Legitimation of Trade- related Environmental Measures under the WTO

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I. INTRODUCTION

During the past 11 years since the WTO was established for the purpose of sustainable development[1] and promotion of free trade, a variety of issues have attracted the members' interests. Among those, the relationship between trade and environment has constantly drawn their attention and has challenged the principles and institutions of the international trade order. Along with this problem, the WTO has difficulty in interpreting whether a series of unilateral trade measures of one Member country are appropriate under a multilateral trading system aiming at preserving the environment or are abused to protect the Member country's domestic market.

Traditionally, there have been two possible routes in the WTO to tackle the trade and environment issues, that is, through the negotiation and consensus among the WTO members and recourse through the

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[1] Faced with a chronical wave of criticism over the GATT's promotion of trade liberalization at the expense of environmental merits, [*see* Generally DANIEL C. ESTY, GREETING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 52-54 (Oxford University Press 1994); Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 405 n.32 (1993), *cited by* Kuei-Jung Ni, *Redefinition and Elaboration of an Obligation to Pursue International Negotiations for Solving Global Environmental Problems in Light of the WTO Shrimp/Turtle Compliance Adjudication between Malaysia and the United States*, 14 MINN. J. GLOBAL TRADE 111, 115 (2004)] the WTO incorporated environmental concerns into its system (Ni, *id.*): the Preamble to the Marakesh Agreement not only addressed the significance of free trade and market access, but also highlighted the value of sustainable development. Ni, *id.*

dispute settlement procedures. Besides the latter recourse with some progressive efficiency in treating with this issue, even though the WTO has coped with this problem through ministerial conference and tried to harmonize between trade and environment by founding the Committee on Trade and Environment [hereinafter CTE][2], the WTO has been unable to give any resolute attitude for diverse pending issues concerning the environmental trade measures and failed to launch a new round of trade-environment negotiations.

Considering the gradual environment aggravation and serious pollution across the planet, it is required to harmonize the environmental preservation through, for instance, the proper utilization of trade-related environmental measures with the principle of free trade under the WTO as soon as possible. If environmental problems, in particular, are not handled timely, it will cost an excessive amount of money and time to restore the environment. The fact that unresolved environmental problems can use up all the profits from the WTO's free trade urges us to build the system to impose timely and efficiently trade measures related to environment.

The purpose of this article is to seek harmonized resolutions of trade and environmental conflicts within the WTO agreements, considering the practical difficulty of relating legally the multilateral environmental agreements (hereinafter MEAs) with the WTO provisions. These resolutions are discussed

[2] Decision on Trade and Environment, Apr. 15, 1994, LEGAL INSTRUMENTS- RESULTS OF THE URUGUAY ROUND, Ministerial Decisions (adopted by the Trade Negotiations Committee, 1994), 33 I.L.M. 1267 (1994) called for the establishment of a Committee on Trade and Environment.

under the presumption that environmental issues in the WTO are better served under a "one-pillar" concept with the WTO as a sole column rather than "two-pillars" idea with WTO and a created world environment organization.[3] This article focuses on finding the most economical and efficient way to meet the fierce clash of interests among WTO member countries as well as to establish the universal and valid standards.

II. TRADE AND ENVIRONMENTAL CONFLICTS UNDER THE GATT/WTO

A. Main Issues on Trade and Environmental Conflicts

Since the early 1970s, as worries about how economic growth affects social development and environment[4] emerged and the Group on Environmental Measures and International Trade[5] was

[3] For the details about the "one-pillar" concept and the "two-pillar" idea, *see* Carlos A. Calderin, *The Emergence of a Responsible Green World Trade Organization: Why Creating a World Environment Organization Would Hinder This Goal,* 8 U. C. DAVIS J. INT'L L. & POL'Y 35, 43-57 (2002).

[4] Regarding, for example, the three categories of environmental harm from trade, that is, physical harm, physical harm through the market, and economic harm through the market, *see* Calderin, *supra* note 3, at 49-57.

[5] This was the first institutional framework within the GATT to address the environmental issue since the creation of GATT in 1947. WTO Secretariat, Symposium, *High Level Symposium on Trade and Environment Background Document*, WTO Trade and Environment Division, para. 2 (Mar. 15-16, 1999), *at*

established in the General Agreement on Tariffs and Trade[6] [hereinafter GATT] Bureau[7] in order to review the impact of trade on the environment,[8] discussions[9] over trade and environment,[10] especially on efficient interaction between trade liberalization and environment, have been seriously debated.[11] At

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http://www.wto.org/english/tratop_e/envir_e/tr_envbadoc.htm (last visited July 27, 2006).

[6] 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]. The GATT parties adopted GATT again, with minor changes, as part of the agreement creating the WTO. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. When it is necessary to distinguish the two, they are called "GATT 1947" and "GATT 1994". WTO Agreement, *id*, art. II:4.

[7] When environmental concerns became domestic and international policy issues in the 1970s, they were not addressed within GATT, but through the UN system. In participation of the 1972 UN Conference on the Human Environment, GATT members agreed to form the EMIT Working Group. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 17 (2001).

[8] WTO Secretariat, *supra* note 5, paras. 2, 6, 7.

[9] During the discussions, 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. Sanford Graines, *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, 752 (2001).

[10] The United States and EC, not wanting challenges by environmentalists to jeopardize the conclusion of the Uruguay Round, attempted to defuse these challenges to trade policy by supporting the formation within GATT of the EMIT Working Group, followed by the creation of a formal Committee within the new and expanded WTO structure, the CTE. Shaffer, *supra* note 7, at 20.

[11] *See* Environment Backgrounder of WTO Secretariat, Trade and Environment at the WTO: background

the Uruguay Round, even though there was not sufficient discussion on performance to address environmental concerns, new sources were introduced which admit initiating the matters related to the environmental preservation and sustainable development[12] before the multilateral negotiations.[13]

Pursuant to a Ministerial Declaration annexed to the Marrakesh Agreement establishing the WTO in 1994, the CTE,[14] a non-negotiating body for exploring the environmental implication to trade[15] was established[16] and has handled issues related to trade and environmental problems[17] so far.[18] The CTE

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document, (Feb. 2004), *at* http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/contents_e.htm (last visited July 27, 2006).

[12] *See* WTO Agreement, *supra* note 6, preamble (observing "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking ... to protect and preserve the environment ...").

[13] For the failures to amend GATT to address environmental concerns during the Uruguay Round, *see* John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment,* 28 HARV. ENVTL. L. REV. 1, 14-19 (2004).

[14] *See supra* note 10.

[15] It extended observer status to the United Nations, the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the International Monetary Fund (IMF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the Commission for Sustainable Development (CSD), the Food and Agricultural Organization (FAO), the International Trade Center (ITC), the Organization for Economic Cooperation Development (OECD), and the European Free Trade Association (EFTA). WTO Secretariat, *supra* note 5, paras. 43-44.

[16] Shaffer, *supra* note 7, at 17.

[17] For the limited performance of the CTE to conclude the detailed resolution of trade and environment conflicts, *see* Shaffer, *supra* note 7, at 1-93 (examining how the WTO has addressed trade and environment issues through a

has tried to come up with various plans including stretching Article XX of GATT or revising it in order to adapt the trade measures in compliance with the environmental purposes of MEAs at the WTO.[19]

The proposals made in the CTE[20] could be grouped into two: i) a legal framework to clarify the relationship between the WTO and MEAs with specific reference to the exception provisions in Article XX of the GATT; ii) some making environment-related results in some or all of the TBT, SPS, TRIPs, Agricultural Agreements, and General Agreements on Trade in Services (GATS), which others feel

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specialized CTE, and treats the CTE as a site to assess central concerns of governence in a globalizing economy).

[18] *Id.*

[19] Outside the WTO, 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 Expert. [Sanford Gaines, *supra* note 9, at 753, *cited by* Marc Rietvelt, *Multilateral Failure: A comprehensive Analysis of the Shrimp/Turtle Decision*, 15 IND. INT'L & COMP. L. REV. 473, 490 (2005)]. In addition, academic studies and conferences addressing trade and the environment proliferated. Sanford, Gaines *supra* note 9, at 753-754, *cited by id*.

[20] With relation to the CTE proposals' dependence, in the US-Shrimp case which was the first major trade-environment dispute following the CTE 1996 Report, the claimants, the respondent and third-party participants each supported their positions by citing different paragraphs from the Report [*see* WTO Dispute Settlement Panel Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R, paras. 4.1-4.73 (circulated on May 15, 1998, as modified by the Appellate Body Report, adopted Nov. 6, 1998), *reprinted in* 37 I.L.M. 832 (July 1998) [hereinafter US-Shrimp Panel Report], *cited by* Shaffer, *supra* note 7, at 38], as well as the dispute settlement panel and the Appellate Body cited the Report. *See* US-Shrimp Panel Report, *id*. paras. 7.50, 9.1 *cited by* Shaffer, *id*.

confident that environmental concerns have been sufficiently dealt with already in these agreements.[21]

In seeking efficient methods to harmonize trade liberalization to environmental protection, they are limited by the fact that every tool should meet the principle of the WTO: enhancing a multilateral cooperative system that pursues trade liberalization.[22] Particularly, environmental trade measures based on non-product-related process or production [hereinafter PPMs]- and issues of paramount importance to environmental measures which may discriminate on the basis of the processes behind products- are inherently difficult to legitimate under the WTO rules.[23] The legitimation of measures based upon PPMs underlying the environmental regime is easily contradictory to the non-discrimination principle embedded in the multilateral trading system.[24]

Under the current WTO system under which Member governments, in most dispute cases, have had no option but to resort to the dispute settlement process of the GATT/WTO, the final decision of the

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[21] Sabrina Shaw & Risa Schwartz, *Trade and Environment in the WTO: State of Play*, 36 J. WORLD TRADE 129, 133 (2002).

[22] For the state of play in the CTE, *see* Shaw & Schwartz, *id*. at 129-144 (Discussing on: i) The WTO-MEAs relationship; ii) Subsidy Reform; iii) TRIPs and biodiversity; iv) Precaution; v) GMOs and biosafety).

[23] "Many countries including developing countries consider that allowing WTO members to discriminate against products based on non-product-related PPMs is a fundamental and impermissible alteration of the present balance of rights and obligations of Members under the WTO Agreement." Shaw & Schwatz, *id*. at 147.

[24] Shaw & Schwartz, *id*. at 132.

Appellate Body in the US-Shrimp case[25] may predict more or less optimistically the practical possibility that there would 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[26] on the other hand".[27]

B. Environmental Measures under the WTO

1. Environmental Measures under GATT Provisions

Since GATT primarily is aimed at removing trade restrictions, the legality of environmental trade restrictions imposed by Member governments or MEAs[28] under GATT should be recognized according to

[25] WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998), *reprinted in* 38 I.L.M. 118 (Jan. 1999) [hereinafter US-Shrimp AB Report] (concerning a ban on importation of certain shrimp and shrimp products imposed by the US).

[26] For the definition of the term "sustainable development", *see* Carlos A. Calderin, *supra* note 3, at 45 n.64.

[27] Axel Bree, *Article XX GATT-Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report*, 17 DICK. J. INT'L L. 99, 102 (1998), *cited by* Rietvelt, *supra* note 19, at 490.

[28] There are approximately 240 multilateral environmental agreements [MEAs], out of which about 20 include provisions that can affect trade. (For further information, *see* WTO Secretariat, *Matrix on Trade Measures Pursuant to Selected MEAs*, WT/CTE/W/160/Rev.2, TN/TE/S/5 (Apr. 25, 2003).) Among the trade-related MEAs, there are Montreal Protocol on Substances that Deplete the Ozon Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, *reprinted in* 26 I.L.M. 1541 (Nov. 1987) (entered into force Jan. 1, 1989) [hereinafter Montreal

the requirements of GATT provisions. Possibly the most conflicting regulations in interpreting and adopting environmental trade measures among GATT provisions[29] are the so-called "three pillars"[30] of GATT:[31] i) general most-favoured-nation treatment[32] requiring that a country treat all contracting parties

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Protocol], stipulating that the production and consumption of compounds that deplete ozone in the stratosphere-chlorofluorocarbons (CFCs) are to be phased out, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 933 U.N.T.S. 243 [hereinafter CITES], regulating the trade of wild animals and plants written in the list of annexes across the borders among members and non-members, Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, Mar. 22, 1989, 28 I.L.M 657, prohibiting hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party, and etc., which regulate trade in a variety of methods to protect environment.

[29] For the conflicts between GATT and domestic environmental laws, *see* Knox, *supra* note 13, at 5-10.

[30] Some commentators have enumerated a fourth central obligation: the elimination on, or abstention from, the use of non-tariff, trade distorting measures, *See* Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 756 (1993); John H. Jackson, Symposium, *Environmental Quality and Free Trade: Interdependent Goals or World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1232 (1992), *cited by* Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 COLUM. J. L. & SOC. PROBS. 175, 183 (1996).

[31] Some commentators also have suggested that Article XXI (Exception for Security Interest) may be useful in an environmental context. (*See* Anderson, *id*. *cited by* Hudnall *id*. at 183) Although this article will briefly address this provision, no nation has ever relied on the Article XXI to justify an environmental measure. *Id*.

[32] For the papers on the most-favoured-nation treatment in the WTO agreement, *see* Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in terms of Most-Favored-Nation Treatment and "Imperial Preference"*, 26 MICH. J. INT'L L. 563, 563 (2005) (discussing free-trade areas from the viewpoints of most-favored-nation treatment and preferential treatment); Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point,* 8 INT'L ARB. L. REV. 131, 131-138 (2005) (examining the tribunals' reasoning

alike for purpose of any "advantage, favour, privilege or immunity";[33] ii) national treatment[34] on internal

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in the Salini and Plama decision and viewing it from the principle of MFN treatment adopted in the previous cases). For the case on the most-favoured-nation treatment in the WTO agreement, *see* WTO Appellate Body Report on European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc. WT/DS246/AB/R (adopted Apr. 20, 2004), *reprinted in* 43 I.L.M. 514 (Mar. 2004) (contending conditions under which the EC accords tariff preferences to developing countries under its current scheme of generalized tariff preferences could not be reconciled with requirements provided paragraph in 2(a), 3(a) and 3(c) of the Enabling Clause).

[33] GATT 1994, *supra* note 6, art. I (General Most-Favoured-Nation Treatment).

[34] For the papers on the national treatment in the WTO agreement, *see* Henrik Horn & Petros C. Mavroidis, *Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination*, 15 EUR. J. INT'l L. 39, 39~69 (2004) (reviewing the case-law on discriminatory taxation for appropriate interpretations of terms appearing in Article III); Peter M. Gerhart & Michael S. Baron, *Understanding National Treatment: The Participatory Vision of the WTO*, 14 IND. INT'L & COMP. L. REV. 505, 505 (2004) (reviewing the national treatment provisions of Article III from a substantive to a procedural perspective by expanding on the surrogate representation rationale); Jian Zhou, *National Treatment in Foreign Investment Law: A Comparative Study From a Chinese Perspective*, 10 TOURO INT'L L. REV. 39, 39 (2000) (studying comparatively the international standards of national treatment from a Chinese perspective); Judith Hippler Bello, *WTO Dispute Settlement Body-Article XX Environmental Exceptions to GATT-National Treatment-Consistency with GATT of U.S. Rules regarding Imports of Reformulated Gasoline, United States-Standards For Reformulated And Conventional Gasoline. 35 I.L.M. 603 (1996) World Trade Organization Appllate Body, Apr. 29, 1996*, 90 AM. J. INT'L L. 669, 669 (1996) (analyzing the Appellate Body's decision on U.S. Gasoline Rule in the relation with environmental provisions of Article XX of GATT). For the cases on the national treatment in the WTO agreement, *see* WTO Appellate Body Report on Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005), *reprinted in* 44 I.L.M. 923 (July 2005) (contending that Dominican Republic's measures affecting the importation and internal sale of cigarettes are inconsistent with Article II:I(b), III:2, III:4, X:3(a), XI:1, XV:4 of GATT 1994); WTO Appellate Body Report on Chile-Taxes on Alcoholic Beverages, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted Jan. 12, 2000) (concerning Chile's special sales tax on spirits, which arguably violates Article III:2 of GATT 1994); WTO Appellate Body Report on Japan-Taxes on

taxation and regulation prohibiting a contracting party from imposing regulations or taxes in a way "so as to afford protection" against import competition;[35] iii) general elimination of quantitative restrictions[36]

Alcoholic Beverages, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter Japan-Alcoholic Beverages AB Report] (concerning the Japanese liquor tax system, which is arguably inconsistent with GATT Article III:2); WTO Appellate Body Report on Korea-Taxes on Alcoholic Beverages, WTO Doc. WT/DS75/AB/R, WT/DS84/AB/R (adopted Feb. 17, 1999), *reprinted in* 38 I.L.M. 761 (May, 1999) (concerning Korean Liquor Tax Law and Education Tax Law, which are arguably inconsistent with Korea's obligation under Article III:2 of GATT 1994).

[35] GATT 1994, *supra* note 6, art. III (National Treatment on Internal Taxation and Regulation).

[36] For the paper on the quantitative restrictions in the WTO agreement, *see* Asif H. Qureshi, *Challenging Quantitative Restrictions for Balance-of-Payments Purposes under the WTO*, 6 INT'L. TRADE L. & REG. 28, 28-31 (2000) (focusing on the procedures involved in challenging balance-of-payment import restrictions). For the cases on the quantitative restrictions in the WTO agreement, *see* WTO Dispute Settlement Request for Consultations on Dominican Republic-Measures Affecting the Customs Valuation and Other Purposes, WTO Doc. WT/DS300/1, (requested on Aug. 28, 2003) (concerning Dominican Republic's measures which affect the importation of cigarettes); WTO Dispute Settlement Request for Consultation on India-Import Restrictions Maintained under the Export and Import Policy 2002-2007, WTO Doc. WT/DS279/1 (requested on Dec. 23, 2002) (concerning import restrictions maintained by India under its Export and Import Policy 2002-2007 with respect to particular products of concern to the European Communities); WTO Appellate Body Report on Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain, WTO Doc. WT/DS276/AB/R (adopted Sep. 27, 2004) (concerning the export of wheat by the Canadian Wheat Board and the treatment accorded by Canada to grain imported into Canada); WTO Dispute Settlement Request for Consultation on Romania-Import Prohibition on Wheat and Wheat Flour, WTO Doc. WT/DS240/1, (requested on Oct. 18, 2001) (concerning Romania's quality requirements for imported wheat and wheat flour); WTO Appellate Body Report on India-Quantitative restrictions on imports of agricultural, textile and industrial products, WTO Doc. WT/DS90/AB/R (adopted Sep. 22, 1999), *reprinted in* 38 I.L.M. 1708 (Nov. 1999) (in respect of quantitative restrictions maintained by India on importation of agricultural, textile and industrial products); WTO Appellate Body Report on European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/AB/R (adopted July 23, 1998), *reprinted in* 37 I.L.M. 1463 (Nov. 1998) (in respect

prohibiting quantitative restrictions on imports of a particular type or from a specific country or on the exportation or sale for export of any product destined for a particular country[37] and so on.[38]

While trade-related environmental measures accepted by governments or environmental agreements can be an efficient means in implementing environmental policy, under the GATT principles of nondiscrimination,[39] these measures may be at risk of being ruled GATT-inconsistent[40] and, thus, no

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of the EC regime for the importation of certain poultry products and the implementation by the EC of the Tariff Rate Quota for these products); US-Shrimp AB Report, *supra* note 25; WTO Appellate Body Report on European Communities-Measures Concerning Meat and Meat Products (hormones), WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998) [hereinafter EC-Hormones AB Report] (regarding the importation of livestock and meat from livestock that have been treated with certain substances having a hormonal action); WTO Dispute Settlement Panel Report on Japan-Measures Affecting Consumer Photographic Film and Paper, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998) (concerning Japan's measures affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper); WTO Appellate Body Report on Canada-Certain Measure Concerning Periodicals, WTO Doc. WT/DS31/AB/R (adopted July 30, 1997) (concerning certain measures prohibiting or restricting the importation into Canada of certain periodicals); WTO Appellate Body Report on Australia-Measures Affecting Importation of Salmon, WTO Doc. WT/DS18/AB/R, (adopted Nov. 6, 1998) [hereinafter Australia-Salmon AB Report] (in respect of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation).

[37] GATT 1994, *supra* note 32, art. XX (General Exceptions).

[38] 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, 241 (1997); Knox, *supra* note 13, at 4-5.

[39] GATT 1994, *supra* note 6, arts. I, III.

[40] For the more details, *see* Knox, *supra* note 13, at 11-13.

longer acceptable under the GATT/WTO system.[41] They are significantly against the most-favoured-nations principle.[42] For example, all kinds of products containing chlorofluoro carbons are banned from trade under the Montreal Protocol[43] even though they are interpreted as like products under the GATT standards. Exports of hazardous and other wastes to nonparties are also prohibited under the Basel Convention, which is in violation of the GATT Article XI prohibition[44] against quantitative restrictions on imports and exports.[45]

Considering the fact that the trade-related environmental measures, particularly under MEAs, would likely be inconsistent with nondiscrimination principles,[46] or prohibitions quantity restrictions,[47] Article XX exceptional provisions are necessary to protect the trade measures for environmental protection from

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[41] Hudnall, *supra* note 30, at 204.

[42] GATT 1994, *supra* note 6, art. I.

[43] Montreal Protocol, *supra* note 28, at 1541.

[44] Although Article XI.2 provides for certain exceptions to the general prohibition against such restrictions, hazardous wastes are unlikely to fall into the categories of "products essential to the exporting contracting parties" or products which are in "temporary surplus". Hudnall, *supra* note 30, at 205.

[45] Betsy Baker, *Protection , Not Protectionism: Multilateral Environmental Agreements and the GATT*, 26 VAND. J. TRANSNAT'L L. 437, 444 (1993).

[46] GATT 1947, *supra* note 6, arts. I, III.

[47] *Id*. art. XI.

potential conflicts with GATT provisions.[48] Under the GATT, when trade-related[49] measures for environmental protection are against one of the above principles or provisions, the legitimacy of the measures should be secured from exceptional provisions in GATT.[50]

The GATT exceptional provisions[51] represent an attempt to strike a balance between permitting the regulation of trade to promote non-commercial goals in certain recognized areas, such as health and environment, while also policing these regulations to ensure they are not applied in ways that restrict trade beyond what is necessary to promote such goals.[52] According to the exception provisions of GATT, members should meet both individual requirements and two conditions imposed by the chapeau of Article XX requiring nations under the equal condition that there should not be any arbitrary or unjustifiable

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[48] Knox, *supra* note 13, at 12.

[49] For the "trade" vs "trade-relate" relating to TRIPs, for instance, *see* Chantal Thomas, *Trade-Related Labor and Environment Agreement?*, 5 J. INT'L ECON. L. 791, 792 (2002) (stating "[A]lthough intellectual property rights can be traded in licensing and other rights-transfer agreements, neither intellectual property rights nor intellectual property need be traded for TRIPs to apply. Rather, the larger premise of TRIPs is that intellectual property rights are affected by trade ...").

[50] GATT 1994, *supra* note 6, art. XX.

[51] For the roots of the language of Article XX of the GATT 1994, *see* Timothy M. Reif & Julie Eckert, *Courage You Can't Understand: How to Achieve the Right Balance Between Shaping and Policing Commerce in Disputes Before the World Trade Organization*, 42 COLUM. J. TRANSNAT'L L. 657, 680-681 (2004).

[52] Reif & Eckert, *id*. at 679-680.

discrimination and disguised restriction to trade.[53]

In order for trade-related measures for environmental protection to have legitimacy, first of all, the measures should fall within the scope of Article XX.[54] Many of the challenged measures[55] brought under the GATT/WTO Dispute Settlement Procedures that were found inconsistent with GATT/WTO rules, in fact, satisfied this scope-related requirement under Article XX.[56]

The measures should also be proven to have met either the requirement "necessary to protect human, animal or plant life or the health"[57] or the requirement "relating to the conservation of exhaustible[58]

[53] These are softened National Treatment and Most-Favoured-Nation Treatment. Jackson, *supra* note 30, at 1240.

[54] This requirement is often referred to as the "policy test". Laura Yavitz, *The WTO and the Environment: The Shrimp Case that Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203, 215 (2001-2002).

[55] Those measures were measure to reduce cigarette use in GATT Dispute Panel Report on Thailand-Rrestrictions on Importation of and Internal Taxes on Cigarettes, adopted Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, para. 72 (1990), *reprinted in* 30 I.L.M. 1122 (July 1991) [Thailand-Cigarettes], protection of dolphin life in Tuna in GATT Dispute Panel Report on United States-Restrictions on Imports of Tuna(EEC), GATT Doc. DS29/R (circulated June 16, 1994), *reprinted in* 33 I.L.M. 839 (July 1994) [US-Tuna(EEC)] and protection of turtles in US-Shrimp.

[56] John J. Emslie, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485, 514 (2005).

[57] GATT 1994, *supra* note 6, art. XX(b). For the construction of this provision in the least inconsistent to GATT, *See* Thailand-Cigarettes, *supra* note 55, para. 72; WTO Dispute Settlement Panel Report on United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R, para. 6.20 (circulated on Jan. 29, 1996, as modified by the Appellate Body Report, adopted May 20, 1996), *reprinted in* 35 I.L.M. 274 (Mar. 1996) [hereinafter US-Gasoline Panel Report].

[58] Referring to the textual interpretation of Article XX in finding that the term "exhaustible" does not exclude

natural resources[59] if such measures are made effective in conjunction with restrictions on domestic production or consumption".[60] This necessary requirement[61] prohibits a Member from adopting a measure that is inconsistent with any other GATT/WTO provision if any alternative, which is not

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"renewable" resources like living animals, the Appellate Body in US-Shrimp 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". US-Shrimp AB Report , *supra* note 25, para. 128, *cited by* Rietvelt, *supra* note 19, at 485 n.73.

[59] This is, so called, the "necessary requirement" or "nexus requirement". For the term "nexus requirement" which is arguably more appropriate in avoiding any confusion, *see* Philip Bentley Q. C., *A Re-Assessment of Article XX, Paragraphs (B) and (G) of GATT 1994 in the Light of Growing Consumer and Environmental Concern about Biotechnology*, 24 FORDHAM INT'L L. J. 107, 112 (2000), *cited by* Emslie, *supra* note 56, at 512 n.147 (stating "Although Art. XX(b) and (d) require that the measure be necessary for the goal sought, Art. XX(g) does not require the restrictive measure to be necessary to the objective of protecting the exhaustible natural resource; instead, it only require that it 'relate' to the objective..."). However this difference may not have a significant impact, "presumably because any measure that limits depletion of a natural resource is justified *per se*" and "arguably" would meet a necessary requirement in any event. *Id*.

[60] GATT 1947, *supra* note 6, art. XX(g). According to this provision, measures' main purpose should be protection. GATT Dispute Panel Report on Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, adopted Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1988) [Canada- Herring and Salmon].

[61] For the major cases applying the necessary requirement, *see* Thailand-Cigarettes, *supra* note 55; GATT Dispute Panel Report, United States-Restrictions on Imports of Tuna (Mexico), circulated Sep. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1991), *reprinted in* 30 I.L.M. 1594 (Nov. 1991) [US-Tuna(Mexico)]; and WTO Appellate Body Report on European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001), *reprinted in* 40 I. L. M. 1193 (Sep. 2001) [hereinafter EC-Asbestos AB Report].

inconsistent with other GATT/WTO provisions, can reasonably be employed by such Member.[62] However, this necessary test is not whether the "policy underlying the measure" is necessary but, rather, whether the "measure" is necessary to achieve the stated policy objective.[63]

Additionally, these measures should not bring any arbitrary or unjustifiable discrimination nor be a disguised restriction,[64] which is often referred to as the "chapeau" requirement.[65] Article XX thus offers general exceptions from international trade obligations for trade measures employed in the pursuit of certain specified goals or purposes including environment protection.[66]

With respect to the applicability of the MEAs' trade measures, even under the GATT system prior to WTO system, in the absence of US-Tuna,[67] applying Article XX(b) and (g) would seemingly not be difficult, since each of the MEAs represents the collective judgment of many governments that restricting trade in specified ways is necessary under the ArticleXX(b), and since trade measures relate to the

[62] Thailand-Cigarettes, *supra* note 55, para. 74, *cited by* Emslie, *supra* note 56, at 514-515.

[63] Yavitz, *supra* note 54, 215.

[64] GATT 1994, *supra* note 6, Chapeau of art. XX.

[65] *See* US-Shrimp AB Report which made the most detailed consideration of the meaning of the chapeau. US-Shrimp AB Report, *supra* note 25, paras. 150-151.

[66] *See* generally Gaines, *supra* note 9, at 740.

[67] *See* US-Tuna(Mexico), *supra* note 61.

conservation of exhaustible natural resources as long as they meet the requirements under the Article XX (g).[68]

Since the MEAs are all open to every country and apply their trade restrictions only to countries whose behavior does not conform to the norms in the agreements, MEAs' measures would also appear to meet the requirement in the chapeau of Article XX.[69] The US-Tuna, however, cast doubt on those possibilities, because under the US-Tuna reading of Article XX some important MEAs were seemingly inconsistent with GATT.[70]

Reviewing the disputes under the GATT/WTO up to now, particularly since the establishment of the WTO, however, treating the measures in pursuit of the environmental agreements through the Article XX of GATT exceptions would be expected to contribute substantially to harmonizing the environmental issues and trade.

2. Environmental Measures under Other WTO Agreements

One outcome of the Uruguay Round is raising various environment-related issues in the preamble[71]

[68] Knox, *supra* note 13, at 12.

[69] Knox, *id*. Even GATT legal experts consulted during the drafting of CITIES and Montreal Convention had said that the trade restrictions in those agreements would fall within Article XX. *Id*.

[70] Knox, *id*. at 13.

[71] Environmental issues in the WTO preamble are: i) "allowing for the optimal use of the world's resources"; ii)

and expanding the application of the regulations related to environmental protection which would impede the flow of international trade.[72] Even though it has historically been understood that preambles of international agreements do not create enforceable measures,[73] the WTO can be defined as an environmental organization[74] considering the fact that the preamble defines the organization and states its purpose.[75] As such, its continued existence depends on its ability to advocate for environmental protection and preservation, which will lead to a level of sustainable development.[76]

There are two WTO environment-related agreements which regulate the issues pertaining to human, animal and plant life and health, and environment. One is the Agreement on Technical Barriers to Trade

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"in accordance with the objective of sustainable development"; iii) "seeking both to protect and preserve the environment". For more details, *see* Calderin, *supra* note 3, at 43-57.

[72] For the WTO having an environmental heart, *see* Calderin, *id*. at 43-57 ("Its (WTO's) main purpose is to expand the production and exchange of goods and services between its Members. ... WTO must do all that is possible to ensure its continued existence defending itself from dangers that threatens its existence. Examples of such dangers are environmental degradation and over-exploitation of world resources... Hence, the preamble... includes language that calls for the protection and preservation of the world's environment and resources...").

[73] Calderin, *id*. at 47.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 48

[hereinafter TBT Agreement][77] and the other is the Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement].[78]

The SPS Agreement addresses measures taken to protect human, animals and plants from certain risks to life and health,[79] including risks arising from additives, contaminants or toxins in foods.[80] As such, the SPS Agreement offers all qualified sanitary and phytosanitary measures, the definition of which comprises and exceeds measures that protect human, animal, and plant life and health.[81] Under the agreement, member countries are required to base their sanitary and phytosanitary measures upon international standards, guidelines or recommendation, however, member countries may maintain a higher level[82] of the measures than the measures based on the relevant international standards, if there is

[77] Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27 [hereinafter TBT Agreement].

[78] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27 [hereinafter SPS Agreement].

[79] For insufficiency of the SPS Agreement to cover health or environmental risks, *see* Stave Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 TUL. ENVTL. L. J. 271, 276-277 (2000) [stating, for example, protection against (real or imagined) human health risks from bioengineered processed products is apparently not covered by the SPS because genetic modification is not listed in the SPS categories, even though the applicability of the SPS to genetic modification products is remaining as complex].

[80] SPS Agreement, *supra* note 78, Annex A.

[81] Meier, *supra* note 38, at 275-276.

[82] "The SPS Agreement and the TBT Agreement do not clearly recognize a right to establish SPS measures and

a scientific justification.[83]

The SPS Agreement[84] states members' right to implement sanitary and phytosanitary measures based on both scientific justification[85] and risk assessment.[86] Each Member country should meet two conditions: One is that members must not cause any unfair discrimination, nor disguised restriction in determining the level of protection.[87] The second condition involves establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection using or selecting alternatives that have the same effects on protection and also are considerably less trade-restrictive.[88]

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technical regulations respectively providing a lower level of protection than would be afforded by a measure conforming to international standards or guidance, which may represent an implicit requirement for WTO to conform their measures to international standards, unless they wish to impose more protective requirements." Richard J. Ferris Jr. & Hongjun Zhang, *The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China*, 14 GEO. INT'L ENVTL. L. REV. 429, 453 (2002).

[83] SPS Agreement, *supra* note 78, arts. 3.1, 3.3.

[84] *Id*. arts. 2, 3, 5, and etc.

[85] *Id*. art. 3.3.

[86] *Id*. art. 5.3.

[87] *Id*. art. 5.5.

[88] *Id*. art. 5.6 n.3.

This trade-restrictive condition at SPS Agreement shows two different aspects from that of the TBT Agreement: i) members shall ensure that restrictive measures should not be more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection.[89] For being violated for this condition, the alternative must be "significantly", not just marginally, less trade restrictive;[90] ii) the measures should have feasibility technically and economically.[91]

The TBT Agreement addresses all voluntary and mandatory standards for products, other than any that qualify as sanitary and phytosanitary measures under the SPS Agreement,[92] which indirectly impact free trade through the measures, including technical regulations for the protection of human health or safety, animal or plant life or health, or the environment.[93] Those measures or regulation should be subject to the principles of the national treatment and the most-favored-nation treatment, and should not be more trade-restrictive than necessary to fulfill a legitimate objective,[94] taking into account the risks

[89] *See id*. art. 5.6 n.3; Steve Charnovitz, *The North American Free Trade Agreement*, 26 LAW & POL'Y INT'L BUS. 1, 11 (1994).

[90] Meier, *supra* note 38, at 279.

[91] *Id*.

[92] TBT Agreement, *supra* note 77, art. 1.5.

[93] *Id*. art. 2.2.

[94] For the interpretation of this prohibition to be environmentally friendly, *see* Calderin, *supra* note 3, at 57 (stating "[s]ince it pressures Members to find legitimate environmental reasons for its standards, rather than simply disguising its protectionist measures in the clothing of environmentalism. ... it entices governments that are interested in erecting

non-fulfillment would create.[95]

These two agreements recognize the rights of WTO members to establish national requirements that are more stringent than international standards, even though the level of "legitimate" purposes to be accepted is different between two agreements,[96] provided that such requirements conform to WTO rules that protect against unnecessary, unjustified, arbitrary and disguised discrimination towards products of other WTO Members.[97] WTO rules do not expressly encourage the application of more stringent standards, but rather the harmonization of standards.[98]

SPS and TBT Agreements which are legally selfsufficient substantial provisions[99] come closer to the

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barriers to trade, to invest in research to find environmental justification for the measures...").

[95] TBT Agreement, *supra* note 77, arts. 2.1-2.2.

[96] Under the SPS Agreement, for a higher level of protection to be imposed, the member should essentially prove the necessity of the measure by way of a scientific risk assessment. (SPS Agreement, *supra* note 78, art. 5.1); under the TBT Agreement, higher level of protection than that established by other members may be imposed where the measure represents the appropriate level of protection. TBT Agreement, *id*. art. 2.4.

[97] Ferris Jr. & Zhang, *supra* note 82, at 452.

[98] For more detailed discussions, *see id.* at 452 -453.

[99] WTO Dispute Panel Report on European Communities-Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States, WTO Doc. WT/DS26/R/USA, paras. 8.31-8.42 (circulated Aug. 18, 1997, as modified by the Appellate Body Report, adopted Feb. 13, 1988) [hereinafter EC-Hormones(US) Panel Report].

intention of environmental protection than other WTO Agreements.[100] These two agreements could be more actively used for environmental protection because Member countries could introduce or maintain trade-restrictive environmental measures even though the measures are not in compliance with other WTO agreements.

Whether SPS and TBT Agreements are to be applied to trade-related measures for environmental protection ahead of the exceptional provisions in GATT should be seen in the future in more dispute cases: With respect to the cases of TBT, the Agreement is arguably more generous than Article XX in allowing exceptions to the GATT, and purports to supersede Article XX in cases of conflict.[101]

In the US-Gasoline case,[102] it was claimed that the U.S. provisions of controlling gasoline were against TBT Agreement, [103] however, the Panel withheld its judgment on this point.[104] Reflecting the panel's conclusion with reservation, it is uncertain that this provision can be applied for environmental issues. The Panel expressed its opinion in this case that the U.S. provisions of gasoline are in breach of

[100] For the conflicts between domestic environmental laws and SPS/TBT Agreement, *see* Knox, *supra* note 13, at 19-24.

[101] Meier, *supra* note 38, at 279.

[102] US-Gasoline Panel Report, *supra* note 57.

[103] TBT Agreement, *supra* note 77, art. 2 (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies ").

[104] US-Gasoline Panel Report, *supra* note 57, para. 6.4.

the GATT provisions[105] and that the US regulations do not have to be debated whether they are not in compliance with the provisions of the TBT Agreement.[106]

As such, by failing to consider the TBT Agreement,[107] even though the Appellate Body implied either that the TBT Agreement does not supersede Article XX in cases of conflict or that the Agreement has a scope as narrow or narrower than Article XX,[108] the case, arguably, indicates that TBT Agreement actually imposes additional requirements on top of the general GATT rules, "the interpretative provision" notwithstanding, and that it may defeat an Article XX defense.[109]

In EC-Asbestos, even though the Appellate Body declined to analyze the applicability of the TBT Agreement,[110] the Body noted that the TBT Agreement being a "specialized legal regime" that "applies

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[105] GATT 1994, *supra* note 6, arts. III, V & XX(b), (d) & (g).

[106] US-Gasoline Panel Report, *supra* note 57, para. 8.1.

[107] The Panel in the case did not treat with the TBT Agreement, because it was found to be unnecessary to consider the TBT Agreement by the reason that the US Regulation at issue was not qualified for an exception under Article XX. US-Gasoline Panel Report, *supra* note 57, para. 6.43.

[108] Meier, *supra* note 38, at 279.

[109] *Id.*

[110] The Panel decided that the French Decree did not meet the definition of "technical regulation" under the TBT Agreement. WTO Dispute Settlement Panel Report on European Communities-Measures Affecting Asbestos-Containing Products, WTO Doc. WT/DS135/R (circulated Sep. 18, 2000, as modified by the Appellate Body Report, adopted Apr. 5, 2001) [hereinafter EC-Asbestos Panel Report]

solely to a limited class of measures",[111] imposes obligations that "seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994".[112]

With respect to the cases of SPS, the Agreement, offering an exception for all qualified sanitary and phytosanitary measures, might allow national environmental measures that a GATT/WTO panel previously would have rejected. As for now, in EC-Hormones,[113] EC-Asbestos,[114] and Japan-Agricultural Products,[115] Appellate Body recognized the WTO members' right to determine their own level of health protection.

Apart from the above two agreements, WTO environment-related provisions include a number of trade regulations such as WTO Agricultural Agreement[116] and WTO Agreement on Subsidies and Countervailing Measures[117] which defines non-actionable assistance and subsidy in relation to the

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[111] EC-Asbestos AB Report, *supra* note 61, para. 80.

[112] *Id*., *cited by* Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 511 (2002).

[113] EC-Hormones AB Report, *supra* note 36, para. 177.

[114] EC-Asbestos AB Report, *supra* note 61, para. 168.

[115] *See* WTO Appellate Body Report on Japan-Measures Affecting Agricultural Products, WTO Doc. WT/DS76/AB/R (adopted Mar. 19, 1999) [hereinafter Japan-Agricultural Products AB Report], paras. 95-101.

[116] Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27 [hereinafter Agriculture Agreement], Annex 2.

[117] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex

environment.[118]

WTO Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPs][119] also excludes necessary inventions from patents or prohibits them from being used for business in order to protect human, animal, plant life or health and environment. The TRIPs Agreement thus allows members to prevent them from obtaining patents that may endanger their ecological survival.[120] Moreover, by excluding certain inventions and process from being patentable, the Member countries are ensuring that they will not need to pay a foreign entity for the right to use domestic natural resources that may be essential to protect human, animal, or plant life or health.[121]

General Agreement on Trade in Services[122] provisions that as long as such measures do not

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1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27 [hereinafter SCM Agreement], art. 8.

[118] The assistance "(i) is a one-time non-recurring measure; and (ii) is limited to 20 per cent of the cost of adaptation; and (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and (v) is available to all firms which can adopt the new equipment and/or production processes". SCM Agreement, *id*. at 8.2(c).

[119] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement], arts. 27.2-27.3 and etc.

[120] Calderin, *supra* note 3, at 56.

[121] *Id*.

[122] General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1B, LEGAL

constitute a means of arbitrary or unjustifiable discrimination between countries, or a disguised restriction on trade in services, any necessary measures may be imposed to protect human, animal or plant life or health.

Such respective provisions of various agreements dealing with environmental issues are directed broadly through the preamble of the WTO Agreement which addresses sustainable development.[123]

III. JUDICIAL INTERPRETATION ON ENVIRONMENTAL MEASURES UNDER GATT/WTO SYSTEM

A. Judicial Interpretation under GATT Mechanism

1. General

INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1167 (1994) [hereinafter GATS], art. XIV.

[123] For a view to regard the sustainable development in the Preamble as the customary international law, *see, e.g.*, Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 J. TRANSNAT'L L. & POL'Y 331, 347-348 (2000), *cited by* Rietvelt, *supra* note 19, at 497 n.144 ("[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...").

Out of several panel procedures[124] that have been carried out under GATT mechanisms related to environment-protecting measures or human-health measures, only three panels were settled and adopted by GATT signatories. Most disputes under GATT were mainly about the general elimination of quantitative restrictions, national treatment on internal taxation and regulation, and general exceptions.[125]

Regarding general elimination of quantitative restrictions, almost all cases,[126] apart from US-Automobiles,[127] were brought based on violation of provisions against quantitative restrictions[128] and panels concluded that the provisions were violated. In US-Canadian Tuna[129] and Thailand-Cigarettes,[130] panels came to the conclusion that import-banning measures of importing countries could not fulfill the

[124] GATT Dispute Panel Report on United States-Prohibition of Imports of Tuna and Tuna Products from Canada, adopted Feb. 22, 1982, GATT B.I.S.D. (29th Supp.) at 91 (1982) [US-Canadian Tuna]; Canada- Herring and Salmon, *supra* note 60; Thailand-Cigarettes, *supra* note 55; US-Tuna(Mexico), *supra* note 61; US-Tuna(EEC), *supra* note 55; GATT Dispute Panel Report on United States-Taxes on Automobiles, GATT Doc. DS31/R (adopted Oct. 11, 1994) [US-Automobile].

[125] For environmental disputes in GATT, *at* http://www.worldtradelaw.net/reports/gattpanels/index.htm (last visited Aug. 12, 2006).

[126] US-Canadian Tuna, *supra* note 124; Canada- Herring and Salmon, *supra* note 60; Thailand-Cigarettes, *supra* note 55; US-Tuna(Mexico), *supra* note 61; US-Tuna(EEC), *supra* note 55; US-Automobiles, *supra* note 124.

[127] US-Automobiles, *supra* note 124.

[128] GATT 1947, *supra* note 6, art. XI.1.

[129] US-Canadian Tuna, *supra* note 124, para. 4.6.

[130] Thailand-Cigarettes, *supra* note 55, para. 70.

provisions[131] permitting exception in importing agricultural produces. In the case of Canada-Salmon and Herring,[132] panel decided that exception clauses permitting restriction for standards, and etc.[133] were not satisfied.[134]

Several cases[135] were also regarding national treatment on internal taxation and regulation. In the case of Thailand-Cigarettes,[136] the Panel concluded that imposition of internal tax on the imported cigarettes was consistent with the national treatment required in the Article III.2[137] of the GATT. In the cases of US-Tuna(Mexico) and US-Tuna(EEC), it was disputed whether the US import prohibition on

[131] GATT 1947, *supra* note 6, art. XI.2(c).

[132] Canada- Herring and Salmon, *supra* note 60.

[133] GATT 1947, *supra* note 6, art. XI.2(b).

[134] Canada- Herring and Salmon, *supra* note 60, para. 4.2.

[135] They are Thailand-Cigarettes, US-Tuna(Mexico), US-Tuna(EEC) and US-Automobile.

[136] Thailand-Cigarettes, *supra* note-, paras. 84-85.

[137] GATT 1947, *supra* note 6, art. III.2.

tuna was in compliance with the national treatment on the domestic regulations[138] in Article III.4[139] of the GATT.

The panel of US-Tuna(EEC) concluded that the United States import prohibitions on tuna and tuna products were not legitimated under the national treatment principle because the distinction from fishing customs and method of tuna-capture does not affect on the unique feature of tuna and tuna products.[140] The implication of the panel's interpretation of GATT provisions was that any law restricting imports on the basis of their non-product-related process or production method[141] would necessarily violate the national treatment[142] and provisions on anti-dumping and countervailing duties[143] unless the PPM affected the physical characteristics of the product.[144]

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[138] Although quantitative restriction against imports is banned under Art.XI.1 of GATT, in case the measure doesn't violate the principle of most-favored-nation treatment nor national treatment on internal taxation and regulation, and according to Art. III.4, foreign goods are not discriminated from domestic like goods, national measures can be imposed on the importing goods.

[139] GATT 1947, *supra* note 6, art. III (National Treatment on Iternal Taxation and Regulation).

[140] US-Tuna(EEC), *supra* note 55, para. 5.8.

[141] For the seemingly proper right of the member countries to decide whether it participates in the trade of products made by the inefficient use of resources in relation with Article XX(e), *see* Calderin, *supra* note 3, at 60-62.

[142] GATT 1947, *supra* note 6, art. III.

[143] *Id*. art. XI.2(c), VI.

[144] Knox, *supra* note 13, at 8.

In the case of US-Automobiles, the panel found that both impositions of the luxury tax and the gas guzzler tax were consistent with national treatment in Article III.2[145] of the GATT due to imposing the same conditional tax on like products.[146] The panel, however, found the US regulation to be inconsistent with domestic regulations provisioned in Article III.4[147] of the GATT, as the separate foreign fleet accounting discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers (i.e. based on origin), rather than on the basis of factors directly related to the products as such.[148]

2. General Exceptions

Reviewing the application of general exceptions of GATT,[149] panels have not often quoted Article

[145] GATT 1947, *supra* note 6, art. III.2

[146] US-Automobiles, *supra* note 124, paras. 5.43, 6.1(a)-(b).

[147] GATT 1947, *supra* note 6, art. III.4

[148] US-Automobiles, *supra* note 124, paras. 5.55, 6.1(c).

[149] GATT 1947, *supra* note 6, art. XX. ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (*b*) necessary to protect human, animal or plant life or health; … (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …").

XX (b) allowing restricted measures necessary to protect human, animal or plant life or health, (g) relating to the conservation of exhaustible natural resources,[150] and provisions of the chapeau of Article XX, but also there have never been trade measures justified with those provisions. With this, the interpretation[151] on Article XX of GATT, the environmental provision, is arguably slanted to the viewpoint of free trade, and thus is accused of its negativeness for environmental protection.[152]

In the case of Canada-Salmon and Herring,[153] with relation to analyzing Article XX(g), the panel

[150] The invocation of an Article XX (b) human health exception has never been successful because most measures fail the "necessary" test, while the exhaustible resource exception has accepted twice. Laura Yavitz, *The World Trade Organization Appellate Body Report, European Communities -- Measures Affecting Asbestos Asbestos-Containing Products Mar. 12, 2001, WT/DS135/AB/R*, 11 MINN. J. GLOBAL TRADE 43, 49 (2002) (footnotes omitted).

[151] For the definition of the term "interpretation" in comparison with the term "construction", *see* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 339 (1999) (stating "in Anglo-American parlance, interpretation refers to the determination of the meaning of words, contained in a contract, statute or treaty, while construction refers to the determination of the intent of the parties in connection with a matter not specifically addressed in the text of the document. While the distinction may be a matter of degree, construction raises greater questions of legitimacy, of fidelity to the intent of the parties and – in statutory or treaty contents – of democracy."); For the adoption of the concept of the interpretation and construction involved by the WTO dispute resolution process, *see* Trachtman, *id*. at 340 (stating "The WTO dispute resolution process often involves interpretation: ... Some dispute resolution proceedings involve construction. ... construction decisions are those involving non-violation nullification or impairment. ... recent WTO jurisprudence has seemingly rejected construction. ... However, construction occurs where concepts that are intended are implicit in the text though they are not expressly articulated...").

[152] *See* Hudnall, *supra* note 30, at 197.

[153] Canada- Herring and Salmon, *supra* note 60.

recognized that salmon and herring stocks are "exhaustible natural resources"[154] but held that the Canadian law was not "related to" the conservation of salmon and herring nor was it "in conjunction with" restrictions on domestic production or consumption.[155]

Analyzing the phrases "relating to" and "in conjunction with" in subparagraph (g), the panel held: the term "relating to" means that a measure must be "primarily aimed at the conservation of exhaustible natural resource";[156] the term "in conjunction with" in Article XX(g) is to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to purpose of the GATT provisions concerned;[157] a trade measure could, therefore, be considered to be made effective "in conjunction with" production restrictions only if it was primarily aimed at rendering effective these restrictions.[158]

Having interpreted the terms "relating to" and "in conjunction with" to mean "primarily aimed at", the panel concluded that it was not necessary to analyze the Canadian law at issue either under the

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[154] *Id*. para. 4.4.

[155] *See id*. para. 4.4.

[156] *Id*. para. 4.6.

[157] *Id*.

[158] *Id*. para. 4.6.

requirements of the Article XX chapeau or in relation to the overall purpose and aim of Article XX.[159]

The US-Tuna (Canada)[160] panel, adopting the reasoning[161] of the panel in the Canada Herring and Salmon case,[162] concluded that, because Article XX(g) was intended to allow contracting parties to take trade measures primarily aimed at restricting production or consumption only within their jurisdiction,[163] the US actions were deemed impermissible because they were focused not on domestic but on extraterritorial tuna production.[164] Such decisions have, even though they have never been adopted, shed useful light on the failures of the GATT structure to properly address environmental concerns in the

[159] Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalizations*, 14 AM. U. INT'L L. REV. 1129, 1140 (1999).

[160] US- Canadian Tuna, *supra* note 124.

[161] The Canada Herring and Salmon panel determined that a measure could be considered to have been taken "in conjunction with" restrictions on production only "if it was primarily aimed at rendering effective these restrictions". Canada-Herring and Salmon, *supra* note 60, para. 4.6.

[162] Because the principle of stare decisis does not apply within the two systems, the Panels and the Appellate Body frequently refer to prior precedents for guidance in settling disputes. Japan-Alcoholic Beverages AB Report, *supra* note 34, *cited by* Terence P. Stewart & David S. Johanson, *A Nexus of Trade and the Environment: The Relationship between the Cartagena Protocol on Biosafety and the SPS Agreement of the World Trade Organization*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 1, 27 (2003).

[163] For the panel's use of the word "extrajurisdictional" rather "extraterritorial" without any definition of an extrajurisdictional offense, *see* Steve Charnovitz, *The Environment vs.Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 496-497 (1993); *see* also ESTY, *supra* note 1, at 105 n.5.

[164] Hudnall, *supra* note 30, at 197.

context of trade liberalization.[165]

In the case of Thailand-Cigarettes, the panel concluded that the import restrictions were not "necessary" within the meaning of Article XX (b), because Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes, finding that a measure is not "necessary" unless there is no available "alternative measures which could reasonably be expected to employ and which is not inconsistent with other GATT provisions".[166] In this case, the "necessary" test was construed to require that a country seeking to justify a trade-restrictive environmental measure show that there exists no other less GATT-inconsistent means of attaining that environmental objective.[167]

As such, the panel limited the basis of its decision to the interpretation of the word "necessary" in subparagraph (b), using by analogy the interpretation of the word "necessary" in subparagraph (d).[168] Furthermore, there was no discussion by the panel of the requirements of the Article XX chapeau to determine whether the measures at issue resulted in "arbitrary or unjustified discrimination", or were an

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[165] *Id.*

[166] *See* Ilona Cheyne, *Environmental Treaties and the GATT,* 1 REV. EUR. COMMUNITY INT'L ENVTL. L. 14, 17 nn.46-47 (1992), *cited by* Hudnall, *supra* note 30, at 188.

[167] ESTY, *supra* note 1, at 48 n.15.

[168] *See* GATT 1947, *supra* note 6, art. XX (d), *cited by* Ala'i, *supra* note 159, at 1144.

attempt at "disguised restriction" or protectionism.[169]

In the cases of US-Tuna(Mexico)[170] and US-Tuna(EEC),[171] concerning the issue of US measure, the panel concluded that the US import prohibition to pursue its dolphin protection objectives for environmental policies was not justified by the exceptions in Article XX (b), (d), or (g) regarding measures to secure compliance with laws or regulations,[172] finding that: justification under the "necessary" standard "required a showing by the party invoking the Article XX exception... that it had exhausted all options reasonably available to it to pursue its... protection objectives through measures consistent with the General Agreement, in particular, through the negotiation[173] of international

[169] Ala'i, *id*. at 1144.

[170] US-Tuna (Mexico), *supra* note 61.

[171] After Mexico failed to pursue adoption of the Tuna-dolphin report, the EC and Netherlands brought another claim to GATT dispute resolution, challenging not only the direct ban on tuna that had been the subject of the first US-Tuna case, but also a secondary ban imposed by the MMPA on imports of tuna from "intermediary" nation that could not prove they had not imported tuna subject to the direct ban [US-Tuna(EEC), *supra* note 55, paras. 4.1-4.7], however, the second US-Tuna closely followed the reasoning of the first report in concluding that the import restrictions were inconsistent with Article XI and that Article XX could not justify the law. Knox, *supra* note 13, at 15.

[172] US-Tuna(Mexico), *supra* note 61, para. 7.1; US-Tuna(ECC), *supra* note 55, para. 6.1.

[173] "The US-Tuna decision's preference for multilateral solutions over unilaterally imposed trade-related measures has either influenced or been incorporated into subsequent international instruments (Ni, *supra* note 1, at 115). For example, Principle 12 of the 1992 Rio Declaration demanded mutual support between trade and environmental regimes." *Id*.

cooperative arrangement".[174]

This language both ignored efforts the US government had made to negotiate agreements on dolphin conservation and appeared to extend the "least GATT-inconsistent" interpretation of "necessary" to all of the Article XX categories.[175] The panel interpreted the word "necessary" as used in subparagraph (b)[176] to mean that the measure must not only be the least-GATT-inconsistent measure,[177] but that the United States must have imposed the measure after it had exhausted all other options.[178] The panel rejected the United States' Article XX (g) argument based on the failure of the measure at issue to satisfy the "primarily aimed at" requirement of that subparagraph, which had been previously interpreted in the cases including Thailand-Cigarettes.[179]

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[174] US-Tuna(Mexico), *supra* note 61, para. 5.28

[175] Knox, *supra* note 13, at 10.

[176] "The Panel of US-Tuna(EEC) articulated the test of Article XX (b) most completely, even though it is still less detailed than the tests that have been applied under Article XX (g): i) national measure to protect human, animal, or plant life or health (policy test), ii) necessary requirements, iii) requirements by the chapeau of Article XX, iv) consideration of alternative GATT-consistent measures." Meier, *supra* note 38, at 280.

[177] *See* US-Tuna(Mexico), *supra* note 61, para. 5.28.

[178] *See id*. para. 5.33, *cited by* Ala'i, *supra* note 159, at 1148.

[179] Ala'i, *id*.

The panel, while applying a three-step analysis in analysing Article XX (g),[180] applied the interpretation of prior panel in Canada-Salmon and Herring by concluding that "relating to" and "in conjunction with" are interpreted to mean "primarily aimed at".[181] It is unprecedented that the panel rejected to extend an exception to allow a trade measure aimed at forcing other countries to change their policies "including policies to protect living things",[182] evaluating the impact of such a measure on the "objectives of the General Agreement."[183]

Even though the results of the two US-Tuna cases, in which the trade-environment conflict first came to a head, were never adopted by GATT Council, the cases received widespread attention and

[180] For the more detatils, *see* Ala'i, *id*. at 1151.

[181] *See* US-Tuna(EEC), *supra* note 55, para. 5.22, *cited by* Ala'i, *id*. at 1152.

[182] *See* US-Tuna(EEC), *id*. para. 5.38, *cited by* Ala'i *id*. at 1153.

[183] *See* US-Tuna(EEC), *id*. para. 5.38, *cited by* Ala'i *id*.

caused many, particularly, environmentalists to view the GATT in a very unfavorable light.[184] However, US-Tuna(EEC) was the first case to recognize explicitly the importance of the environment and to refer to the "objective of sustainable development",[185] which foreshadowed a new era under the WTO establishing with dual objectives,[186] that is, free trade and the objective of sustainable development.[187]

In the case of US-Automobiles, the panel concluded that the Corporate Average Fuel Economy regulation cannot be justified by Article XX (g) or (d) of GATT given it chooses the separate foreign fleet accounting.

Reviewing the above cases, in Canadian Salmon-herring, Thailand-Cigarettes, and US-

[184] Emslie, *supra* note 56, at 511-12; For more details, *see* 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), *cited by* Rietvelt, *supra* note 19, at 483 n.68 (stating "Before the US-Tuna rulings, the prevailing view was that article XX of the GATT decided any conflicts between free-trade rule and environmental norms in favor of the latter. The US-Tuna 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 US-Tuna, environmentalists- and others with concerns about how the trading system balances competing values- saw the GATT as a regime dedicated to the triumph of free trade over all other human concerns.").

[185] US-Tuna(EEC), *supra* note 55, para. 5.42.

[186] "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 environement, and promotion of sustainable development on the other.", *See* Gains, *supra* note 9, at 739 [quoting Preamble of the (Marrakesh) Ministerial Decision on Trade and Environment, Apr. 15, 1994, GATT/MTN. TNC/MIN (94) /1/Rev.1], *cited by* Rietvelt, *supra* note 19, at 498.

[187] Ala'i, *supra* note 159, at 1153.

Tuna(Mexico), the panels based their decisions on narrow interpretations of the words "necessary", "related to", and "in conjunction with" in subparagraphs (b), (d), and (g) of Article XX.[188] Particularly, there has been no discussion in any of those decisions about the goals and policies that the Article XX exceptions generally seek to promote and protect within the multilateral trading system,[189] except in US-Tuna(EEC), where the panel refers to the "objectives of the General Agreement", the importance of the "sustainable development", and the "environment".[190]

Such as, under Article XX (b), (d), and (g), the standards deciding its justification would be "the least-restrictive means test."[191] It was commented that such a strict interpretation set a "high hurdle for environmental policies" because a policy approach to intrude less on trade is always conceivable and therefore in some sense available.[192] Thus, under the (pre-WTO) GATT mechanism, the trade-related

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[188] Ala'i, *id*. at 1154.

[189] *Id*.

[190] US-Tuna(EEC), *supra* note 55, para. 5.38.

[191] *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 338 (2d ed. 1999).

[192] ESTY, *supra* note 1, at 48.

measure for environmental protection has had difficulties in securing recognition with its legitimacy.[193]

It also seems difficult to induce case law on interpretation of trade measures related to environmental protection from the conclusions of panels under the GATT mechanism. Reviewing the trade disputes related to environmental measures under the GATT, it is found that the interpretations of Article XX (b), (d), (g) and the chapeau are incoherent and unpredictable. Even though there does not seem to be a problem in terms that panels of GATT do not have to follow the principle of *stare decisis,*[194] it will be a crucial issue from the viewpoint of legal stability and predictability in the application of law.

B. Judicial Interpretation under WTO Mechanism

1. General

[193] *See* TREBILCOCK & HOWSE, *supra* note 191, at 338 (stating "There have, however, been comments that those definitions do not seem to pose an insurmountable threat to environmental measures: For example, even in the context of the US-Tuna case, the United States arguably had exhausted available alternative measures by pursuing the tuna problem with Mexico in the context of both bilateral and regional negotiations.") Hudnall, *supra* note 30, at 188.

[194] For the issue of *stare decisis* in the current WTO dispute settlement process, *see* Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-precedent Rule in International Trade Law-Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N. C. J. INT'L L. & COM. REG. 487, 487-519 (2004) (Overviewing the issue of *stare decisis* in the current WTO dispute settlement process and proposing the way to institute *stare decisis* within the process).

Since the WTO was launched, several cases including US-Gasoline,[195] US-Shrimp and EC-Asbestos[196] handled by the dispute settlement procedures focused mainly on general exceptions, the most-favored nation treatment, national treatment, the TBT Agreement and the SPS Agreement. Comparing jurisprudence of the WTO about these cases with that of the GATT, the Dispute Settlement Body at the WTO is more positive about legitimating trade-related measures for environmental protection through the judicial interpretation of general exceptions than GATT.

For instance, in the case of US-Shrimp and EC-Asbestos, the Appellate Body made it clear that interpretation and application of the Article XX is necessary to settle disputes regarding trade-related environmental measures until the new measures from the Environmental Committee are made,[197] and applying the exemption in a way that has renewed both debate and controversy surrounding the relationship between trade and environment.[198]

2. US-Gasoline

The main issue of the case of US-Gasoline was whether the US gasoline regulation violated Article I,

[195] WTO Appellate Body Report on United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter US-Gasoline AB Report].

[196] EC-Asbestos AB Report, *supra* note 61.

[197] US-Shrimp AB Report, *supra* note 25, para. 155.

[198] US-Shrimp AB Report, para. 118, quoting the US-Gasoline AB Report, *supra* note 195, at 22.

Article III, Article XX of the GATT 1994 and Article II of the TBT Agreement.[199] The Appellate Body, applying a "two-tier approach",[200] concluded that US measures were found to satisfy Article XX(g), but to violate Article XX[201] because the method of making standards of gasoline rule did not meet the requirements of the chapeau of the Article XX[202] which ensures that exceptions in GATT Article XX are not abused or misused,[203] that is, the measure is not a "disguised restriction on international trade".[204]

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[199] TBT Agreement, *supra* note 77, art II (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies).

[200] The Appellate Body in its analysis of this case created a two-tier(prong) test in identifying whether a measure complies with Article XX. "First, the Appellate Body evaluates if a measure fulfills the requirements of any of the subparagraphs, that is, evaluates the baseline establishment rule under the requirements of subparagraph (g) of Article XX. If a measure complies with any of the subparagraphs, the Appellate Body then examines if the manner in which the measure is applied complies with the chapeau of Article XX." US-Gasoline AB Report, *supra* note 195, at 22, *cited by* Calderin, *supra* note 3, at 54 n.99.

[201] With respect to the Article XX defense, the panel had concluded that "i) the U.S. rule could not be justified under Article XX (b) as 'necessary to protect human ... health' because the rule had at its disposal other means less inconsistent with GATT to accomplish the same health and environmental goals, and ii) the EPA rule could not be justified under Article XX (g) as 'relating to' the conservation of 'exhaustible natural resources' since affording treatment to imports in accordance with Article III:4 would not necessarily prevent the attainment of the desired level of conservation of fair quality under the rule". US-Gasoline Panel Report, *supra* note 57, paras. 6.26, 6.28, 6.40, *cited by* Alexander Stewart Choinski, Symposium, *Anatomy of a Controversy: The Balance of Political Forces Behind Implementation of the WTO's Gasoline Decision*, 33 LAW & POL'Y INT'L BUS. 569, 590 (2002).

[202] US-Gasoline, AB Report *supra* note 195, at 26-27.

[203] *Id*. at 22.

[204] *Id*. at 20.

In the process,[205] the Appellate Body cleared away two obstacles to using Article XX(g) that dated back to the US-Tuna report[206]: i) the least GATT-inconsistent test could not be imported into Article XX(g)[207]; ii) Article XX(g) language "in conjunction with restrictions on domestic production or consumption" could not be interpreted to be "primarily aimed at" making the domestic restrictions effective.[208] Instead, the language required only "even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources".[209]

Regarding "relating to", the Appellate Body interpreted the term as requiring a "substantial relationship" of the measure and the conservation of resources and did not overload it with the consideration of the objectives of the GATT,[210] which was regarded as a step towards a more

[205] The test that the Panel and the Appellate Body have applied when considering Article XX(g) in US-Gasoline can be consolidated: "i) definition of petroleum as natural resources, ii) measure's aim, iii) national measure's effect in conjunction with restrictions on domestic production or consumption, iv) requirements by the chapeau of Article XX v) jurisdictional requirements, vi) consideration of alternative course of action, vii) resolution by international agreement." Meier, *supra* note 38, at 280-281.

[206] US-Tuna(Mexico), *supra* note 61, para. 7.1; US-Tuna(EEC), *supra* note 55, paras. 6.1, 5.28.

[207] US-Gasoline AB Report, *supra* note 195, at 15-16.

[208] *Id*. at 19-20.

[209] *Id*. at 19-21, *cited by* Knox, *supra* note 13, at 33.

[210] US-Gasoline AB Report, *supra* note 195, at 19, *cited by* Bree, *supra* note 27, at 113.

environmental friendly reading of Article XX (g).[211] Such as, the Appellate Body stated that Article XX (g) requires "even-handness" and not "identity of treatment", and so long as domestic restrictions were also subject to equivalent restrictions, then the requirements of subparagraph (g) as indicated by the words "in conjunction with" were satisfied.[212] This was a significant departure from prior panel decisions under the GATT mechanism and is a signal that the Appellate Body does not intend to continue on the "narrow interpretative path" of prior panels with regard to Article XX (g).[213]

The Appellate Body then turned to the interpretation of the Article XX chapeau and stated that while the requirements of the subparagraph (g) were applicable to the measure itself, that is, the "baseline establishment rule", the chapeau "by its express terms" addresses "the manner in which that measure is applied",[214] expanding the scope of Article XX by holding that the Vienna Convention[215] requires that

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[211] DAVID HUNTER Et Al., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1196, (1196), Mark Edwards Foster, *Trade and Environment: Making Room for Environmental Trade Measures within the GATT*, 71 SOUTHERN CAL. L. REV. 393, 430 (1997-98), *cited by* Bree, *supra* note 27, at 113.

[212] US-Gasoline AB Report, *supra* note 195, at 20-21, *cited by* Ala'i, *supra* note 159, at 1159.

[213] Ala'i *id.* at 1158-1159.

[214] US-Gasoline AB Report, *supra* note 195, at 22, *cited by* Ala'i, *id.* at 1159.

[215] For the critics to the excessive reliance upon the Vienna Convention in interpretation from the viewpoint of interpretative approach of international treaty, *see* Knox, *supra* note 13, at 47-74 (stating that a greater reliance upon Article 31(3) of the Vienna Convention instead of an ad hoc assortment of interpretive tools including the Appellate Body's adoption in Shrimp-Turtle would not provide indisputable measures to every issue).

each Article XX subparagraph imposes a different burden based on the different words in the statute,[216] and each subparagraph must be interpreted specifically based on the specific facts of each case.[217] Interpretating the term "a disguised restriction on international trade",[218] the Appellate Body noted that the same considerations evaluated under the tests for "arbitrary and unjustifiable discrimination[219] "should also be considered when determining whether a measure amounts to a "disguised restrictions", but that the main focus for the latter test should be evaluating whether the measure represents "abuse or illegitimate use" of the Article XX exceptions.[220]

Interpreting the Article XX's chapeau, the Appellate Body, incorporating a "balancing test" to

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[216] US-Gasoline AB Report, *supra* note 195, at 17, *cited by* Ala'i, *supra* note 159, at 1160.

[217] US-Gasoline AB Report, *id*. *cited by* Ala'i, *id*. at 1160.

[218] The Appellate Body found that the U.S. regulations constituted a disguised restriction on international trade because the United States had not shown any attempt to mitigate such discrimination or alleviate the costs imposed by the regulations on foreign gasoline producers as it had for domestic producers. US-Gasoline AB Report, *supra* note 195, at 28, *cited by* Reif & Eckert, *supra* note 51, at 697.

[219] The Appellate Body, in making the "unjustifiable discrimination" determination, underscored the fact that the United States had "more than one alternative course of action available … in promulgating regulations implementing the CAA "that were less inconsistent with GATT(US-Gasoline AB Report, *supra* note 195, para. 4.10, *cited by* Choinski, *supra* note 201, at 591-92). Had it chosen such alternative courses, the United States could have avoided subjecting imported gasoline to the discriminatory treatment that resulted from the imposition of more exacting statutory baselines. Choinski, *id*. at 592.

[220] US-Gasolilne AB report, *supra* note 195, at 25, *cited by* Reif & Eckert, *supra* note 51, at 697.

balance Article XX interests with the trade liberalization goals of the GATT 1994 in each case that comes before it,[221] which has been followed by the later cases,[222] noted that the United States had not tried to cooperate with concerned countries to address the administrative problems and that it appeared to have disregarded the potential financial burdens on foreign refiners.[223] It further pointed out that if Article XX exceptions are not to be abused or misused, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties and rights of the parties concerned.[224]

Although the Appellate Body ruled against regulations whose aim was environmental protection and preservation,[225] the decision was estimated to be environmentally conscious and to imply that the desired goal of the WTO was to protect and preserve the environment[226] in an open, equitable and

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[221] Ala'i, *supra* note 159, at 1162.

[222] *See*, for example, US-Shrimp AB Report, *supra* note 25, para. 15.6; WTO Dispute Settlement Panel Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of DSU by Malaysia, WTO Doc. WT/DS58/RW, para. 156 (adopted as uphelded by Appellate Body Report, Nov. 21, 2001) [hereinafter US-Shrimp (21.5) Panel Report].

[223] The U.S. government had argued on appeal that allowing individual baselines for foreign refiners would have caused administrative difficulties and that imposing a uniform statutory baseline on all domestic refiners would have required to bear large financial burdens. US-Gasoline AB Report, *supra* note 195, at 25.

[224] *Id*.

[225] US-Gasoline AB Report, *supra* note 195, at 29-30.

[226] The Appellate Body pointed out that in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade

nondiscriminatory fashion if possible.[227]

3. US-Shrimp

Like the previous US-Tuna disputes under the GATT system, the main battlefield in the US-Shrimp cases rested on the interpretation of GATT Article XX, focusing on the environmental exceptions in paragraphs (b), (g), and its chapeau,[228] and on whether there was a geographic or jurisdictional limitation on paragraph (b) and (g), or whether a member could invoke those exceptions to protect environmental interests beyond its territory.[229] Even though the panel in US-Tuna(Mexico) used the drafting history to decide that nothing had changed in the last decades,[230] the Appellate Body[231] explicitly acknowledged the need to "broaden the scope of the environmental exception" due to raising international concerns about the environment.[232] Particularly, the report not only acknowledged the "principle of sustainable

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and the environment. US-Gasoline AB Report, *id*.

[227] Calderin, *supra* note 3, at 54.

[228] US-Shrimp AB Report, *supra* note 25, paras. 111-188, *cited by* Ni, *supra* note 1, at 116.

[229] US-Shrimp Panel Report, *supra* note 20, paras. 3.183-3.234, *cited by* Ni, *id*.

[230] US-Tuna(Mexico), *supra* note 61, para. 5.26 [concerning the question whether the protecting of extra jurisdictional living beings can be justified by Article XX (b)], *cited by* Bree, *supra* note 27, 109.

[231] *See* US-Shrimp AB Report, *supra* note 25, para. 98.

[232] *See* Bree, *supra* note 27, at 109.

development" as "generally accepted" but also "fundamentally based a part of its analysis on this principle".[233]

In the case that marks perhaps "one of the most complicated and convoluted legal analysis ever rendered",[234] the Appellate Body, applying "customary rules of interpretation of international law",[235] and then a two-tier analysis[236] to Article XX as in US-Gasoline,[237] held that analysis of an Article XX exception should initially begin with the specific exception claimed, and that the chapeau addresses only the application of a measure[238] that has been determined to fall within a specific exception.[239]

The Appellate Body concluded: The United States' measure[240] to protect sea turtles serves an

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[233] *Id*.

[234] Rietvelt, *supra* note 19, at 474.

[235] US-Shrimp AB Report, *supra* note 25, para. 114.

[236] This sequential analysis reflects the "fundamental structure and logic of Article XX, because the measure must first meet the specific requirements of a given exception before it is examined under the broad standards of the Chapeau". Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent with the GATT and the TRIPs Agreement?*, 17 AM. U. INT'L L. REV. 459, 486-487 (2002).

[237] US-Gasoline AB Report, *supra* note 195, at 22.

[238] In contrast to the Panel's "chapeau-down" approach, the Appellate Body established this proper sequence for carrying out an analysis under Article XX. Rietvelt, *supra* note 19, at 484.

[239] Knox, *supra* note 13, at 34.

[240] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990,

environmental objective that is recognized as legitimate under paragraph (g) of the Article XX of the GATT 1994.[241] In its consideration of whether turtles were covered by the exception for "natural resources" in Article XX (g), the Appellate Body found that the meaning of the words in the exception is not "'static'[242] … but is rather 'by definition, evolutionary'",[243] as in the Canadian Salmon-Herring case.[244] However, in the Canadian Salmon-Herring, the panel needed to note only that the "United States agreed that salmon and herring were exhaustible natural resources", and the two US-Tuna panel reports did not spend a single word on that problem, therefore, the US-Shrimp Appellate Body report was the first to thoroughly address whether "living resources" fall under the definition of "exhaustible natural resources".[245]

Pub. L. 101-162, Title VI, § 609, Nov. 21, 1989, 103, Stat. 1037 (codified at 16 U.S.C. 1037).

[241] The Appellate Body sought guidance from other external international instruments other than WTO Agreements such as the 1982 Convention on the Law of the Sea, the Convention on Biological Diversity, and the Resolution on Assistance to Developing Countries, which was adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, in attempting to define the term "natural resources". US-Shrimp AB Report, *supra* note 25, paras. 129-130, *cited by* Stewart & Johnson, *supra* note 162, at 34.

[242] In the past, the panels have accepted dolphins, clean air, and petroleum as exhaustible natural resources. Meier, *supra* note 38, at 280-281.

[243] Reif & Eckert, *supra* note 51, at 685 (footnotes omitted).

[244] Canada-Herring and Salmon, *supra* note 60, para. 4.4.

[245] Bree, *supra* note 27, at 106-107 (footnotes omitted).

Agreeing that Section 609 was a measure "relating to the conservation of exhaustible natural resources,[246] the Appellate Body concluded that the statute came within the exception in Article XX (g) despite the fact that Section 609 called for a unilateral ban on imports on the United States.[247] These types of attempts to influence production and process methods outside the jurisdiction of the importing country have been anathema to many in the GATT community, and some have since expressed "alarm that the Appellate Body decision apparently allows the use of these process standards".[248]

Regarding the term "relating to", the Appellate Body, overruling the US-Tuna Report,[249] interpreted the term similarly to how it had in the US-Gasoline dispute,[250] which fulfills the "self-imposed requirements of treaty interpretation", as it reflects the ordinary meaning of the terms, to read in their context, and in the light of the object and purpose of the GATT.[251] Analysing the last clause of Article XX (g), which requires that the measures at issue "are made effective in conjunction with restrictions on

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[246] US-Shrimp AB Report, *supra* note 25, para. 145, *cited by* Howard F. Chang, *Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT*, 8 CHAP. L. REV. 25, 35 (2005).

[247] Chang, *id*. at 35.

[248] *Id*.

[249] US-Shrimp AB Report, *supra* note 25, para. 118.

[250] Bree, *supra* note 27, at 113.

[251] Bree, *id*. at 114.

domestic production and consumption", the Appellate Body, noting that the US legislation imposed similar restrictions both on US shrimp trawl vessels and shrimp importers,[252] concluded: it was "in principle, … an even-handed measure".[253] As such, the interpretation of Article XX (g) has been consistent with the Appellate Body Report in the US-Gasoline case, but has incorporated "new perspectives that are consistent with and can be related to principles of international environmental law".[254]

This measure, however, has been enforced by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX: because in relation with the manner of implementation of the law it is "more concerned with effectively influencing WTO members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers"[255] and, more importantly, because the United States failed to engage in international negotiations[256] with shrimp

[252] Bree, *id*. at 115.

[253] US-Shrimp AB Report, *supra* note 25, para. 144; Bree, *id*. at 115.

[254] Bree, *supra* note 27, at 115.

[255] US-Shrimp AB Report, *supra* note 25, at 165.

[256] "Thus, the Appellate Body incorporated this mandate into the Shrimp case by equating the failure of the United States to pursue negotiations with Asian nations with arbitrary and unjustifiable discrimination." Ni, *supra* note 1, at 112.

exporting countries before[257] imposing the embargo.[258]

Examining the US measures first with regard to the prohibition against unjustifiable or arbitrary discrimination,[259] in interpretation of the Article XX chapeau, the Appellate Body declared that it was enough that the measure be held inconsistent with Article XX because Section 609[260] constituted both unjustifiable and arbitrary discrimination,[261] without specifically addressing the issue of whether the statute, in fact, constituted a "disguised restriction on international trade".[262] This reasoning of the

[257] For the interpretation issue of the term "before" herewith, in US-Shrimp (21.5) Panel Report, *supra* note 232, and WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of DSU by Malaysia, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001), *reprinted in* 41 I.L.M. 149 (Jan. 2002) [hereinafter US-Shrimp (21.5) AB Report], *see* Ni, *supra* note 1, at 123-29 (stating that the Panel declined to confirm the superiority of multilateral approaches over unilateral means, instead of clarifying the legal implications of the term "before", and the Appellate Body did not expressively deal with this critical issue in its review).

[258] US-Shrimp AB Report, *supra* note 25, paras. 166-172.

[259] *Id*. para. 160.

[260] Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988 (1989) [codified at 16 U.S.C. § 1537 (1994)]. This provision banned the importation into the United States of shrimp harvested with technology that could adversely affect certain sea turtles, (Id.), with the provided exemptions for imports from nations that were certified to have a regulatory program and average rates of incidental turtle takings comparable to those of the United States and for nations where particular fishing environment did not pose a threat to sea turtles. *Id.*, cited by Rief & Eckert, *supra* note 51, at 683.

[261] Dailey, *supra* note 123, at 374, *cited by* Rietvelt, *supra* note 19, at 488.

[262] Dailey, *id*.

decision was in compliance with reasoning in the Appellate Body Report in the US-Gasoline, [263] and has been followed by the EC-Asbestos.[264]

In the process, the Appellate Body, noting that the discrimination in Article XX is different in its nature and quality from the discrimination in the treatment of products in the meaning of Article I, III, XI,[265] as already held in the US-Gasoline, looked at the actual application of the US import ban and concluded that the "cumulative effect" of the differences[266] in the means of application of Section 609 constituted an "unjustifiable discrimination".[267] The Appellate Body based its finding of arbitrary discrimination on two points, which is significantly briefer than the one concerning unjustifiable discrimination:[268] i) the rigidity and inflexibility of the certification process and ii) the lack of

[263] *See* EC-Hormones AB Report, *supra* note 36, para. 239.

[264] *See* Rief & Eckert, *supra* note 52, at 696.

[265] US-Shrimp AB Report, *supra* note 25, para. 142, *cited by* Bree, *supra* note 27, at 120-121.

[266] The Appellate Body criticized the following features of the US measures in its actual application: "i) coercing other members to adopt essentially the same regulatory program; ii) failing to engage in serious multilateral negotiations with the objective of concluding bi-or multilateral agreements for the protection of sea turtles; (ii a) the United States concluded one regional agreement, but did not negotiate with other countries; iii) countries desiring certification under Section 609 were treated differently". Bree, *supra* note 27, at 121.

[267] US-Shrimp AB Report, *supra* note 25, para. 176, *cited by* Bree, *supra* note 27, at 120-121.

[268] Bree, *supra* note 27, at 127.

transparency,[269] predictability, and thus, due process and basic fairness in the certification process.[270]

While, in general, the parties to the US-Shrimp 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 of the dual requirements is debated seriously[271] due to its ambiguous language.[272] The Appellate Body read the chapeau as giving it broad powers[273] to strike a "balance" or draw a " line of

[269] It was indicated to be noteworthy that the lack of transparency was one of the complaints concerning the WTO dispute settlement procedure. Bree, *id*. at 127 n.171.

[270] US-Shrimp AB Report, *supra* note 25, paras. 177-84, *cited by* Bree, *id*. at 127.

[271] Bree, *id*. at 106.

[272] SPS Agreement(art. 5.5) provides more clearly than the GATT provisions: "[M]ember shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade …" EC-Hormones Panel interpreted this provision in line with the standards of the chapeau of Article XX of the GATT 1994 quoting the Appellate Body Report in the US-Gasoline (EC-Hormones Panel Report(US), *supra* note 99, paras. 8.215-8.216).
Against this interpretation by the Panel, the Appellate Body, considering that there are structural differences between the standards of Article 5.5 of the SPS Agreement(*Id*. para.239), found that the question whether arbitrary or unjustifiable differences or distinctions in levels of protections established by a Member do in fact result in discrimination or a disguised restriction in international trade should be solved in the circumstance of each individual case. *Id*. para. 240.

[273] Regarding interpretation of the chapeau of Article XX in US-Shrimp, Rief & Eckert criticized: "the Appellate Body's finding that ... illustrates the wide latitude for panel or Appellate Body interpretation of provisions like Article XX. This holding opens the door to the potential creation of a costly and lengthy administrative hurdle that lacks any basis in the language of Article XX. … the Appellate Body's interpretation of the opening paragraph of Article XX has provided dispute settlement panel with increased discretion to uphold or strike down legitimate health and safety regulations depending primarily on a particular panel's view of the facts and circumstances of a case." Reif & Eckert,

equilibrium",[274] between the environmental interests protected by the exceptions in Article XX and the trade interests promoted by the "substantive" provisions of GATT,[275] that is, "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".[276] While this "balancing test" resembles those proposed by some environmental critics, it suffers from the "unpredictability"[277] inherent in all balancing tests.[278]

The decision has also the important meaning as the GATT/WTO first case to treat with the issue of nongovernmental amicus submission[279] in dispute settlement proceedings.[280] The Appellate Body held

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supra note 51, at 693-694.

[274] For the flexible location of the line of equilibrium, *see* US-Shrimp AB Report, *supra* note 25, para 159. (ruling "[t]he location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging ; the line moves as the kind and the shape of the measures at stake vary as the facts making up specific cases differ"); *see* also US-Shrimp (21.5) Panel Report, *supra* note 222, para. 5.51 (ruling "the position of the line itself depends on the type of measure imposed and on the particular circumstance of this case").

[275] Knox, *supra* note 13, at 37.

[276] US-Shrimp AB Report, *supra* note 25, para. 15.6, *cited by* Rietvelt, *supra* note 19, at 486.

[277] *See* Rief & Eckert, *supra* note 52, at 693-694.

[278] Knox, *supra* note 13, at 37.

[279] The Center for Marine Conservation ("CMC") and the Center for International Environmental Law("CIEL") jointly submitted an amicus brief while the World Wide Fund for Nature("WFN") filed an independent amicus brief. *See* US-Shrimp Panel Report, *supra* note 20, para. 3.129.

[280] *Id*. para. 3.129.

that the NGO's amicus briefs were acceptable in panel proceedings,[281] stating that "those briefs formed part of the appellant's submission, and observed that it is for a participant in an appeal to determine for itself what to include in its submission",[282] which was followed in other later cases.[283]

Regarding the jurisdiction problem,[284] although it left open the possibility that Article XX(g) has a jurisdictional limitation[285] it would be easier to meet than that[286] imposed by the US-Tuna panels.[287] The

[281] US-Shrimp AB Report, *supra* note 25, para. 187.

[282] *Id*. para. 81.

[283] The cases are Thailand-H Beams, US-Shrimp(21.5-Malaysia) (*See* WTO Appellate Body Report on European Communities-Trade Description of Sardines, WT/DS231/AB/R (adopted Oct. 23, 2002) [hereinafter EC-Sardines AB Report], para. 156 nn.56-57), EC-Asbestos, US-Lead and Bismuth II. [WTO Appellate Body Report on Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the united Kingdom, WT/DS138/AB/R (adopted June 7, 2000), *cited by* Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143, 269 (2003).

[284] In US-Tuna(Mexico), relying on the reasoning of the Canadian Salmon-Herring Report (Canadian Herring and Salmon, *supra* note 60, para. 4.6), the Panel held that extraterritorial enforcement of any regulation is contrary to GATT policies [US-Tuna(Mexico), *supra* note 61, *cited by* Rietvelt, *supra* note 19, at 483 n.68]. In US-Tuna(EEC), the Panel backed off from its somewhat rigid stance, however, by reopening the possibility that countries may enforce environmental regulation abroad, but only if doing so will not infringe upon the sovereignty of other member countries. US-Tuna(EEC) Panel Report, 33 I. L. M. 830 (1994), *cited by* Rietvelt, *supra* note 19, at 483 n.68.

[285] The Appellate Body, avoiding dealing with the jurisdiction of extraterritorial application of environmental trade measures by the United States (*see* US-Shrimp AB Report, *supra* note 25, para. 133), considered the trade ban on shrimp product to be a measure in compliance with the provisions of Article XX(g). *Id*. paras, 125-145.

[286] US-Tuna(EEC) Panel Report, *supra* note 55, para. 5.28; US-Tuna(Mexico) Panel Report, *supra* note 61, para. 5.28.

US-Shrimp seemed to make it clear that MEA-mandated trade restrictions against MEA parties would satisfy the chapeau, since in such cases the parties themselves would have demarcated their own "line of equilibrium" between trade and environmental concerns,[288] even though it has sometimes been estimated to remain doubtful that other trade restrictions, especially if aimed at an extrajurisdictional resource, would survive the chapeau.[289]

The Appellate Body, with regard to the trade measures based on PPMs, reversing the legal interpretation of the panel,[290] concluded that members may restrict imports based on the method of production (that is, the method of shrimp harvest), which can be justified with the Article XX provided

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[287] Knox, *supra* note 13, at 35.

[288] For the primary reliance of the Appellate Body on an extratextual principle to read the chapeau, *see* Knox, *supra* note 13, at 56 (stating that the Appellate Body, making little or no effort to find the ordinary meaning of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade", read the chapeau as giving it broad powers to strike a balance or find a "line of equilibrium" between trade and environmental interests).

[289] *See* Knox, *supra* note 13, at 38-39; Rietvelt, *supra* note 19, at 489 (stating "... 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 interpretations of the chapeau...").

[290] The panel examined the U.S. measure under the Section 609 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 ", and finally 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. *See* Rietvelt, *supra* note 19, at 482.

that it is not implemented in an arbitrary or discriminatory manner.[291]

Ultimately, while the Appellate Body concluded that the US import ban was not justified under GATT Article XX,[292] it nonetheless applied Article XX "in a manner more accommodating to US trade restrictions than earlier GATT reports".[293] The US-Shrimp appellate decision strengthens the right of the state to adopt conservation measures by a "liberal interpretation of exhaustible natural resources",[294] indicating that "unilateralism may, in fact, be a common aspect and application of Article XX (g) justifiable measures",[295] even though the practical application of such an assertion is open for debate.[296]

The Appellate Body also called for multilateral solutions to respond to concern over endangered sea turtles, which has lead WTO panels to have repeatedly referred to the need to pursue multilateral

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[291] Against this decision, complaint, Thailand, criticized highly that the right to discriminate based on "like product" had not been accepted in the WTO mechanism and that the Appellate Body, on its own initiative, had altered the balance of rights and obligations under the WTO Agreement. WTO Dispute Settlement Body, *Minutes of Meeting*, held in the centre William Rappard on Nov. 6, 1998, WTO Doc. WT/DSB/M/50 (Dec. 14, 1998).

[292] US-Shrimp AB Report, *supra* note 25, paras. 154-155, *cited by* Shaffer, *supra* note 7, at 39.

[293] The Appellate Body found that Article XX must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment". *Id*.

[294] Rietvelt, *supra* note 19, at 488.

[295] *See* US-Shrimp AB Report, *supra* note 25, at 121, *cited by* Rietvelt, *supra* note 19, at 488.

[296] Rietvelt, *id*. at 489.

solutions to environmental problems,[297] by citing to the Inter-American Convention for the Protections and Conservation of Sea Turtles.[298] As such, the Appellate Body recognizes the "growing importance of the environment, sustainable development, and Article XX within the WTO system".[299]

4. US-Shrimp (21.5)

With regard to the US implementation of the Appellate Body's decision, the Panel ruled that the United States, in revising the guidelines implementing Section 609,[300] had addressed the concerns set out

[297] With regard to the preference for multilateralism in the WTO to deal with environmental issues, it is arguably problematic for the Appellate Body to recommend a multilateral approach when trade-related measures in an MEA could be challenged under the DSU. The preference for multilateral solutions in the WTO, however, has been arguably weakened by the Appellate Body's implicit nod of acceptance for multilateral trade measures outside of MEA (*See* Shaw & Schwartz, *supra* note 21, at 145). However, the Appellate Body's eagerness to adopt international environmental rules would be consistent with the provisions on treaty interpretation in the Understanding on Rules and Procedures Governing the Settlement of Dispute that require taking into account customary norms of international law [*see* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU], *cited by* Ni, *supra* note 1, at 120], as stipulated in the Vienna Convention on the Law of the Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention], *cited by* Ni, *id.* at 120.

[298] This is a multi-national convention negotiated by the United States with some of the affected countries for the protection and conservation of sea turtles. Inter-American Convention for the Protection and Convention of Sea Turtles, opened for signature Dec. 1, 1996, 37 I.L.M. 1246.

[299] Ala'i, *supra* note 159, at 1169.

[300] For the consideration of Section 609 as a "carrot" and a "stick" that would together serve to extend sea turtle

by the Appellate Body,[301] and reaffirmed that: the optional way for the parties to this dispute to contribute effectively to the protection of sea turtles[302] in a manner consistent with WTO objectives,[303] including sustainable development, would be to reach cooperative agreements[304] on integrated conservation strategies.

Regarding the cooperative agreements, the Panel and the Appellate Body read the Appellate Body decision[305] in US-Shrimp that the U.S government could impose the restrictions only after it made

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protection beyond the limited confines of U.S waters and its exclusive economic zone, *see* Rietvelt, *supra* note 19, at 479-480.

[301] *See* US-Shrimp AB Report, *supra* note 25, para. 98.

[302] For the sea turtles and shrimp trawling as the most wasteful commercial fishery in the world from the viewpoint of environmentalist, *see* Rietvelt, *supra* note 19, at 476-478.

[303] "Both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." WTO Agreement *supra* note 6, Preamble.

[304] The implementation panel interpreted that because the United States had an obligation to negotiate, but not necessarily, at this stage, an obligation to reach an international agreement. [US-Shrimp(21.5) Panel Report, *supra* note 222, para. 5.67], and thus the United States had to make "serious good faith efforts" to negotiate an international agreement, *id*. para. 5.86.

[305] For the different interpretation with regard to this point, *see* Ni, *supra* note 1, at 130, ("the US-Shrimp Decision was contextually interpreted to be unclear whether the Appellate Body intended to require the conclusion of an international agreement in order for the U.S. import ban to be valid, or whether the United States was merely obliged to make good faith efforts to negotiate with the complaining members.").

serious efforts in good faith[306] to negotiate an agreement on sea turtle conservation with all interested parties, not that it could impose the restrictions after an agreement was concluded.[307] After reviewing US efforts to reach an agreement, the panel concluded that the United States was in compliance with this requirement,[308] because the United States had entered into a binding agreement with Latin American countries even though it had failed to reach such an agreement with Malaysia.[309]

As such, the Appellate Body read the chapeau in consistence with the spirit of many of the environmental critics' proposals[310] by allowing the chapeau to justify unilateral measures – even a unilateral measure identical in many respects to the law that led to the US-Tuna decisions − as long as they are applied flexibly and in connection with good-faith[311] efforts to reach a multilateral agreement.[312]

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[306] For the significance of good faith, *see* US-Shrimp (21.5) Panel Report, *supra* note 222, para. 5.60 (stating "the notion of good faith... implies a continuity of efforts which... is the only way to address successfully the issue of conservation and protection of sea turtles through multilateral negotiations... even though the Appellate Body only refers to 'serious efforts', the notion of good faith efforts implies...").

[307] Knox, *supra* note 13, at 39.

[308] US-Shrimp (21.5) Panel Report, *supra* note 222, para. 5. 87.

[309] *Id*. para. 5.72-5.86.

[310] Knox, *supra* note 13, at 41.

[311] Malaysia, meanwhile, took the position that once it was in the process of negotiating with the United States, the United States should drop its ban on the importation of shrimp from Malaysia. The United States was of the view that it was negotiating in good faith and was entitled to maintain its ban until the negotiations resulted in an agreement. A WTO panel and the Appellate Body ruled against Malaysia.[US-Shrimp (21.5) AB Report, *supra* note 257, at 49-51,

The agreements cover, *inter alia*, the design, implementation and use of "turtle excluder devices" while taking into account the specific conditions in the different geographical areas concerned.[313]

Surrounding US-Shrimp case, some WTO members were afraid of the potential abuse of unilateral measures in the name environmental protection.[314] In order to clarify the relationship between the WTO and MEAs as well as to prevent abuse, two suggestions were made: i) to amend Article XX to accommodate the use of trade measures pursuant to MEAs; or ii) to make interpretation or understanding

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cited by Sydney M. Cone, III, *The Environment and the World Trade Organization*, 22 N.Y. L. SCH. J. INT'L & COMP. L. 245, 248-249 (2003)]. On the basis of the panel and Appellate Body reports, it was considered fair to state that, in the guise of raising procedural points under the relevant WTO agreements and rules, Malaysia was simply re-itigating the WTO decision calling for negotiations between Malaysia and the United States. Cone, *id*.

[312] Knox, *supra* note 13, at 41.

[313] *Id*, paras. 7.1-7.2.

[314] *See*, for example, Alan Oxley, *Implications of the Decisions in the WTO Shrimp Turtle Dispute*, Int'l Trade Strategies Ltd. (Feb. 2002), *at* http://www.tradeandenvironment.com/files/PDF/shrimp-turtle.pdf, *cited by* Rietvelt, *supra* note 19, at 493. (stating that 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); For additional arguments of what Oxley views as dangerous precedents made by the Appellate Body, *see id*. at 4, *cited by* Rietvelt, *id*. at 493 n.129 (listing: Article XX(g) can have extraterritorial reach ; A trade restriction can be imposed on a product if its processing method has negative environmental consequences; International declarations and conventions, regardless of their status, 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).

of Article XX.[315] They were suggested on the presumed basis of "*persona non grata* of unilateral measures in multilateral trade system", when the legitimate measures based on MEAs are acceptable under WTO and the relationship between WTO and MEAs is clarified, which will lead trade to multilateral system.[316]

5. EC-Asbestos

The case of EC-Asbestos,[317] "furthering the interpretation of WTO rules of importance to the trade and environment debate",[318] attracted attentions because the Appellate Body accepted French import ban as legitimate under Article XX(b) on the ground that it was a "necessary"[319] measure to achieve the

[315] Swiss Proposals to Clarify the WTO-MEA Relationship Based on the Principles of Mutual Supportiveness and Deference. WTO Committee on Trade and Environment, Clarification of the Relationship between the WTO and Multilateral Environmental Agreements, WTO Doc. WT/CTE/W/168 (19 October, 2000); WTO Committee on Trade and Environment, The Relationship Between the Provisions of the Multilateral Trading System and Multilateral Environemental Agreements(MEAs), WTO Doc. WT/CTE/W/139 (8 June, 2000).

[316] With these suggestions, there would be serious debates surrounding the issues about what criteria should be used to define a MEA and whether it is the role of the WTO to decide these criteria. *See* Shaw & Schwartz, *supra* note 21, at 149.

[317] EC-Asbestos AB Report, *supra* note 61, paras. 101-103.

[318] Shaw & Schwartz, *supra* note 21, at 150.

[319] The Appellate Body read Article XX(b) to incorporate a least GATT-inconsistent requirement that, without GATT-consistent measure, the party should use that which entails "the least degree of inconsistency with other GATT provisions". EC-Asbestos AB Report, *supra* note 61, para. 171.

legitimate goal of protecting human life and health that met the requirements of chapeau of Article XX.[320] With relation to the "necessary" test, the Appellate Body, referring approvingly to a GATT panel's decision in Thailand-Cigarettes,[321] stated that whether another WTO-consistent measure is "reasonably available" involves a "weighing and balancing process" that includes a consideration of "the extent to which the alternative measure contributes to the realization of the end pursued'".[322] The Appellate Body found that there were no less trade restrictive measures available that would achieve the same end as the import ban and, as a result, the measure was necessary under paragraph (b).[323]

From an environmental viewpoint, this decision is seen as proof of the more positive attitude of the Appellate Body toward the environment considering its inclusion of environmental measures.[324] This is in spite of the Appellate Body's conclusion of the "least GATT-inconsistent" gloss,[325] such as the US-

[320] For the criticism against this part of the decision by the panel from the view point of judicial economy, *See* Bhala & Gantz, *supra* note 112, at 517 (stating "[O]nce the Appellate Body determined that ... were not 'like product', there was no violation ..., and thus no absolute need to resort to the exception in Article XX. Arguably, the Article XX issue became moot. Nor would the Appellate Body's normal appreciation for 'judicial economy' seem to support the need for this portion of the decision").

[321] Thailand-Cigarettes, *supra* note 55, para. 75.

[322] EC-Asbestos AB Report, *supra* note 61, para. 172, *cited by* Reif & Eckert, *supra* note 51, at 689.

[323] *Id*. para. 175, *cited by* Reif & Eckert, *id*.

[324] Bhala & Gantz, *supra* note 112.

[325] US-Tuna(EEC), *supra* note55, para. 4.12; US-Tuna(Mexico), *supra* note 61, para. 4.4.

Tuna panels.[326] This finding was also read to be a signal to WTO to recognize that human health[327] is superior to exhaustible natural resources, which could be signaled by the Appellate Body's stating "'[t]he more vital or important [the] common interest or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends".[328]

Another notable point of view expressed by the Appellate Body is the arguably expanded test for physical characteristics to include toxicity in analyzing the "likeness" of a product in the Article III of GATT 1994. The Appellate Body, holding that the Panel should not have excluded "the health risks associated with chrysotile asbestos fibers from its examination of the physical properties of that product",[329] decided that carcinogenesis or toxicity is major characteristics of chrysotile asbestos fibers in defining "physical properties" of products that are likely to influence the competitive relationship between products in the marketplace.[330] The Appellate Body reversed the conclusion of the panel that asbestos

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[326] *See* EC-Asbestos AB Report, *supra* note 61, para. 171, *cited by* Knox, *supra* note 13, at 31-32.

[327] The EC-Asbestos was the first case out of the GATT/WTO cases to accept the member countries' measure to protect human health, since measures to protect human health in the Thailand-Cigarettes, however, the measure was not accepted under Article XX(b). *See* Thailand-Cigarettes, *supra* note 55, paras. 63, 75-77, 81.

[328] WTO Appellate Body Report on Korea-Mesures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R, para. 172 (adopted Jan. 10, 2001).

[329] EC-Asbestos AB Report, *supra* note 61, para. 116.

[330] *Id.* para. 114.

fibers and cement-based products and the products used in France as its substitute were "like products".[331]

The Appellate Body initially pointing out that the panel did not analyze the element of risk when comparing "like product",[332] utilized the same test as the Panel, the "market-based approach" to likeness with criteria of "physical properties, end-uses, consumers' tastes and habits, and tariff classification",[333] but did not agree with the manner in which the Panel applied the test:[334] The only similarities the Appellate Body found were a few isolated circumstances in which the end-uses for the products were same.[335] The Appellate Body commented that the analysis of end-uses and consumers' tastes and habits are particularly important under Article III considering the provision's concerns with competitive relationship in the marketplace.[336]

The matter has also taken on significance in that it was the first case[337] which enabled WTO Dispute

[331] *Id*. paras. 125-126, 132.

[332] EC-Asbestos AB Report, *supra* note 61, para. 85.

[333] *Id*. para. 110.

[334] *Id*. *cited by* Yavitz, *supra* note 150, at 59.

[335] *Id*. para. 125, *cited by* Yavitz, *id*. at 61.

[336] *Id*. para. 117, *cited by* Yavitz, *id*. at 60.

[337] This case regarding the TBT Agreement was accepted by European Communities-Trade Description of Sardines: The Appellate Body noted that EC-Asbestos established three criteria for a document to be a technical regulation; "i) The document must apply to an identifiable products. ii) The document must lay down characteristics of the product. iii) Compliance with the product characteristics must be mandatory." [EC-Sardines AB Report, *supra*

Settlement Body to go through TBT Agreement: The Appellate Body reached the conclusion that the French Decree is a technical regulation under the TBT Agreement,[338] because; the banning decree at issues, which on the face of it was not a technical regulation, was the document that laid down the characteristics of products containing asbestos fibers as well as applicable administrative provisions.[339] The analysis and application of the TBT Agreement in interpreting "like product" would be one of the main subjects on trade and environmental issues under the WTO world.[340]

Regarding the minimum standards of the TBT and SPS Agreements, the Appellate Body, affirming the EC-Hormones[341] Appellate Body's positive decision for the "autonomous right"[342] of WTO members

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note 283; WTO Dispute Panel Report on European Communities-Trade Description of Sardines, WT/DS231/R (circulated May 29, 2002, as modified by the Appellate Body Report, adopted Oct. 23, 2002) [hereinafter EC-Sardines Panel Report]]. The Appellate Body, relying on EC-Asbestos, noted that "a product does not necessarily have to be mentioned explicitly in a document for that product to be an identifiable product. Identifiable does not mean expressly identified." (EC-Sardines Panel Report, *id*. para. 7.41). The Appellate Body, furthermore, noted that, based on EC-Asbestos, "product characteristics include not only 'features and qualities intrinsic to the product', but also those that are related to it, such as 'means of identification'." Bhale & Gantz, *supra* note 283, at 273.

[338] EC-Asbesstos AB Report, *supra* note 61, para. 75.

[339] Shaw & Schwartz, *supra* note 21, at 151.

[340] Shaw & Schwartz, *id*. at 150.

[341] EC-Hormones AB Report, *supra* note 36.

[342] This right comes from one of three substantive principles which the Appellate Body in EC-Hormones, EC-Asbestos, and US-Shrimp looked beyond the text before it to cite, that is, "i) each WTO member has the right to determine its own level of protection of health and safety; ii) natural resources are generally understood to include

to determine their own level of protection of health,[343] emphasized the WTO members' own rights.[344] The Appellate Body, recognizing that scientific opinions can differ,[345] noted that parties need not only adopt measures consistent with the mainstream view in the scientific community.[346]

With respect to the preliminary procedural matter, the Appellate Body, on the basis of Article 16 (1) of the Working Procedures for Appellate Review,[347] issued instructions to non-party participants in the proceeding as to how they might apply for leave to file written briefs,[348] which went well beyond the limited approval given to NGO briefs in the course of US-Shrimp.[349] Even though the Appellate Body

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living natural resources; and iii) international environment measures should normally be based on multilateral agreement". For more details, *see* Knox, *supra* note 13, at 52-59.

[343] EC-Hormones AB Report, *supra* note 36, para. 177.

[344] *Id*. para. 168.

[345] The Appellate Body in EC-Hormones and Australia Salmon stated that an adequate assessment did not have to make a monolithic finding and could be presented both a mainstream and a divergent scientific view. *See* EC-Hormones AB Report, *supra* note 36, paras. 187, 194; Australia-Salmon AB Report, *supra* note 36, paras. 123-124.

[346] Knox, *supra* note 13, at 43.

[347] Article16 (1) provides: "[W]here a procedural quiestion arises … a division may adopt an appropriate procedure … provided that it is not inconsistent with the DSU …".

[348] For more detailed information, *see* Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, WT/DS135/9, Nov. 8, 2000.

[349] *See* US-Shrimp AB Report, *supra* note 25, paras. 50-52.

generated great controversy[350] by choosing not to review amici curiae briefs in making its decision after developing elaborate procedures,[351] for those concerned with the uneasy relationship between trade and the environment under the WTO, this is a case of some importance.[352]

This case was also the first case for the Appellate Body to examine the scope of Article XXIII:1(b) of the GATT, that is, the non-violation provision, where the Appellate Body, holding that, since Article XXIII:1(b) uses the term "any" measures, health measures are among those which may establish a cause of action under the provision,[353] rejected the EC's assertion there may be no nullification or impairment where the GATT Article XX exceptions related to "health objectives" are operable.[354]

6. Other Cases

There have been four dispute cases reviewed by the Appellate Body under the SPS agreement which

[350] Against this unusual action by the Appellate Body, the General Council instructed the Appellate Body to act "with extreme prudence" regarding the acceptance of briefs from non governmental organizations, [WTO Members Warn Appellate Body on Amicus Procedures, INSIDE U.S. TRADE, Dec. 1, 2000 (electronic edition) 1, *cited by* Bhala & Gantz, *supra* note 112, at 510], while the Appellate Body's denial of leave to all 11 NGOs that complied with its procedural requirements sparked a wave of protest by NGOs. Yavitz, *supra* note 150, at 56-57.

[351] *See* Yavitz, *id*. at 56 (footnotes omitted).

[352] *See* Bhala & Gantz, *supra* note 112.

[353] EC-Asbestos AB Report, *supra* note 61, para. 188.

[354] Bhala & Gantz, *supra* note 112, at 515.

are likely to be influential to trade and environment conflicts:

In EC-Hormones, the Appellate Body found that the EC measure to ban the sale of meat from cattle treated with hormones violated the SPS Agreement because it was not based on a risk assessment;[355] In Australia-Salmon, the Appellate Body found that Australia's import prohibition on fresh, chilled and frozen salmon to prevent fish-bone diseases from spreading into Australia's environment and affecting its fishing industry[356] violated the SPS Agreement, because it was not based on a proper risk assessment, constituted a disguised restriction on trade, and was more trade restrictive than necessary;[357] In Japan-Agricultural Products,[358] the Appellate Body concluded that the Japanese measure violated SPS Agreement because it was not based on an adequate risk assessment, was maintained without sufficient scientific evidence, and the regulations did not comply with the SPS Agreement's transparency requirements;[359] In Japan-Importation of Apples,[360] the Appellate Body found that Japan's phytosanitary

[355] EC-Hormones AB Report, *supra* note 36, para. 253

[356] Australia-Salmon AB Report, *supra* note 347, para, 2.

[357] *Id*. para. 279.

[358] The dispute was about the Japanese regulation that required exporters of fruits and nuts to submit to an extensive testing process on each new variety of fruit or nut intended to be shipped to Japan. Japan-Agricultural Products AB Report *supra* note 115, para, 2

[359] Japan-Agricultural Products, AB Report - para, 143

[360] The dispute was concerning whether Japanese phytosanitary measures on imported U.S. apples are inconsistent with its obligation under the SPS Agreement, GATT 1994, and the Agreement on Agriculture. WTO Appellate Body

measure at issue was maintained "without sufficient scientific evidence" and that was not imposed in respect of a situation "where relevant scientific evidence is insufficient".[361]

Regarding the "science requirement"[362] that the sanitary and phytosanitary measure should be based on scientific principle,[363] the Appellate Body in Japan-Agricultural Products interpreted that the provision required that there should be a rational or objective relationship between the SPS measure and the scientific evidence.[364] The Panel and Appellate Body concluded that Article 2.2 was being violated because Japan could not show that the quarantine and fumigation used for one variety of fruit or nut

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Report on Japan-Measures Affecting the Importation of Apples, WTO Doc. ET/DS245/AB/R (adopted Dec. 10, 2003) [hereinafter Japan-Importation of Apples AB Report], paras. 1-4.

[361] Japan-Importation of Apples AB Report, *id.* para. 243.

[362] For purposes of analysis, the provisions of the SPS Agreement can be broken down into nine key disciplines [Charnovitz, *supra* note 79, at 278-290]: i) "science requirement" (SPS Agreement, *supra* note 78, art. 2.2); ii) "requirement for a risk assessment" (SPS Agreement, *id*. art. 5.1); iii) "requirement for national regulatory consistency" (SPS Agreement, *id*. art. 5.5); iv) "the least trade restrictiveness requirement" (SPS Agreement, *id*. art. 5.6); v) "discipline to forbid arbitrary or unjustifiable discrimination" (SPS Agreement, *id*. art. 2.3); vi) "requirement to use international standards" (SPS Agreement, *id*. art. 3.1); vii) "discipline involving the recognition of equivalence" (SPS Agreement, *id*. art. 4.1); viii) "discipline regarding approval and inspection procedures" (SPS Agreement, *id*. art. 8); ix) "precautionary principle in relation with provisional measures" (SPS Agreement, *id*. art. 5.7).

[363] SPS Agreement, *id*. art. 2.2.

[364] Japan-Agricultural Products AB Report, *supra* note 115, para. 24

would be inadequate for other varieties.[365]

Regarding the requirement for a "risk assessment",[366] the requirement that the sanitary and phytosanitary measures should be based on[367] the risk assessment[368] has proven to be of central importance in enforcing the SPS Agreement, which has often been litigated in SPS-related WTO disputes[369] and consequently "resulting in a small body of case law".[370] The Appellate Body found that a risk assessment must find evidence of an ascertainable risk,[371] stating it will not be sufficient for

[365] Japan-Agricultural Products AB Report, *supra* note 115, para. 84; WTO Dispute Settle Panel Report on Japan-Measures Affecting Agricultural Products, WTO Doc. WT/DS76/R (circulated on Oct. 27, 1998, as modified by the Appellate Body Report, adopted Mar. 19, 1999) [hereinafter Japan-Agricultural Products Panel Report], paras. 8, 26-27.

[366] For the definition of the term "risk assessment, *see* SPS Agreement, *supra* note 78, Annex A, para. 4.

[367] The Appellate Body in EC-Hormones interpreting "based on" as a "substantive requirement" (EC-Hormones AB Report, *supra* note 36, para. 193), stated that the risk assessment had to "sufficiently warrant", "sufficiently support", "reasonably warrant", "reasonably support", or "rationally support" using the health measure, and that these must be an "objective relationship" or a "rational relationship" between the risk and the measure. Charnovitz, *supra* note 79, at 281-282 (footnote omitted).

[368] SPS Agreement, *supra* note 78, art. 5.1.

[369] *See* EC-Hormones AB Report, *supra* note 36, paras. 178-209; Australia-Salmon AB Report, *supra* note 36, paras. 112-138; Japan-Agricultural Products AB Report, *supra* note 115, paras. 109-114.

[370] Charnovitz, *supra* note 79, at 279

[371] EC-Hormones AB Report, *supra* note 36, para. 187; Australia-Salmon AB Report, *supra* note 36, para.125, *cited by* Charnovitz, *id*. at 280.

governments to impose regulations simply on the basis of the theoretical risk that underlines all scientific uncertainty.[372] In Australia-Salmon, the Appellate Body agreed that lending too much weight to "unknown and uncertain elements" in risk assessment is not proper under the SPS Agreement,[373] even though there is not any criterion on the magnitude of risk to maintain acceptable risk assessment.[374]

Regarding "the least trade restrictiveness requirement" that "sanitary and phytosanitary measures should not be more trade-restrictive than required to achieve their appropriate level of protection",[375] the Appellate Body interpreted Article 5.6: "i) government are obligated to determine and reveal their chosen level of protection to WTO panels so that SPS rules can be applied;[376] ii) in analysing an alternative measure, panels will consider whether it matches the intended level of protection, not the actual level of protection achieved by the SPS measure that is the target of the WTO lawsuit[377]; iii) the complaining country must show that the alternative measure exists".[378]

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[372] EC-Hormones AB Report, *supra* note 36, para. 186, *cited by* Charnovitz, *id*.

[373] Australia-Salmon AB Report, *supra* note 36, para. 129.

[374] *See id*. para. 124; EC-Hormones AB Report, *supra* note 36, para. 186.

[375] SPS Agreement, *supra* note 78, art. 5.6.

[376] Australia-Salmon AB Report, *supra* note 36, para. 206, *cited by* Charnovitz, *supra* note 79, at 285.

[377] Japan-Agricultural products AB Report, *supra* note 115, paras. 197-200, *cited by* Charnovitz, *id*.

[378] *Id*. paras. 126, 130, *cited by* Charnovitz, *id*.

With relation to the requirement to use international standards, by conforming to the international standard, a government's measure would be presumed to be complied with SPS rules, which would be rebuttable, however.[379] If a government chooses to pursue a level of health protection higher than the international standard, then it must meet all other requirements imposed by the SPS Agreement.[380]

Regarding "provisional measures", the Article 5.7 of the SPS Agreement[381] states that, where relevant scientific evidence is insufficient, a government may "provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information",[382] which provides a good window for introducing the so-called "precautionary principle".[383] The Japan-Agricultural Products was the first case to deal with the Article 5.7,[384] where Japan argued that "varietal testing could be considered

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[379] Charnovitz, *id.* at 286.

[380] SPS Agreement, *supra* note 78, art. 3.3.

[381] For the comment on the Article 5.7 as insufficient provisions, *see* Charnovitz, *supra* note 79, at 292 (commenting: "[p]recautionary principle should be written into the Article … word 'provisionally' is … objected to … some business groups and developing country … view Article 5.7 as a potential loophole that allows trade restrictions lacking a scientific basis") (footnotes omitted).

[382] SPS Agreement, *supra* note 78, art. 5.7.

[383] Charnovitz, *supra* note 79, at 288.

[384] Charnovitz, *id*.

a provisional measure",[385] against which the Appellate Body stated that Japan had not obtained information for an objective assessment as to whether fruit varieties manifest dissimiliar quarantine effects.[386] In EC-Hormones, the EC chose to invoke 5.1 instead of 5.7, by calling attention to the "precautionary principle",[387] which characterized as a "rule of customary international law",[388] against which the Panel[389] and the Appellate Body[390] stated and confirmed that even if it was part of customary international law, the precautionary principle would not override Article 5.1, particularly since the precautionary principle had been incorporated into Article 5.7.[391]

The SPS Agreement, as well as TBT Agreement, coming closer to the intention of environmental

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[385] Japan-Agricultural Products Panel Report, *supra* note 365, paras. 4.187-4.188.

[386] *See* Japan-Agricultural Products Panel Report, *id.* paras. 4.48-4.60; Japan-Agricultural Products AB Report, *supra* note 115, paras. 92-94, *cited by* Charnovitz, *supra* note 79, at 289.

[387] The Rio Declaration of 1992 was evaluated to make the most well-known formulation of the "precautionary approach: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradations." Charnovitz, *supra* note 79, at 293 (footnote omitted).

[388] Charnovitz, *supra* note 79, at 289 (footnote omitted).

[389] *See* EC-Hormones Panel Report(US), *supra* note 99, para. 8.157.

[390] *See* EC-Hormones AB Report, *supra* note 36, paras. 123-125.

[391] For some additional observations about the precautionary principle offered by the Appellate Body, *see* Charnovitz, *supra* note 79, at 289-290.

protection than other WTO agreements, could be more actively used for environmental protection and might allow national environmental measures[392] that GATT/WTO Dispute Settlement Body previously would have rejected, because Member countries could introduce or maintain trade-restrictive environmental measures as their positive rights, not as mere passive exceptions like in the GATT, even though the measures are not in compliance with other WTO agreements. As for now, in EC-Hormones,[393] EC-Asbestos,[394] and Japan-Agricultural Products,[395] Appellate Body recognized the WTO members' positive right to determine their own level of health protection.

C. WTO's Shift to More Environment-friendly Approaches

A careful look at the disputes under the WTO provisions shows that the WTO has substantially been developing interpretative principles for accommodating both trade and environmental concerns: A series of rulings by the WTO Dispute Settlement Body has established the "principle that trade rules do not

[392] For the conflicts between domestic environmental laws and TBT/SPS Agreement, *see* Knox, *supra* note 13, at 19-24.

[393] EC-Hormones AB Report, *supra* note 36, para. 177.

[394] EC-Asbestos AB Report, *supra* note 61, para. 168.

[395] *See* Japan-Agricultural Products AB Reports, *supra* note 115, para. 95-101.

stand in the way of legitimate environmental regulation".[396]

The Appellate Body in US-Gasoline, the first case under the WTO mechanism, ruled that US restrictions on importing gasoline from member countries cannot be justified.[397] Even though environmentalists have charged that the WTO infringed the US right to protect the environment, the Appellate Body concluded that the US regulations for the conservation of exhaustible natural resources were themselves legitimate[398] under Article XX of the GATT.[399] The Appellate Body merely did not acknowledge the US procedural provisions which were against the principle of national treatment by requiring stricter standards for foreign refiners than domestic ones.[400] The Appellate Body did not single-

[396] About fixing this kind of principles in the WTO system, environmentalists say that "although we lost in combats, we won the war". Michael M. Weinstein & Steve Charnovitz, *The Greening of the WTO*, 80 FOREIGN AFF. 147, 151 (2001).

[397] US-Gasoline AB Report, *supra* note 195, at 26-27.

[398] For the favorable comment on this decision to affirm the U.S. right to protect the environment as a significant finding by the USTR, *see* Dispute Settlements in the WTO: Hearing Before the Subcomm.on Int'l trade on the S. Comm.on Fin., 106th Cong. 6 (2000) (Testimony of Ambassdor Charlene Barshefsky, U.S. Trade Representive).

[399] US-Gasoline Panel Report, *supra* note 57, para. 5.1.

[400] The Appellate Body's following conclusions are particularly of symbolic significance from the viewpoints of the environmental protection under the WTO: "WTO Members have a large measure of autonomy to determine their own policies on the environment, 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." US-Gasoline AB Report, *supra* note 195, at 19 (April 29, 1996) *cited by* Rietvelt, *supra* note 19, at 483.

handedly damage the US right to protect environment.

The next case was US-Shrimp, in which the WTO panel[401] and Appellate Body concluded that the US measure based on the harvest devices not designed to protect endangered sea turtles was not justified under the WTO provisions.[402] The Appellate Body turned its serious attention to the ordinary meaning of the language in GATT Article XX[403] and concluded that the US regulation itself serves an environmental objective that is recognized as legitimate,[404] however, like in the US-Gasoline case, its enforcement constituted a means of arbitrary or unjustifiable discrimination between countries.[405]

The conclusion of US-Shrimp case revealed that the import banning against a certain country is permittable even when it is for protecting exhaustible natural resources out of its territories. Accordingly,

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[401] US-Shrimp Panel Report, *supra* note 20, para. 7.62.

[402] US-Shrimp AB Report, *supra* note 25, para. 187.

[403] The Appellate Body, particularly, criticized the panel for failing to examine the ordinary meaning of the words of Article XX. US-Shrimp AB Report, *supra* note 25, para. 115.

[404] This decision made compliance with the ruling relatively easier for the United States: "The United States did not have to repeal or amend the law. Rather … the United State could channel its resources into resolving the dispute in a way consistent with the goals of the statute and the WTO decision … the Department of State revised its guidelines for implementing section 609 to increase the transparancy and predictability of decision making … . In addition … attempted to launch multilateral negotiation on a sea turtle conservation … ". Reif & Eckert, *supra* note 51, at 684.

[405] US-Shrimp AB Report, *supra* note 25, para. 186.

in both US-Gasoline and US-Shrimp, the Appellate Body upheld the validity of the measures in question,[406] while striking down the manner in which the measures were implemented.[407] Furthermore, both Appellate Bodies reiterated that Members have a right to take measures to protect the environment.[408]

This attitude of the WTO toward the environment protection is considered to "have moved away from the mercantilist ethos", which has dominated the GATT era, offering a broader interpretation of the goals of the WTO, and have reconstructed "the normative hierarchy of the WTO by creating parity between the environmental exceptions included in Article XX and the substantive obligations of the GATT" (e.g., Article I and III).[409] This is considered so even though the Appellate Body has been criticized to "ignore the principle of sustainable development[410] focusing on the perceived incorrect

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[406] For the criticism against this view in relation with US-Shrimp, however, *see* Rietvelt, *supra* note 19, at 489 (stating "Yet the mere possibility that unilateral trade measures may be allowed in the future has the international trade community up in arms. However, it is important to note 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 Report' ").

[407] Calderin, *supra* note 3, at 55.

[408] *Id*.

[409] Oren Perez, *Multiple Regimes, Issue Linkage, and International Cooperation: Exploring the Role of the WTO*, 26 U. PA. J. INT'L ECON. L. 735, 755 (2005).

[410] For an example of critical comments on the decision relating to this principle from the viewpoint of environmentalism, *see* Rietvelt, *supra* note 19, at 473-499 (stating that in the Appellate Body's US-Shrimp decision

interpretation and application of GATT Article XX and its exceptions",[411] or to "give little ground for hope that the WTO will tolerate any real-world unilateral use of trade leverage in furtherance of environmental protection objectives reaching beyond national boundaries".[412] As such, the US-Shrimp Appellate Body report would be evaluated to "lead the WTO dispute settlement bodies to keep an open mind towards all kinds of global problems, and not view the problems from the trade perspective".[413]

The fact that the Appellate Body objected only to the procedural aspect in the US-Gasoline and the US-Shrimp cases and found that the Article XX (g) exception was flexibly applicable provides an increased opportunity for future panels and the Appellate Body to use the "discretion embeded in the Article XX (g) exception" to advance the shaping functions refelected in that provision.[414]

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the application of sustainable development as a legal concept was conveniently ignored and such oversights have evidenced the need for a more neutral forum and arbiter of international trade-environment issues).

[411] Rietvelt indicated: "The guidelines for interpreting treaties are given in the Vienna Convention on the Law of Treaties 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.' The Convention later specifies the need that the treaty be interpreted as a whole, 'including its preamble and annexes'. 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." Reitvelt, *id*. at 497 (footnotes omitted).

[412] Gains, *supra* note 9, at 743-44, *cited by* Chang, *supra* note 246, at 34.

[413] *See* Bree, *supra* note 27, at 129.

[414] Reif & Eckert, *supra* note 51, at 686.

There was an epochal conclusion in the EC-Asbestos case, where the WTO Appellate Body supported the French measure that prohibits the importing of goods containing ingredients harmful to human health from Canada. Although the Appellate Body in EC-Asbestos has not directly addressed the problem inherent to the US-Tuna holding that products cannot be differentiated solely on the basis of their PPM,[415] it has rejected an attempt by a WTO panel to narrow the scope of likeness far more drastically than the US-Tuna panels,[416] and moreover, it has completely revitalized Article XX.[417]

Such an attitude of the Appellate Body is in harmony with the moderate environmentalists to have proposed broadening the scope of likeness and revitalizing the environmental exceptions in Article XX,[418] and is different from the panel's decisions in the two US-Tuna cases. The GATT panels in US-Tuna cases determined that US restrictions on imports of canned tuna from nations that did not enforce dolphin-safe fishing methods could not be justified under the GATT on environmental grounds because it was against the principle of non-discrimination.[419] These cases are regarded to be representatives of the apparent "penchant of GATT panel to interpret GATT in a manner to discourage the use of unilateral

[415] US-Tuna(Mexico), *supra* note 61, para. 3.16.

[416] *Id*. para. 3.50.

[417] Knox, *supra* note 13, at 30.

[418] *Id*.

[419] Meier, *supra* note 38, at 241.

environmental measures" even to accomplish multilateral goals.[420]

As such, the Appellate Body took an opportunity to further calm the environmental community by confirming the applicability of the human health exception,[421] which succeeded from the Appellate Body's decision in US-Shrimp to hold that the US regulation was a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX (g) exception.[422]

It was also the notable case in which the WTO took step to rule on SPS and TBT Agreements[423] as well as considering definition of the term "like product", and treated with the "concept of precaution"[424] under the WTO rules.[425] In relation to the SPS[426] and TBT Agreements, the Appellate Body concluded,

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[420] Hudnall, *supra* note 30, at 202.

[421] Bhala & Gantz, *supra* note 112, at 517.

[422] *See* US-Shrimp AB Report, *supra* note 25, para. 141 (stating that this step to rule on the TBT Agreement should provide sufficient impetus for Member States to pay closer attention to this agreement).

[423] *See* Shaw & Schwartz, *supra* note 21, art. 151.

[424] For the definition of precaution, *see* Shaw & Schwartz, *supra* note 21, at 140 (stating " [d]efined as taking precautionary measures when there is insufficient scientific proof, yet ... could lead to irreversible damage or risk ..."); and for the concept of precaution, in particular, incorporated in the SPS Agreement and TBT Agreement, *see* Shaw & Schwartz, *id*. at 142.

[425] Shaw & Schwartz, *supra* note 21, at 150-151.

[426] For the cases on SPS Agreement, *see* Japan- Importation of Apples AB Report, *supra* note 362; EC-Asbestos AB Report, *supra* note 61; Japan-Agricultural Products AB Report, *supra* note 115; EC-Hormones AB Report, *supra* note 36; Australia-Salmon AB Report, *supra* note 36.

on the basis of the Body's reasoning with the minimum standards of the SPS Agreement in EC-Hormones,[427] that the TBT Agreement requires its parties to use relevant international standards "as a basis for" these domestic TBT measures except when the international standards "would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued."[428]

With regard to the requirement that SPS or TBT measures must not be any more trade restrictive than necessary to fulfill a legitimate objective[429] (in the TBT Agreement), or not more trade restrictive than required to achieve the appropriate level of sanitary or phytosanitary protection[430] (in the SPS Agreement), in the case of Australia-Salmon,[431] the Appellate Body said that a measure will fail this requirement in the SPS Agreement only if there is a reasonably available alternative that is "significantly less trade restrictive" and that "achieves the Member's appropriate level of sanitary or phytosanitary protection,"[432] which is obviously similar to the Panel decision's interpretation of GATT Article XX(b) in

[427] EC-Hormones AB Report, *supra* note 36, para. 177.

[428] TBT Agreement, *supra* note 77, art. 2.4.

[429] *Id*. art. 2.2.

[430] SPS Agreement, *supra* note 78, art. 5.6.

[431] Australia-Salmon AB Report, *supra* note 36, para. 194..

[432] *Id*. (citing Article 5.6 of SPS Agreement), *cited by* Knox, *supra* note 13, at 44 n.180.

the EC-Asbestos.[433]

The Appellate Body so far has adopted the interpretations of the SPS and TBT Agreements that mirror several moderate proposals made by environmental critics: that "every party has the right to adopt a standard with a higher level of protection than the international standard"; that "SPS measures with higher levels of protection need not be in accord with the 'majority' scientific view"; and that "a substantial burden of proof is on the party challenging the SPS and TBT measure even if the measure exceeds the international standard".[434]

Even though there has been the criticism on the WTO from the environmental viewpoint, the organization has tried to respect the members' environmental policies and measures to protect their environments provided that the measures are legitimate and justifiable under the WTO provisions. In opposition to the other WTO organization's record of ineffective dealings concerning trade and environmental conflicts, the Appellate Body has consistently tried to confirm its position as the environmentalist of the WTO.

[433] EC-Asbestos Panel Report, *supra* note 110, para 8.177, *cited by* Knox, *supra* note 13, at 44 n.180.

[434] Knox, *supra* note 13, at 45.

IV. EFFECTIVE NEXUS BETWEEN TRADE AND ENVIRONMENT

The seeming conflict between the promotion of free trade and the protection of the environment should be harmonized in order to cope with environmental issues effectively.[435] Giving priority to free trade and restricting trade measures related to environment excessively will accelerate the exhaustion of resources and damage on environment. On the other hand, if environmental protection were placed ahead

[435] The proposed effective methods of nexus between trade and environment, suggesting to choose understanding or guideline of relationship between the WTO and MEAs or approach to modify the regulations of the WTO like general exceptions of Article XX, up to now are: i) "'status quo' approach seeks to address the WTO-MEA relationship in various ways while not amending the GATT/WTO. This approach is based on the premise that the WTO already has sufficient scope to accommodate the use of trade-related measures pursuant to MEAs; that only a small number of MEAs contain trade measures; and that thus far there has not been any dispute about trade measures under MEA. (submitted by India, Hong Kong, and Egypt in 1996); ii) 'waiver' approach is that WTO Members would take a decision to authorize Members to derogate from their delegation for a limited period of time. (submitted by Hong Kong in 1996) This approach is very accessible to the Members because waivers do not need to be ratified by each WTO Member; iii) 'clarification of WTO rules' is to adopt an Understanding or Guidelines on the WTO-MEA relationship or to amend WTO rules, specifically the general exceptions in Article XX. (submitted by European Communities, Switzerland, and Japan); iv) 'approach to clarifying the WTO-MEA relationship along the lines of co-operation' is to clarify the relationship through an interpretative decision based on the general approach of mutual supportiveness and deference without amendments of WTO rules. (submitted by Switzerland)." Shaw & Schwarz, *supra* note 21, at 134-137. Besides, the United States has long been a strong advocate of WTO action on harmful fisheries subsidies to address the harmonization between the trade and the environment and sustainable development. For the details, *see* Alice L. Mattice, *The Fisheries Subsidies Negotiations in the World Trade Organization: A "Win-Win-Win For Trade, the Environment and Sustainable Development*, 34 GOLDEN GATE U.L. REV. 573, 573-585 (2004).

of free trade and excessive import restrictions were accepted, the result would impose such a high level of international standards on developing countries that it would detract those countries' economic development efforts. The concept of international trade is not complete without taking into consideration its environmental issues[436] and the long-term positive effects of sustainable development on the international trade and human beings' welfare level in the end.

For harmonizing these two issues, policies should be sought, which promote the free trade that eliminates trade barriers and, simultaneously protect the environment and human, animal and plant life needed to achieve sustainable development. Reviewing disputes relating to these two seemingly conflicting issues, simultaneous harmonization between free trade and protecting environment could substantially be carried out by a proper interpretation of the Article XX of GATT 1994. Considering the fact that the WTO Dispute Settlement Body [hereinafter DSB] has interpreted the trade-related environmental measures more positively and actively, and acknowledged the legitimacy of substantial regulation for environmental protection consistently, particularly when compared to the panels under the GATT system, the WTO seems well-positioned to interlace those two issues smoothly.

In spite of such endeavors and performances made through the DSB at the WTO, however, free trade supporters including developing nations and environmentalists[437] do not seem satisfied with the efforts of

[436] Calderin, *supra* note 3, at 36.

[437] For the north-south challenge in linking trade and environmental standards, *see* Thomas, *supra* note 49, at 818-819 (stating "[w]hile economic consequences are at the nub of developing-country government opposition, they alone

the WTO. Environmentalists indicate the following reasons for criticizing the WTO: i) it is not easy to pass the two-tier test[438] to apply the exceptions of Article XX of the GATT, and ii) GATT's Article XX does not specify expressively the exceptional measures for environmental protection.

Developing nations, on the contrary, are already worrying about potential abuse of trade measures based on environmental protection, even though, the WTO just recently began to manage to affirm the legitimacy of environmental trade measures through the judicial interpretation of the provisions concerned.

A. Modification and Creation of WTO Provisions

In order to address more specifically the criticism from both free trade supporters and environmentalists on how to harmonize trade and environmental measures, the listed exceptions of the Article XX of GATT would be better served by implementing independent measures for protecting the

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do not explain it. The special bitterness often present in such objections derives from a widely held belief that the attempt to include ... environment standards is no more than rank protectionism thinly disguised ...").

[438] For example, the Appellate Body's test for discrimination under the chapeau of Article XX has been criticized by one former USTR official who calls the provision "a proverbial 'eye of the needle' through which hardly any national environmental measure will be able to pass". Gaines, *supra* note 9, 773, *cited by* Reif & Eckert, *supra* note 51, at 693.

environment.[439] After that, the new environmental agreement can be separated from the WTO or attached to the WTO Agreements as an annex,[440] which will provide a way to accept trade measures under the WTO that is lawfully legitimated under the independent or annexed stand-alone approved environmental agreement.[441]

The deliberated agreement on these basic requirements includes all MEAs confirmed by member's mutual consent, and could suggest clarified standards about the trade-related environmental measures and

[439] There is an opinion that Article 20 (k) can be created to regulate environmental measures independently, which can lead the measure to be used with flexibility. *See* Jill Lynn Nissen, *Achieving a Balance between Trade and the Environment: The Need to Amend the WTO/GATT to Include Multilateral Environmental Agreement*, 28 LAW & POL'Y INT'L BUS. 901, 925-928 (1997).

[440] The official position of the WTO is that environmental issues fall outside of its jurisdiction as a body concerned with trade. For example, the WTO stated that other agencies specialized in environmental issues are better qualified to undertake those issues, because the WTO is only competent to deal with trade. WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE 46 (2nd ed. Mar. 2001), *at* http://www.wto.org/english/res_e/doload_e/tif.pdf, *cited by* Thomas, *supra* note 49, at 792.

[441] For the policies called 'Making clean the provisions of the WTO' related to efficient linkage trade with environment, *see* Nissen, *supra* note 439, at 911-928; WTO CTE, *Resolving the Relationship between WTO Rules and Multilateral Environmental Agreement, submission by the European Community*, WTO Doc. WT/CTE/W/170 (Oct. 19, 2000); WTO CTE, *Clarification of the Relationship between the WTO and Multilateral Environmental Agreements, submission by Switzerland*, WTO Doc. WT/CTE/W/168 (Oct. 19, 2000); WTO CTE, *Submission by Korea on Item 1* (June 12, 1996), *at* http://www.wto.org/english/tratop_e/envir_e/cte_docs_list_e.htm (last visited Aug. 19, 2006); WTO CTE, *The Relationship betweeen Trade Measures Pursuant to MEAs and the WTO Agreement, Proposal by Japan*, WTO Doc. WT/CTE/W/31, (May 30, 1996); and WTO CTE, *Submission by the European Community on Item 1*, (Feb. 19, 1996), *at* http://www.wto.org/english/tratop_e/envir_e/cte_docs_list_e.htm (last visited Aug. 19, 2006).

policies to the members. Thus, it is the ideal approach for the proper environmental protection under the WTO mechanism to conclude the independent and self-sufficient environmental agreement, whether it is placed within WTO or out of it. However, considering the intense conflicts of interest and disputes between member countries, it will be difficult to make it sooner rather than later:[442]

In the first place, when trade-related environmental measures are independently listed into Article XX as exceptions, there may be contradictory concerns about uncertainty and abuse surrounding the enforcement of the measures. Developed countries that advocate the trade-related environmental measures would consider it a repeat mistake of the current GATT/WTO system to link trade measures with environmental problem. In other words, Members complain it is very hard to overcome difficulties such as setting up the standards for complying with the "necessary" conditions or "chapeau" requirements in applying Article XX's exceptions. On the other hand, from the viewpoint of developing countries with negative attitudes against trade-related environmental measures, under the multilateral free trade system, it could provide a discretionary chance that the respective trade restrictions of member countries possibly constitute a non-tariff barrier.

With relation to making the independent or annexed environmental agreement, the complications and difficulties to induce agreements among the member countries have been evidenced through the

[442] Regarding the provision alteration, professor Jackson has skeptical about the methods [Jackson, *supra* note 30, 1227]. On the contrary, it was emphasized that it is the best way to amend the provisions of the WTO. Nissen, *supra* note 439.

legislative history of the Uruguay Rounds and ministerial conferences under the WTO. Considering the critical gap in viewpoints between the free traders and the environmentalists, it will take substantial time to build a consensus about the agreement.

As an alternative, the following supplementary suggestions shall reflect reality and facility. To reduce the concerns about uncertainty and abuse argumented respectively by each side simultaneously, it is suggested that the exceptions of Article XX (b) would add the trade-related measures for environmental protection and the Agreement on Trade-Related Environmental Measures would be newly established, through which environment-related measures could be smoothly inserted into the multilateral trade mechanism at the WTO.[443]

Like this, as environmental measures are not included in additional provision of Article XX independently [i.e. like (k)], but included in clause (b) in parallel with other existing measures, as differently from the advanced countries' concern, satisfying the requirements would be easier than those which the GATT/WTO have ever experienced, and, by including environmental measures expressively

[443] Similarly, Chantal Thomas suggested as follows: "Article XX (b) could be amended to read 'necessary to protect human, animal or plant life or health in accordance with principles recognized in the multilateral environmental agreements listed in the annex hereto' and GATT Article XX (g) could be amended to read 'relating to the conservation of exhaustible natural resources in accordance with principles recognized in the multilateral environmental agreements listed in the annex hereto ...' ..." (*See* Thomas, *supra* note 49, at 813). However, this approach is different from the approach suggested in this paper from the fact that the annex would then choose and list any multilateral environmental agreements established out of WTO mechanism that WTO Members felt that had attained a sufficient level of legitimacy to warrant their specific recognition.

into exceptions, a satisfying requirement would be easier.

As for now, without environmental measures being listed separately as exceptions, since the environmental measure has to meet narrowly and limitedly the conditions of (b) or (g), the WTO DSB cannot help being strict in enforcing the requirements concerning this measure. Under such mechanism, it would be more difficult to cope with the newly-emerging delicate environmental issues, not to speak of the currently contradictory matters.

In the case that environmental measures are listed in Article XX independently [i.e.(k)], the requirements of those measures to be legitimate should be newly interpreted through the dispute settlement procedures.[444] This case contrasts with the case of inclusion of environmental measures in clause (b) where the degree and contents of "necessary" condition and "chapeau" requirements required under Article XX are interpreted according to those that have already been established through the judicial interpretations under the WTO. Particularly, considering the signal of the WTO to regard the human health superior to the exhaustible natural resources which can be read in the EC-Asbestos,[445]

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[444] *See* US-Gasoline AB Report, *supra* note 195, at 17 ["applying the basic principle of interpretation … are to be given their ordinary meaning … the Panel Report failed to take adequate account of the words actually ussed by Article XX in its several paragraphs … 'necessary' in paragraphs (a), (b) and (d); 'essectial' in paragraph (j); 'relating to' in paragraph (c), (e) and (g); 'for the protection of' in paragraph (f); 'in pursuance of' in paragraph (h); and 'involving' in paragraph (i)"] This reasoning has been adapted by US-Shrimp. *See* US-Shrimp AB Report, *supra* note 25, at 120.

[445] EC-Asbestos AB Report, *supra* note 61, para. 172.

adding up the environmental measures in Article XX (b) would seemingly make it easier for the DSB to accept those measures than in Article XX (g).

When an environmental trade measure is provisioned in Article XX (b) parallel with other measures, developing countries concerned about abuse will be relieved: While adding this measure as an independent term [i.e.(k)] to Article XX would mean that the legitimacy of environmental measures be interpreted more widely, including it in (b) implies securing the same level of legitimacy of environmental measures to the level for protecting humans, animals or plants health and life which already has been accepted without much controversy under the past GATT system.[446]

Additionally, including the environmental measures expressly in clause (b) parallel with other existing measures would reduce or eliminate the contentious debate having surrounded whether or not the principle of sustainable development has risen to the level of customary international law in interpretation of the environmental measures under the WTO provisions.[447]

Regarding the Agreement on Trade-Related Environmental Measures, to prevent conflicts with both parties' interests in accepting the independent environmental measures into WTO, the measures complying with measures' standards provisioned in the Agreement should be confirmed with their

[446] *See* Thailand-Cigarettes, *supra* note 55, paras. 63, 75-77, 81; Bhala & Gantz, *supra* note 112, at 515.

[447] For the debate on this point raised in relation with the US-Shrimp decision, *see* Rietvelt, *supra* note 19, at 496-498.

legitimacy under the WTO provisions.[448] Such standards will enable DSB of the WTO to solve the difficulty in deciding criteria when DSB judges the legitimacy of measures relating to MEAs. Consideration should properly be paid in establishing basic criteria: The basic criteria should not be hard for members to satisfy, and the criteria chosen and adopted by the Agreement should not be taken advantage of by Member countries as disguised restrictions under the system, particularly, due to ambiguous provisions of the WTO.

Throughout the legislative history of GATT/WTO agreements, there have often been the "creative ambiguities" as the legacy of compromises and the result of negotiated outcomes[449] with regard to the complex issues. In the case of these ambiguities, however, the dispute settlement mechanism has to be utilized again to clarify or modify WTO rights or obligations, which will weaken the legal certainty or predictability under the WTO system.[450]

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[448] For the suggestions that the GATT be amended to extend the exemptions of article XX to include trade provisions of MEAs, *see* WTO CTE, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol, UNCEP*, WTO Doc. WT/CTE/W/115 (June 25, 1999); WTO CTE, *Submission by the European Community on Item 1* (Feb. 19, 1996) *at* http://www.wto.org/english/tratop_e/envir_e/cte_docs_list_e.htm (last visited Aug. 19, 2006). For the similar exemptions that can be provided through article XXV waiver clause on a case by case basis, *see* WTO CTE, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol, UNEP*, WTO Doc. WT/CTE/W/115 (June 25, 1999).

[449] Shaw & Schwartz, *supra* note 21, at 151.

[450] The WTO has strengthened a dispute settlement mechanism for the legal certainty or predictability, [*see* WTO Dispute Settlement Body, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc. WT/DSB/RC/1, preamble (Dec. 11, 1996), *cited by* Maki Tanaka, *Bridging the GAP Between*

With respect to the plausible contents of the agreement, which might be a core of this suggestion, it would be acceptable if the levels of trade measures and main contents of the agreement are as same as those of TBT Agreement and SPS Agreement.[451] It is meaningful that the level of trade measures and main contents of the agreement would be decided as same as those under TBT and SPS Agreements considering the harmonized approach of both agreements employed in dealing with linkage between the free trade objectives and the legitimate regulatory objectives such as the human health protection:

Given the main purpose of these two agreements is avoiding the possibility of Member countries' (including developed countries) abusing non-tariff barriers by applying Article XX, this level of Agreement on Trade-Related Measures will convince the developing countries that this agreement would block the chance of abusing environmental measures which have allegedly occurred even under the current Article XX (b) or (g) of the GATT; Given both agreements emphasize that members have the

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Northern NGOS and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles, 30 ECOLOGY L. Q. 113, 145 (2003)], entailing "multilateral quasi-judicial proceedings", which seeks the efficient resolution of conflicts between national trade policies [*see* DSU, *supra* note 297, arts. 3.3, 12.8, *cited by* Tanaka, *id*. at 145], and articulation of rules and principles governing multilateral trade relations. *See* Chi Carmody, *Of Substantial Interest: Third Parties Under GATT*, 18 MICH. J. INT'L L. 615, 618-619 (1997), *cited by* Tanaka, *id*. at 145-146.

[451] An amendment to the SPS Agreement was suggested by Chantal Thomas, which sets forth conditions under which WTO Members can administer health and safety regulations affecting trade flows: "[h]ave the right to take sanitary and phytosanitary measures in accordance with the preconditonary principle [or approach] ... in Article 2(1)". *See* Thomas, *supra* note 49, at 814.

"right" to protect the human health or the environment[452] instead of dealing with those legitimate regulatory concerns as mere marginalized "exceptions", which is distinctive feature vis-à-vis GATT,[453] a higher level of legitimate regulatory protection in environments would be secured under the proposed mechanism.

The core of this agreement is that trade-related environmental measures should be based on scientific principle[454] and satisfy international standards.[455] The Agreement on Trade-Related Environmental Measures can accept the established international standards adopted by several principal environmental agreements as TBT[456] or SPS[457] Agreements encourage members to follow other externally established

[452] For instance, SPS Article 2 provisions that Members have the right to take sanitary measures necessary for the protection of human health ("… for the protection of human, animal or plant life or health, of the environment ..." SPS Agreement, *supra* note 78, art. 2), while the TBT Preamble recognizes that no country should be prevented from taking measures. ("Recognizing that no country should be prevented from taking measures necessary to ... for the protection of human, animal or plant life or health ...", TBT Agreement, *supra* note 77, Preamble).

[453] For more details, *see* Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625, 660-665 (2005).

[454] *See* SPS Agreement, *supra* note 78, art. 5.

[455] *See id*. art. 3.

[456] *See* TBT Agreement, *supra* note 77, art. 4.1.

[457] *See* SPS Agreement, *supra* note 78, art. 3.

standards, guidelines, recommendations and harmonization:[458] i.e. in case of the SPS Agreement, following external agreements are accepted; Codex Alimentarius, Office International des Epizootics(OIE), International Plant Protection Convention.[459] Each member, provided that there are appropriate reasons, can maintain even stricter environmental restrictions than international standards.[460]

When there are different levels of environmental restrictions between importing countries and exporting countries, the principle of equivalence can be adapted when the exports' level could be substantially meet the importers' one through the utilization of the objective environment assessment, in order to make environmental restrictions objective.[461]

Establishing or amending domestic standards of environmental restrictions, a Member country should legitimize several facts: i.e. i) Members should report the establishing or amending domestic

[458] This deference to certain international standards explicitly has been suggested as one of the accommodation models between the WTO and other regimes, that is, comity, choice of forum or choice of law, preemption, and deference: "The WTO uses a deference model for some ... (IMF) decisions ... SPS defers to certain international standards explicitly ... WTO language ... 'sustainable development' implicitly defers to environmental norms. ... AB ... deferred to ... (CITES) ... DSU provisions allow WTO panels to seek the advice of experts ... commentators have suggested that 'environmental experts could be allowed to sit on GATT Panels dealing with trade and environmental disputes'." Claire R. Kelley, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79, 92-102 (2006) (footnotes omitted).

[459] *See* SPS Agreement, *supra* note 78, art. 3.4.

[460] *See id*. art. 3.3.

[461] *See id*. art. 4.

standards of environmental restrictions to the newly established Environmental Commission at the WTO and other Members concerned to attain their transparency;[462] ii) Disputes related to environmental measures should observe the procedures of Dispute Settlement Body of the WTO,[463] and the panels or the Appellate Body should systematically be able to get advisory report from Expert Review Group like in the case of SPS Agreement,[464] or TBT Agreement.[465]

For developing countries: through advice, credits, donations and grants, technologies of environmental protection and measurement are offered;[466] to give export chances to developing countries, a reservation period shall be given to them about interested items;[467] in accordance with agreements, all

[462] *See id*. art. 7.

[463] *See id*. art. 11.1.

[464] *See id*. art. 11.2.

[465] *See* TBT Agreement, *supra* note 77, art. 14.2; Besides, there are two other agreements providing advisory report, that is, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 6, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994) [hereinafter Customs Valuation Agreement], arts. 18, 19 and Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *id*. Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND (1994) [hereinafter Subsidies and Countervailing Measures Agreement], art. 24.

[466] *See* TBT Agreement, *supra* note 77, art. 12; SPS Agreement, *supra* note 78, art. 10.

[467] *See* SPS Agreement, *supra* note 78, art. 10.3.

or parts of obligation can be forebeared for some period.[468]

With this amended provision in Article XX, legal stability and expectability can be enhanced in applying trade-related environmental measures by approving them expressly as one of listed exceptions of the GATT. Furthermore, by including trade-related environmental measures explicitly into the WTO mechanism, environmental measure can be under watch and restraint by the WTO, which will help prevent, in advance, members' trade-related measures from being shown up as non-tariff barriers until the free-trade objective is fulfilled under the WTO.

In case of establishing agreements, of course, a scientific environmental protection policy should be developed and improved because trade measures for environmental protection are to be strictly regulated under the WTO. It is also essential that environmental policies should be established and managed with harmonization to cope with the environmental issues which are the global common challenges.

This approach would thus be more realistic than previously discussed approaches because it can reduce and accommodate the interests conflicts between developed countries listed by environmentalists and developing countries worried about the abuse of trade-related environmental measures.[469]

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[468] *See id*. art. 10.2.

[469] This approach would also be such considering the fact: "the inclusion of affirmative environmental standards into the WTO mechanism has been negatively evaluated, particularly, among the developing countries, because it would in effect be the result of a shift in institutional strategy from a 'soft law' to a 'hard law' approach." *See* Thomas, *supra* note 49, at 812.

B. Redefinition of Like Products

One of the most controversial issues in interpreting the product under the GATT in linking trade with environmental policies is defining what is a "like product".[470] The difficulty in defining like product[471] related to environmental issues is whether the product that is made by methods that harm the environment and another product that damages the environment less can be treated as like products, although the final physical characteristics are same.

If each nation treats these products differently and each nation imposes differential tariffs in accordance with the level of environmental pollution or imposes tariff to internalize environmental cost caused by producing process, there will be no problems from an environmental viewpoint.[472] On the

[470] *See* TREBILCOCK & HOWSE, *supra* note 191, at 397.

[471] For the GATT/WTO disputes on the term "like products", particularly, with respect to the Article III of the GATT, *see* WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) (article III:2 of the GATT 1994); WTO Appellate Body Report on Canada-Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R (circulated July 30, 1997) (article III:2 and article III:4 of the GATT 1994); WTO Dispute Settlement Panel Report on Indonesia-Certain Measures Affecting the Automobiles Industry, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 23, 1998) (article I:1 and III:2 of the GATT 1994); WTO Appellate Body Report on Korea-Taxes on Alcoholic Beverages, WTO Doc. WT/DS75/AB/R, WT/DS84/AB/R (adopted Feb. 17, 1999) (article III:2 of the GATT); WTO Appellate Body Report on Chile-Taxes on Alcoholic Beverages, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted Jan. 12, 2000) (article III:2 of the GATT 1994); EC-Asbestos AB Report, *supra* note 61, (article III:4 of the GATT 1994).

[472] JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC

other hand, if these products are treated as like products, imposing tariffs such as differentiated tariff and environmental cost can possibly violate "the most-favored nation principle".[473]

The biggest difference in interpreting the term" like product" between the WTO and MEAs would be whether the process and production methods shall be taken into account or not in defining it. The provisions in the WTO Agreement have treated a product as a like product if it has identically physical characteristics, despite adopting different PPMs.[474] Lots of provisions in MEAs which emphasize environmental protection take approaches that focus on PPMs[475] rather than physical characteristics in

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RELATIONS: CASES, MATERIALS AND TEXT 44-45 (West Publishing 3rd ed. 1995).

[473] SANDRA L. WALKER, ENVIRONMENTAL PROTECTION VERSUS TRADE LIBERALIZATION: FINDING THE BALANCE: AN EXAMINATION OF THE LEGALITY OF ENVIRONMENTAL REGULATION UNDER INTERNATIONAL TRADE LAW REGIMES 44 -45 (Bruxelles Publication des Facultes Universitaires Saint-Louis, 1993).

[474] For the rule to interpret "like products" under Article III, *see* Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW. 619, 624 (1998) (stating: "The only kind of product distinction that can be recognized under Article III is a distinction based on the qualities of the product themselves or the characteristics that govern product qualities. Product distinctions based on characteristics of the production process or of the producer that are not determinants of product characteristics are viewed as illegitimate").

[475] For the concept of PPMs in the world of the WTO/GATT from the viewpoints of the environmentalism, *see* Calderin, *supra* note 3, at 61-62 (stating "[P]PMs are not a new concept to the world of the WTO/GATT. Article XX, subparagraph(e) allows countries to apply measures that prohibit or restrict the importation of products of prison labor. Prison labor is a PPM... like in the example of tuna, the product made from prison labor is not different than the same type of product made by wage-earner...").

defining a "like product".[476]

Trade restrictions, in particular, by adopting PPMs in interpreting the "like product", can cause serious troubles in keeping pace with provisions of the WTO Agreement because trade restrictions would be imposed even though the physical characteristics are identical when the adopted PPMs are different.[477] Although the GATT has no definite provisions of "like product",[478] common views made through the decisions of US-Tuna cases show that "like products" are decided by "physical characteristics, the characteristics of ingredients, final usage purpose, habits of customers, not by PPMs".[479] The panel thus interpreted "like product" under Article III according to the rule of the "product-process distinction"[480] and concluded that the United States violated its national treatment obligations under Article III because imported tuna was the same product as domestic tuna but was treated less favorably.[481]

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[476] *See*, for example, Montreal Protocol, *supra* note 28, at 1541.

[477] *Id.*

[478] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 258 (Lexis Law Pub. 1969).

[479] US-Tuna(Mexico), *supra* note 61, para. 7.1; US-Tuna (EEC), *supra* note 55, para. 5.8.

[480] The panel concluded that, by using the method of catching tuna as a basis for differential treatment of imports, the U.S. measures attempted to regulate the method of catching tuna rather than the product and were not justified under GATT. US-Tuna(Mexico), *supra* note 61, paras.5.14-5.15; Three years later, a new GATT panel in US-Tuna(EEC) made same conclusion. *See* US-Tuna(EEC), *supra* note 55, para. 5.15.

[481] US-Tuna(EEC), *supra* note 55, paras. 5.8-5.16.

The panel in US-Automobiles, finding the US standard[482] to be based on factors relating to the control or ownership of producers/importers to cars as products,[483] concluded that differential treatment of products under the US measure was not permitted under Article III:4.[484] The panel, employing the "aim and effects approach",[485] found that the distinction made under the gas guzzler tax pursued the

[482] *See* US-Automobiles, *supra* note 124, para. 5.39.

[483] *Id*. paras. 5.53-5.55.

[484] *Id*. para. 5.54.

[485] The US-Beverages (GATT Dispute Panel Report on United States-Measures Affecting Alcoholic and Malt Beverages, adopted June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 [US-Beverages]) was the first case to suggest the aim and effects test advocating that the issue presented by article III should not be the matter of distinguishing the determinants of product characteristics and the aspects of the production process, but rather deciding the policy purposes behind the product - process distinction rule [*See* William J. Snape, III & Naomi B. Lefkovitz, 1994 Cornell International Law Journal Symposium, *Greening the GATT: Setting the Agenda/ Greening the GATT Within the Existing Framework -- Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L. J. 777, 796 (1994); Hudec, *supra* note 474, at 626; Robert Howse & Donald Regan, *The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249, 268 (2000), *cited by* Tanyarat Mungkalarungsi, *The Trade and Environment Debate*, 10 TUL. J. INT'L & COMP. L. 361, 375 (2002)]. The panel stated that the distinction in various U.S. laws between low-alcohol and high-alcohol beer was made for purposes of protecting social welfare, and that such product distinction did not create adverse conditions of competition for Canadian brewers because Canadian brewers produced both types of beer. Hudec, *id*. at 627; Ernst-Ulrich Petersmann, *International Trade Law and International Environment Law: Prevention and Settlement of International Environmental Disputes in GATT*, 27 J. WORLD TRADE 43, 64 (1993), *cited by* Mungkalarungsi, *id*. at 375.

legitimate objective of concerning fossil fuels,[486] in respect to the US gas guzzler tax on designated automobiles according to their fuel efficiency.[487] The case poses an important question on how to reach on acceptable discussion under Article III when the disproportionate effect on foreign goods is inherent in the nature of the regulation.[488]

In order to balance the value of free-trade and environmental protection, the value of environmental protection, which has been evaluated rather poorly, should be advanced by defining the term of "like products" more obviously; i.e. the definition of "like products" should be shifted from the way of emphasizing physical characteristics into the way of emphasing functional characteristics. The term of "functional characteristics" should be defined prudently, and, in particular, the function in relation with socio-economic aspects should be considered. Such a shift of the way of defining "like products" not only strengthens the relationship between trade and environment efficiently, but also is expected to help take the measure for animals or plants health and safety legally related to the TBT Agreement and SPS Agreement which are parallel with the above proposed Agreements on Trade-Related Environmental Measures.

Such the signs of redefinition of "like products" could be found in the decision of the Appellate Body

[486] Munklarungsi, *supra* note 485, at 378.

[487] US-Automobiles, *supra* note 124..

[488] Hudec, *supra* note 474, at 629.

at the WTO, even though, under the current trade regulations, it is difficult to take trade restrictions on the base of PPMs that are not connected to the characteristics of product: Under the GATT mechanism, the panel of US-Tuna(Mexico) showed definite attitudes that trade measures based on PPMs could not be justified under the GATT provisions.[489] According to the panel, by using the method of catching tuna as a basis for differential treatment of imports, the US measures attempted to regulate the method of catching tuna rather than the product and were not justified under GATT.[490] Similar rationale can be seen in subsequent dispute settlement decisions under the GATT.[491]

Under the WTO mechanism, however, the Appellate Body in US-Shrimp decided that trade restrictions against the products including environmentally non-sustainable production process and methods could be acceptable by defining "like products" in a narrower sense[492] than before.[493] It is also

[489] US-Tuna(Mexico), *supra* note 61, para. 3.16.

[490] *Id*. paras. 5.14-5.15.

[491] For the same conclusion on the same facts in US-Tuna(EEC) *supra* note 55, para. 5.15.

[492] US-Shrimp AB Report, *supra* note 25, para. 93.

[493] US-Tuna(Mexico), *supra* note 61, para. 3.50.

very significant to environmentalism[494] that Appellate Body took into account its process and ingredients in defining "like product"[495] in EC-Asbestos.[496] In defining "like products", using a "market-based approach", the Appellate Body examined physical properties, end uses and tariff classification,[497] and reasoned that the health risk should be included in the analysis of "physical properties", as well as with respect to "consumer taste".[498] As such, under the WTO mechanism, the Appellate Body in the above two cases, differing from the decision of US-Gasoline,[499] began to take into account environmental

[494] *See* Bhala & Gantz, *supra* note 112, at 516 (stating "while one can argue the practical desirability of the Panel's relegation of health concerns to Article XX (b), confining the 'like product' analysis under Article III:4 to commercial and trade considerations, the environmental community should be buoyed by this aspect of the Appellate Body's determinaiton").

[495] There are two different views about the Appellate Body decision on this point: i) "The analysis in Abestos would allow governments to differentiate among products based on their PPMs as long as the differentiation does not result in less favorable treatment." [Robert Howse & Elizabeth Tuerk, *The WTO Impact or Internal Regulations-A Case Study of the Canada-EC Asbestos Dispute*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 297-298 (Hart Publishing 2001)]; ii) "[A]ny optimism that future WTO panels will tolerate origin-neutral PPMs in the context of Article III would be unfounded" [Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59,92 (2002)].

[496] EC-Asbestos AB Report, *supra* note 61, para. 48.

[497] *Id*. para. 59.

[498] *Id*. para. 61.

[499] The panel stated that the wording of article III:4 does not allow less favorable treatment to depend on the characteristics of the producer and the nature of data held by them because the treatment of the imported and domestic goods concerned should be assured on the objective basis of their likeness as products and should not be exposed to a highly subjective and variable treatment according to extraneous factors. *See* US-Gasoline Panel Report,

consideration in determining even though it is still unclear whether the Appellate Body takes into account the environmental concerns arising solely from the PPMs of a product in determining the likeness of a product.[500]

Even though the WTO does not, and should not, have the capacity to dictate adequate PPMs to its Members,[501] the WTO Members should have increased sovereignty to analyze the production methods of goods that they import, as long as the analysis and resulting measures do not constitute arbitrary and unjustifiable discrimination.[502] Thus each Member should be able to decide whether it wishes to participate in the trade of products made by the inefficient use of resources.[503] By doing so, the WTO structure would help promote sustainable development and the optimal use of the world's resources.[504] Increasing such sovereignty under the WTO is in line with the balanced approach which has been encouraged by the WTO Appellate Body since the US-Gasoline.[505]

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supra note 57, paras. 6.11-6.13.

[500] Knox, *supra* note 13, at 30.

[501] Calderin, *supra* note 3, at 61.

[502] *Id.*

[503] *Id.*

[504] *Id.* at 62.

[505] *See* US-Gasoline AB Report, *supra* note 195, at 28-29; US-Shrimp AB Report, *supra* note 25, para. 170.

If the members of the WTO and MEAs have conflicts due to the ambiguous terms like "like products", these kinds of problems should be settled by DSB at the WTO, provided that the parties are the members of the WTO.[506] Considering the potential advent of diverse environmental changes, such ambiguous terms would fairly be difficult to clarify solely through the jurisdictional interpretation by the DSB.

In order to harmonize the trade and environmental policies without friction, every endeavor should be made to stipulate the definition or range of the ambiguous terms. Redefining the conception of "like product" will contribute to connecting trade and environment together by amending of the WTO provisions as well as annexing of the environmental agreement discussed above.

V. CONCLUSION

Two ways to solve the disputes in relation to disharmony between trade and environmental policies can be outlined: i) after occurrence of dispute, its main issue can be brought to the DSB and settled (ex

[506] *See* DSU, *supra* note 452, art. I (Coverage and Application).

post approach);[507] ii) before occurrence of dispute, potentially conflicting provisions and measures can be solved politically through mutual agreements and consensus among the Members (ex ante approach).[508] Surrounding the two ways, even though it could be argued that the judicial effort to devise a politically acceptable resolution of trade and environment conflicts may have seemed doubtable, or even quixotic, without the political resolution, governments have consistently accepted most elements of the judicial resolution. The above analysis shows that the ex post approach should be pursued parallel to an ex ante approach for the actual harmonization of trade and environment conflicts.

Summarizing the cases dealt in the dispute settlement procedures at the GATT, the justification of trade measures aiming at environmental protection had been strictly interpreted. Consequently, GATT/ WTO mechanism has been accused of being negative about environmental protection. Fortunately, however, since the launch of the WTO, trade measures for environmental protection in several cases have been justified in accordance with the judicial interpretation on the Article XX of the GATT. This progressive interpretation on the provisions is meaningful considering the fact that it offered the driving force to revolutionize the nature of the dispute on trade and environment. Such an interpretation is

[507] For the three effects of the judicial resolution of legal conflicts between trade and environment, *see* Knox, *supra* note 13, at 74-78.

[508] About this opinion, for example, Dr. Sylvia Ostry has mentioned that WTO system is unable to be altered only by lawsuits and political method should be chosen as a preferred choice. WTO SECRETARIAT, TRADE, DEVELOPMENT AND THE ENVIRONMENT 46, (Kluwer Law International 2000).

substantially evaluated to improve the value of the sustainable development and environmental protection.

However, if the criterion of connecting trade with environment is not established and main issues are solved just by interpreting the existing provisions, it can threaten the certainty and predictability in applying law when new environmental issues such as biological diversity, GMOs, or sustainable management of resources are raised. It is essential, therefore, that the definite standard of connection of trade regulation with environmental regulation, most of all, should be established. Apparently, up to now, the strategies under the WTO system to link the environmental issues with trade ones have tended to avoid friction of members' interests and facilitate the harmonious approaches in lesson of GATT/WTO mechanism's failure to solve this problem due to the members' contradictory interests. Following are why the suggestion in this article is the most appropriate in dealing with trade and environment issue than others suggested so far.

Today, an important and urgent problem which faces the world is to protect the global environment, at least, at the same level as that of human beings, animals or plants health and life provided in exceptions of Article XX of the GATT1994. There can not be any differentiation in which is more important between human beings, animals or plants health and life, and environmental protection, thus, they equally need an urgent resolution, that is, mutual equity is needed in dealing with these issues. The measures to protect animal and plant health or lives without environmental protection would be only a short-term ad hoc device.

Under the WTO mechanism, which has been equipped with a judicially higher stability and predictability than under the GATT for past 11 years, there have not been any fatal errors or criticism against the WTO related to the animals, plants, health or lives in the process of fulfilling WTO agreements including TBT and SPS Agreements, and of settling disputes. As above, establishing environmental agreement at the same level as TBT and SPS Agreements and inserting environmental measures into exceptions of Article XX of the GATT will, at least, at the same level as the current protection of human beings, animals and plants health, meet the problems of the legitimacy and block the chance of abuse of trade measures in pursuit of environmental protection with balance.

Another appropriateness of this proposal is that it will relieve the disapproval against establishing new environmental provisions at the WTO, especially that of developing countries. Considering the fact that the SPS Agreement has been established and enforced without any fatal problem, even though developing countries expressed their complaints during the SPS Agreement negotiations of Uruguay Round, developing countries do not have to worry about the newly established agreements and provisions which are much similar to SPS Agreement in their purposes and the level of contents. Export-oriented developing countries will be the most benefied by concluding this kind of agreement. Customers in developed countries will make demands on regulation that will force developing countries to lose trade when their relaxed environmental standards do not meet the requirements of the developed countries.

In conclusion, the approach above is attractive to both developed countries and developing ones. For

developed countries, legitimacy and predictability can be improved in applying these measures. For developing countries, which have chronically worried about abusing trade measures related to environment, the Trade-Related Agreement on Environment can function as a safety valve to block the chance of abuse.

To allow more widely the usage of trade measures aiming at environmental protection through the amendment and creation of WTO provisions, consensus and mutual agreement among members should, first of all, be brought which is learned from the experience of Uruguay Round negotiations. In order to achieve this goal, the participation of all members of the WTO including developing countries is necessary and financial and technical support for nations which do not have sufficient capacities to deal with environmental affairs should be considered.