resources develops out of the recent United States victory in the Shrimp/Turtles dispute, perhaps the GATT/WTO will be the best forum to bring trade and environment disputes in after all. However, focusing attention on possible alternatives to GATT dispute settlement are worth noting.⁹⁴ Some commentators

⁹³ See generally, Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, Apr. 29, 1996, WT/DS2/AB/R (1996), at [http://www.worldtradelaw.net/reports/wtoab/us-gasoline\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf); GATT, Article III.

⁹⁴ See generally, Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environmental Disputes*, 25 ECOLOGY L. Q. 189.

feel that “it is not necessary for [International Environmental Law] to be forced into the procrustean bed of trade law. GATT/WTO tribunals now adjudicate a significant number of issues that could be heard in more impartial fora that could recognize and uphold, rather than diminish or marginalize IEL.”⁹⁵ If the United States ever joins the United Nations Convention on the Law of the Sea (UNCLOS) its dispute settlement mechanism could be invoked to settle trade and environment disputes, especially in the marine resources context. Since the UNCLOS endorses environmental protections that the GATT does not recognize, environmentally-protective trade sanctions are more likely to be upheld in UNCLOS dispute settlement.⁹⁶

Another possible forum that disputes involving the protection of marine resources is the ICJ, which incorporates a wide corpus of law⁹⁷ and puts a greater emphasis on International Environmental Law than the GATT/WTO system does. Some commentators have suggested that since the United States recognizes UNCLOS as customary international law that it could be bound by its precepts in the ICJ: “[E]ven where states are not parties to UNCLOS, but nevertheless accept its provisions as codifications of customary IEL, the International Court of Justice (ICJ) can adjudicate trade and environment disputes in limited circumstances.”⁹⁸ Louis B. Sohn, in his book The Law of the Sea in a Nutshell⁹⁹ proposed that the United States sign a supplementary declaration under Article 36¹⁰⁰ of the ICJ, accepting jurisdiction of the court with respect to the rules of international law codified in UNCLOS.¹⁰¹ By so doing, the United States would have an easier time passing legislation to protect marine living resources because UNCLOS supports marine living resource protections that the GATT clearly does not. This mechanism would have a limited effect, as it would “be confined to those countries that have accepted the Article 36 jurisdiction of the ICJ.”¹⁰² Moreover, the ICJ would have to weigh out and consider both UNCLOS and GATT, but at least it would allow the ICJ to decide whether UNCLOS could prevail over GATT/WTO.¹⁰³

CONCLUSION

Unilateral trade sanctions (in their rawest form) to protect marine living resources are neither legal nor effective. Several conditions must be satisfied in the sanction-implementing legislation before a GATT DSB will not look upon the sanction with disfavor. Although the GATT DSB places a high burden on countries that wish to protect marine living resources, it does not do so because it necessarily disagrees with the objectives of environmentally-responsible nations (i.e., because it is anti-environment). In fact, GATT DSB has softened itself to environmental issues quite a bit over the years. The Appellate Body seems to be especially conscientious of the environment, as it is comprised of individuals that hail from all areas of expertise, not just trade

⁹⁵ *Id* at 192.

⁹⁶ *Id* at 210.

⁹⁷ See ICJ Article 38, *supra* note 15.

⁹⁸ See Guruswamy, *supra* note 85, at 191.

⁹⁹ LOUIS B. SOHN & KRISTEN GUSTAFSON, *THE LAW OF THE SEA IN A NUTSHELL* 238-46 (1984).

¹⁰⁰ Article 36 provides in pertinent part: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

¹⁰¹ Guruswamy, at 225.

¹⁰² *Id.*

¹⁰³ *Id.*

and business. Tracing GATT history back to Tuna/Dolphins I and comparing the Panel's tone in that case to the Appellate Body's tone in Shrimp/Turtles makes apparent this suggestion.¹⁰⁴ Though the United States initially lost the dispute, the Appellate Body ruled in favor of the United States after the flaws in its legislation were remedied. Finally, the addition of the GATT annexes (i.e., covered agreements) such as the TBT and other agreements should theoretically help further soften the GATT to environmental issues (that is, if they are properly invoked).

The WTO is not as anti-environment as many critics believe, but it *does* value free trade over the environment. But who can blame them? Free trade and global prosperity were the purposes of its creation, not the protection of animals. This is especially true in the marine animals context because as part of the global commons, GATT panelists saw them as belonging to no one. Nevertheless, environmental objectives may be furthered by the WTO if a certain protocol is followed and if the measure imposed is indeed not a disguised restriction on trade. In particular, the conservation of marine living resources (which by-and-large are part of the global commons) through trade sanctions should not be imposed unilaterally (i.e., without widespread, uniform multilateral negotiation) in a manner that chips away at the sovereignty of other WTO Members. Trade Sanctions to protect marine living resources will be honored by the GATT/WTO DSB so long as they are rendered in a GATT-friendly manner. If countries find themselves unable to render marine resource protective legislation in a GATT-friendly manner, perhaps it is time to explore alternative forums (such as UNCLOS or the ICJ) for disputing trade sanctions to protect marine living resources and other environmental issues.

¹⁰⁴ The Panel in Tuna/Dolphins I determined that Article XX exceptions could not be invoked to protect dolphins outside of a country's jurisdiction. In contrast, the Appellate Body in Shrimp/Turtles recognized the need to protect migratory sea turtles extraterritorially as valid under Article XX.