Fordham Environmental Law Review

Volume 19, *Number* 1 2009 *Article* 5

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INTERNATIONAL TRADE AND THE ENVIRONMENT: WHAT IS THE ROLE OF THE WTO?

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I. INTRODUCTION

The international community is increasingly being forced to recognize that the state of the environment is a global concern.[1] Unfortunately, the nature of the problem cannot be addressed unilaterally as it does not relate exclusively to any individual state.[2] Concurrent with this growing public environmental awareness is recognition of the interrelationship between trade liberalization and the environment.[3] In 1999, the preexisting idea that the desire to protect health and the environment sometimes comes into conflict with the stated goals of international trade entered the spotlight.[4] The growing divide between free traders and environmentalists was evidenced by the convergence of thousands of protestors in Seattle for the gathering of the World Trade Organization's Third Ministerial Conference.[5] This protest signaled a new round in a conflict that grew exponentially since the creation of the World Trade Organization (WTO) in 1995. Too much of the world, the WTO is an organization that has exceeded its mandate; it not only sets the rules for international trade, but it also establishes the environmental protection standards for its member governments.[6]

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1. *See* Tania Voon, *Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol*, 10 J. TRANSNAT'L L. & POL'Y 71 (2000).

2. *See id.* at 72.

3. *See id.*

4. *See id.*

5. *See id.* (discussing the "growing disquiet over the unresolved conflict between trade and the environment").

6. Doaa Abdel Motaal, *Trade and the Environment in the World Trade Organization: Dispelling Misconceptions*, 8 REV. OF EUR. COMTY. & INT'L ENVTL. L. (R.E.C.I.E.L.) 330 (1999).

This note will attempt to examine the at times conflicting interests of the WTO and environmental advocates, specifically the structure and policies of the WTO as they relate to environmental protection. Part II provides the historical background and sets the stage for the current debate; it includes the formation of the WTO and the organization's reaction to the harsh criticism it has endured at times. Part III discusses the official position of the WTO as it relates to environmental issues and juxtaposes its positions against some of the Appellate Body's decisions in this regard. Part V offers some more notable suggestions for reconciling the conflict between WTO standards and environmental protection concerns.

II. HISTORY OF THE DEBATE BETWEEN FREE TRADE AND THE ENVIRONMENT

The origins of the trade and environment debate date as far back as 1972.[7] At the time, environmental protection concerns were just coming into the forefront of domestic and international policy considerations.[8] The recognition of a need for an international forum in which to hear environmental management concerns led to the 1972 Stockholm Conference on the Human Environment.[9] In preparation for this conference, General Agreement on Tariffs and Trade (GATT) members created the Working Group on Environmental Measures and International Trade (EMIT).[10] Although EMIT did not conduct its first meeting until twenty years later, its first conference was conducted right before the 1992 United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro, (also known as the Rio Earth Summit).[11] This was no coin-

7. *See* Julio Garcia Burgues & Mikel Insausti Muguruza, *Trade and the Environment in the WTO: The European Community's Participation in the Committee on Trade and Environment*, 6 REV. OF EUR. COMTY. & INT'L ENVTL. L. (R.E.C.I.E.L.) 163 (1997).

8. *See* 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).

9. *See* Katie A. Lane, Comment, *Protectionism or Environmental Activism? The WTO as a Means of Reconciling the Conflict Between Global Free Trade and the Environment*, 32 U. MIAMI INTER-AM. L. REV. 103, 105 (2001).

10. *See* Shaffer, *supra* note 8, at 17.

11. United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26, 31 ILM 874 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

cidence, the EMIT group was convened at the request of members of the European Free Trade Association (EFTA) in anticipation of UNCED.[12]

During the interim period between these two conferences important developments took place in several environmental forums. In 1983 the United Nations convened the World Commission on Environment and Development to address the growing concern "about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development."[13] The Commission's report, entitled "Our Common Future" (also known as the Brundtland Report), coined the term "sustainable development."[14] It identified poverty as one of the most important causes of environmental degradation and hypothesized that greater economic growth through increased international trade would act to reverse this trend.[15]

The Rio Earth Summit focused attention on the role of international trade in combating poverty and protection of the environment.[16] Agenda 21, the measure adopted at the conference, emphasizes the importance of international trade in promoting the concept of "sustainable development."[17] During the latter part of the Uruguay Round of negotiations, as a result of the renewed interest in the relationship between trade and the environment, the Preamble to the Marrakesh Agreement Establishing the WTO was created. It referenced the importance of working towards sustained development.[18] Members recognized that:

[T]heir relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living ...

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12. WTO Secretariat, *Trade and Environment at the WTO* 4 (Apr. 2004), http://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf [hereinafter *2004 Report*].

13. World Commission on Environment and Development, G.A. Res. 42/187, at 1, U.N. Doc. A/RES/42/187 (Dec. 11, 1987).

14. U.N Environment Program Governing Council, Report of the World Commission on Environment and Development, *Our Common Future*, ¶ 27, U.N. Doc. A/42/427/Annex (Aug. 4, 1987) (*prepared by* Gro Brundtland) [hereinafter *Brundtland Report*].

15. *See id.* ¶ 8.

16. Early Years: Emerging Environment Debate in GATT/WTO, http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (last visited Mar. 28, 2008).

17. *See 2004 Report*, *supra* note 12, at 4.

18. *Id.*

while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development* seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[19]

The Members also adopted a ministerial decision arising out of the Marrakesh Agreement calling for the establishment of the Committee on Trade and Environment (CTE).[20] The Committee's mandate calls for the identification of the relationship between trade measures and environmental measures in order to promote sustainable development. Additionally, the mandate makes it incumbent upon the CTE to make appropriate recommendations regarding the necessity of any modifications to the provisions of the multilateral trading system.[21] Since the CTE has this broad mandate, it is significantly more influential than its predecessor group, the EMIT.[22]

More recently, at the Doha Ministerial Conference (which began in November 2001), the ministers agreed to launch negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEA's).[23] These talks will seek to clarify the relationship between trade measures taken under the environmental agreements and WTO rules.[24] The negotiations are conducted in "special sessions" of the CTE. During these sessions the Committee acts as the forum whereby the environmental and developmental aspects of international trade are debated.[25] The CTE "regular" is charged with examining the effects of environmental measures on market access, intellectual property agreement and biodiversity and labeling for environmental purposes.[26]

Progressive reinforcement of environmental policies at the national and international levels and the concerns these policies addressed spurred the increased interest in the relationship between trade and the environment.[27] A chief concern was the possible effect that en-

19. *Id.* at 4-5.
20. *Id.* at 5.
21. *Id.*
22. *Id.*
23. The Doha Declaration Explained, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited Mar. 28, 2008).
24. *Id.*
25. *See 2004 Report*, *supra* note 12, at 5.
26. *See id.*
27. Burgues & Muguruza, *supra* note 7.

vironmental measures might have on trade and competitiveness.[28] Importantly, following some GATT panel decisions, a widespread perception began to emerge among environmental advocates. This important perception was that the multilateral trading system was not sufficiently sympathetic to environmental concerns.[29]

III. WTO RULES: ARE THEY A CAUSE FOR CONCERN?

A. The Position of the WTO

To further elucidate this point one must assess how the WTO deals with the trade related aspects of environmental policies. This calls for an examination of various agreements entered into by WTO members as well as some of the decisions rendered by the Dispute Settlement Body. The WTO has categorized trade related environmental concerns thusly: while some take the form of product standards requiring a certain level of environmental efficiency,[30] others take the form of outright bans resulting in the foreclosure of the use of some environmentally harmful goods.[31] Yet, others may exist in the form of government subsidies for environmentally friendly merchandise or production methods.[32]

Product standards are dealt with primarily through the WTO Agreement on Technical Barriers to Trade (TBT). The TBT Agreement was designed by WTO member governments and acknowledges the right of each individual government to set environmental protection standards at the level it considers appropriate.[33] More-

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28. *Id.*

29. *Id.*

30. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement].

31. General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S 187 [hereinafter GATT]. The first General Agreement on Tariffs and Trade came into effect in 1947, however, as a result of the various negotiating rounds, including the major overhaul in 1994, the agreement exists in its current form as GATT 1994.

32. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement].

33. TBT Agreement, *supra* note 36, at Preamble.

over, the TBT recognizes the protection of human, animal or plant life, or health and the protection of the environment as legitimate objectives for member countries to pursue.[34] However, the Agreement attempts to ensure that these standards are neither discriminatory, nor create unnecessary obstacles to international trade.[35] For example, a country must apply any environmental standard for one product to all such products, regardless of their source.[36] It must not relax its standards towards those that are imported from a particular source, nor towards those that are produced domestically.[37] In addition, member governments may develop product standards that create obstacles to but they must ensure that these obstacles are not avoidable ones.[38] If an obstacle is avoidable, the least trade restrictive measure must be sought.[39]

WTO rules pertaining to bans are set out in Article XI of the GATT. For the most part, Article XI forbids the use of quantitative restrictions and prohibitions by a member country. As a result, any ban put into place by a WTO member would automatically be inconsistent with Article XI.[40] However, prior to the creation of the WTO, GATT contracting parties recognized the need for a trade measure that might be inconsistent with the rules of Article XI.[41] Thus, the General Exceptions of Article XX were created. These exceptions allow member nations to implement trade policies with environmental objectives that are otherwise inconsistent with GATT rules provided certain conditions are met.[42] First, the measure must fall within one of the listed exceptions specified in Article XX. In the context of measures addressing environmental concerns, the applicable exceptions include: 1) the measure is "necessary" for the protection of the environment (XXb), or 2) "related" to the conservation of exhaustible natural resources (XXg). Second, the measure must meet the conditions of Article XX's chapeau; it must be applied in a way that does not constitute arbitrary or unjustifiable dis-

34. *See id.*

35. *Id.* art. 2.2. The Agreement calls for non-discrimination in the preparation, adoption and application of product specifications and conformity assessment procedures.

36. *Id.* arts. 2.1, 5.1.1.

37. *Id.* art. 2.1.

38. *Id.* art. 2.2.

39. *Id.*

40. *See* GATT, *supra* note 37, art. XI.

41. *2004 Report*, *supra* note 12, at 50.

42. *See* GATT, *supra* note 37, art. XX.

crimination between countries or act as a disguised restriction on trade.[43] It is important to note that the analysis for an Article XX exception does not put the necessity of the environmental objective into question; instead, it questions the necessity of the trade measure used to achieve the objective.[44] For example, if a WTO member government can prove that a ban implemented falls within Article XX (b) or (g) and the ban is not applied in a discriminatory manner, either between countries or in a way that affords protection to domestic industry (chapeau), then it can circumvent Article XI by way of an Article XX exception.

With respect to subsidization, the Agreement on Subsidies and Countervailing Measures (SCM) is an agreement created by WTO member governments in order to regulate their use of subsidies for products manufactured within a given state.[45] Under this agreement certain subsidies were designated "non-actionable," thus generally removing them from the prohibition.[46] These non-actionable subsidies expired in 2000 pursuant to Article 31 of the SCM Agreement.[47] Previously, however, non-actionable subsidies related to environmental concerns were permitted when used to promote the adaptation of existing facilities to new environmental requirements. Once again, certain conditions had to be met for their application.[48] For instance, the subsidy had to be made available to all firms that incorporated the new equipment, was limited to 20% of the adaptation costs, did not cover the cost of replacing and operating the assisted investment, was directly limited to planned reduction in a firm's pollution and did not cover any manufacturing cost savings.[49] In addition, the subsidy was only a one time non-recurring measure.[50] The effect of these requirements was that subsidies having an adverse impact on trade were still allowed under the SCM Agreement so long as they were used for certain environmental purposes.

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43. *Id.*

44. Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos*].

45. SCM Agreement, *supra* note 38.

46. *Id.* art. 8 annex 1A.

47. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 269 (3d ed. 2005).

48. SCM Agreement, *supra* note 38, art. 8.2(c).

49. *See* TREBILCOCK & HOWSE, *supra* note 53, at 269.

50. *Id.*

As previously mentioned, the WTO is quick to point out that it does not set the rules for environmental protection or establish any standards in this regard.[51] It only sets conditions that require environmental standards be met when they have an impact on trade. Though these rules are not designed to undermine the environmental protection objectives of member governments, their application has effectively reduced the ability of countries to set their own environmental agenda.[52] The resulting situation is one in which the WTO's stated position at odds with the practical effects of their policies. This contradiction is underscored in several panel and Appellate Body decisions involving U.S. attempts to set its own environmental policy.

B. WTO v. U.S. Domestic Environmental Regulations

The organs established to resolve disputes among WTO members are WTO panels and the Appellate Body. Although they are not bound by precedent in the same manner as domestic courts in the U.S., previous rulings made by both the panels and the Appellate Body are likely to be the best indicators for predicting how the WTO might deal with disputes involving similar environmental matters in the future. Several American attempts at implementing a policy centered on "sustainable development," have been thwarted by certain key rulings. The following cases illustrate the concerns of some environmental advocates for the future viability of environmental protection measures.

1. Tuna-Dolphin I

The first of these decisions arose out of a dispute between the U.S. and Mexico (Tuna-Dolphin I).[53] In 1972, the U.S. enacted legislation in the form of the Marine Mammal Protection Act (MMPA).[54] The MMPA established a moratorium on the taking of dolphins in the Eastern Tropical Pacific Ocean by U.S. fishermen.[55] It also pro-

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51. *See* discussion, *id.* at 5.

52. *See* Andrew Green, *Climate Change, Regulatory Policy and the WTO*, 8 J. INT'L ECON. L. 143 (2005).

53. Panel Report, *United States – Restriction on Imports of Tuna*, (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna-Dolphin I*].

54. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (2000).

55. Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*,

vided protection for whales, seals, polar bears and other sea mammals.[56] The Act regulated the harvesting of yellowfin tuna in hopes of reducing dolphin mortality incidental to the use of purse-sein fishing nets[57] and provided for a ban on tuna imported from "intermediary nations."[58] By 1977 the MMPA helped reduce dolphin mortality related to tuna harvesting from 300,000 dolphin deaths per year to a little over 25,000.[59] As the statute applied solely to U.S. vessels, in an attempt to avoid the domestic restrictions, several American fishermen engaged in the practice of sailing under foreign flags.[60] Congress responded by amending the MMPA in 1984 to require that foreign imports of tuna be harvested under comparable or equivalent standards as those employed by U.S. vessels.[61] If these standards were not met, the Secretary of Commerce was empowered to issue an embargo on the importation of the environmentally unfriendly products.[62] With this amendment, the import of tuna was essentially prohibited unless U.S. authorities made a determination that the tuna was caught using measures comparable to those employed by the United States.[63]

The restrictions imposed by the MMPA were challenged by Mexico under Articles I, III, IX, XI and XIII of the GATT 1947.[64] Specifically, Mexico challenged the provision in the MMPA that prohibited the importation into the U.S. of yellowfin tuna caught using methods that resulted in collateral injury to dolphins. The WTO panel concluded that the import restrictions were not internal regulations in accordance with Article III, were inconsistent with Article XI and were not saved by the exceptions of Article XX. In this case, the Panel's decision was not adopted because under the GATT 1974, in order to accept a decision prior to its adoption a consensus was required. The U.S. and Mexico settled their differences outside of the GATT framework. Nonetheless, the most significant portion of

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37 AM. BUS. L. J. 73, 98 (1999); *see also* 16 U.S.C. § 1371(a) (2003) (Moratorium on taking and importing marine mammals and marine mammal products: Imposition; exceptions).

56. Miller & Croston, *supra* note 61, at 97.
57. *See* 16 U.S.C. § 1362(5) (2003).
58. *Id.*
59. Miller & Croston, *supra* note 61, at 97.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See Tuna-Dolphin I, supra* note 59, ¶¶ 3.1-3.9.

the report concerned the extraterritorial application of the MMPA. The panel ruled that the jurisdiction to protect plant or animal life does not extend outside the territory of the nation imposing the restriction.[65] The Panel's approach to extraterritoriality focused on Article XX (g)'s requirement that the measure be taken in conjunction with the restrictions on domestic production or consumption. According to the Panel: "A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction."[66]

Another key portion of the Panel decision involved its "like product" analysis. The Panel concluded that differences in a process or production method were not relevant in determining "likeness."[67] This case resulted in the rule that products produced in an environmentally unfriendly manner cannot be treated differently than products produced in an environmentally friendly manner on the sole basis of the difference in process or production method.[68] Consequently, the sale of the tuna within U.S. borders did not afford the right to protect animals in international waters outside of the U.S. affected by the "process" used to obtain the tuna.

2. Tuna-Dolphin II

A similar complaint was made by the European Economic Community and the Netherlands in the second Tuna-Dolphin case (Tuna-Dolphin II).[69] This second Panel decision upheld parts of the previous Panel's findings and rejected others.[70] As in the previous report, the Panel emphasized the importance of promoting sustainable development but refused to endorse any particular method of environmental conservation.[71] The U.S. continued to prohibit imports that were harvested in violation of the MMPA both from "primary nations" and "intermediary nations."[72] The complainants argued

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65. *Id.* ¶ 5.31.

66. *Id.*

67. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 360 (5th printing 2007).

68. *Id.* at 316.

69. *See* Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) (unadopted) [hereinafter *Tuna-Dolphin II*].

70. *See id.*

71. *Id.* ¶ 5.42.

72. *Id.* ¶¶ 2.9, 2.12.

that the embargo constituted a quantitative restriction in violation of Article XI. Once again, the U.S. countered with the argument that the MMPA qualified for an exception under Article XX (b) and (g) and that the embargo was necessary in order to enforce the restrictions on the import of tuna harvested in a manner inconsistent with U.S. standards.[73] According to the U.S., this necessarily included restrictions on imports from countries that process and export tuna from sources whose methods did not conform to these standards, the so-called intermediary nations.

The Panel concluded that the U.S. import restrictions were not justified as measures necessary to protect human, animal, or plant life and health under Article XX (b), nor were they "primarily aimed" at the conservation of exhaustible natural resources as required under Article XX (g).[74] However, the U.S did prevail on one important point: the Panel deemed efforts to protect dolphins to be a valid policy aimed at conserving an exhaustible natural resource.[75] In so doing, the Panel noted that the provisions of Article XX (g) were not limited to resources located in the territory of the country imposing the restrictions.[76] This conclusion was in direct contravention of the narrower domestic reading of Article XX (g) by the earlier Tuna-dolphin I panel.

Of particular import was the Panel's suggestion that international environmental treaties were irrelevant to its analysis. The reason given by the Panel was that these treaties were not concluded by the contracting parties to the GATT and thus were not applicable to the interpretation of its provisions.[77] The implication of this position is that international agreements existing outside of the GATT are marginalized and thus rendered moot when considered in any trade related context.[78] Not only is this reasoning untenable in the context of environmental protection efforts, it is inconsistent with the Vienna Convention.[79]

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73. *Id.* ¶ 3.7.

74. *Id.* ¶ 5.27.

75. *Id.* ¶ 5.13.

76. *Id.* ¶¶ 5.16-5.20.

77. *See* TREBILCOCK & HOWSE, *supra* note 53, at 134-35. The authors suggest that the Panel's interpretation in this regard implies a conception of the GATT as a "self-contained regime, sealed off from the norms and rules of other international regimes and the values and constituencies that these reflect." *Id.*

78. *See id.*

79. *See* Vienna Convention on the Interpretation of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

As was the case in Tuna-Dolphin I, the U.S. was able to veto the adoption of the Tuna-Dolphin II panel report. Nonetheless, these two cases became the standard by which to evaluate unilaterally applied environmental measures.[80] The U.S. was placed in the difficult position of having to make a choice between following its own statutorily enacted mandates or abiding by the obligations imposed upon it by the GATT.[81] If the U.S. complied with the decisions of the GATT panel it would be forced to retreat on conservation policies that reflected the prevailing public sentiment of its citizenry.[82] However, by refusing to follow the Panel's decision, the U.S. would jeopardize its standing in the international community and risk suffering sanctions from affected nations.[83] These rulings underscore the tension between environmental protection efforts and international trade.

3. Reformulated Gasoline

Shortly after the formation of the WTO, Venezuela and Brazil requested the formation of a dispute settlement panel to decide whether certain regulations of the United States Clean Air Act,[84] more specifically, the U.S. Environmental Protection Agency's (EPA's) "Gasoline Rule"[85] were inconsistent with WTO obligations.[86] These regulations, intended to reduce air pollution in the U.S., required that gasoline sold in certain U.S. regions with high levels of air pollution meet a specific pollution standard.[87] This "reformulated" gasoline was contrasted with "conventional" gasoline

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80. *See* Miller & Croston, *supra* note 61, at 107.

81. *Id.*

82. *Id.*

83. *Id.*

84. Clean Air Act, 42 U.S.C. §§ 7401-7671 (2000). The Clean Air Act sets limits on certain air pollutants, including how much can be in the air anywhere in the United States. The Environmental Protection Agency is the regulating authority charged with enforcing the Act's provisions. Individual states may have more stringent air pollution laws, but they may not have less restrictive standards; *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

85. Regulation of Fuel and Fuel Additives-Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80 (2007).

86. *See* Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *Gasoline Panel Report*].

87. *See* Clean Air Act, 42 U.S.C. § 7545(k)(2)-(3) (2000).

whose sale was allowed in all other parts of the U.S.[88] At a minimum, the conventional gasoline had to meet the same pollution standards as gasoline sold in 1990 (baseline standard).[89] One of the objectives of the conventional gasoline standard was to prevent blending of pollutants removed from reformulated gasoline into conventional gasoline.[90] To achieve this objective, a statutory baseline was established in place of the producer specific 1990 baseline and applied to producers not in operation in 1990 and to importers.[91] At the heart of the dispute was the fact that most foreign producers were not eligible for the less strict individual baselines and instead had to rely on the harsher statutory baselines.[92]

The claim against the U.S. was based on the position that the regulations of the Clean Air Act and the Gasoline Rule were inconsistent with Article III and not covered by the exceptions of Article XX.[93] The Panel concluded that the regulations treated importers of gasoline less favorably than domestic producers and were therefore inconsistent with the provisions of Article III.[94] Although the Panel found that the regulation was not excepted by Article XX (b), (d) and (g), the Appellate Body ruled that the baseline standards fell within the Article XX (g) exception.[95] However, the base line standards did not comply with the chapeau of Article XX. The chapeau prohibits the application of an environmental measure in a way that constitutes: 1) arbitrary discrimination; 2) unjustifiable discrimination; or 3) a disguised restriction of international trade.[96] The Appellate Body viewed the fundamental purpose of the introductory clause as an attempt to avoid abuse or illegitimate use of the Article XX exceptions.[97] In applying the introductory clause, the Appellate Body found the U.S. had alternative courses of action available to it when it implemented the Clean Air Act.[98] This meant that the Ap-

88. *See id.* § 7545(m)(3)(6).
89. *Id.* § 7545(k)(10)(B).
90. *See Gasoline Panel Report, supra* note 92, ¶ 2.4.
91. *See* 40 C.F.R. § 80.
92. *See Gasoline Panel Report supra* note 92 ¶ 3.7.
93. *Id.* ¶ 3.1.
94. *Id.* ¶ 6.10. This issue was not considered by the Appellate Body; the United States did not appeal this portion of the Panel's ruling.
95. *See* Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, 35 I.L.M. 603, 633 (May 20, 1996).
96. *Id.*
97. *Id.* at 629.
98. *Id.*

pellate Body found the measures to be related to the conservation of an exhaustible natural resource (clean air), that they were made in conjunction with restrictions on domestic production or consumption, but that they were an unjustifiable discrimination and a disguised restriction on international trade.[99] This conclusion was based on the fact that domestic producers had a choice to either establish their own 1990 baselines or rely on the statutory baseline. Contrary to domestic producers, foreign producers did not have the option of establishing facility specific baselines.[100] The Appellate Body suggested alternative courses of action could have included an imposition of statutory baselines for all gasoline producers or the availability of individual baselines for all foreign and domestic producers.[101]

Finally, the Appellate Body concluded that U.S. and foreign producers could have sought cooperative arrangements to reach the same result.[102] This raises the issue of "multilateral environmental agreements" and their relationship to the provisions of the multilateral trading system. The Appellate Body appears to endorse the widely held recognition that using multilateral solutions to transboundary environmental problems is preferable to unilateral solutions.[103] It has not, however, taken the opportunity to directly confront the potential conflicts inherent in these types of agreements.

4. Shrimp-Turtle I

The most recent case involving U.S. attempts to implement environmental protection measures that directly effecting trade arose when India, Malaysia, Pakistan and Thailand challenged certain provisions of the U.S. Endangered Species Act.[104] In 1989, Congress amended the Endangered Species Act with Section 609, to afford protection to sea turtles on an international basis.[105]

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99. *Id.* at 633.
100. *Id.* at 609-10.
101. *Id.* at 629.
102. *Id.* at 631.
103. *See 2004 Report*, *supra* note 12, at 35.
104. *See* Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle I AB Report*]; *see also* Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS59/R (May 15, 1998) [hereinafter *Shrimp-Turtle I Panel Report*].
105. *See* Endangered Species Act of 1973, 16 U.S.C. § 1537 (2000).

Prior to its amendment, the Act only extended protection to various species of sea turtles within U.S waters.[106] In circumstances similar to those in the Tuna-Dolphin case, sea turtle mortality was directly related to commercial shrimp trawling activity.[107] Specifically, the use of nets in to harvest shrimp resulted in the incidental death of sea turtles at a rate significant enough to make them subject to the protection of the Endangered Species Act.[108] Section 609 required shrimp trawlers to use "turtle excluder devices" (TED's) in their shrimp nets when fishing in areas likely to be turtle habitats.[109] The statute further restricted the importation of shrimp and shrimp products to countries with comparable regulations in place or to those that could demonstrate that their fishing practices did not pose a threat to turtles. Countries could also comply through a certification process.[110] In practice, exporting countries had to demonstrate the use of TED's in order to be certified under this law.[111]

The certification requirement was immediately challenged under Articles I, III and XI of the GATT. The Panel established to decide the issue concluded that the certification requirement violated Article XI (1), and was not justified under Article XX.[112] The U.S. did not argue, nor did the Panel consider the import restriction as an overall regulatory measure enforced at the border.[113] Under this type of scheme, the applicable provision of WTO law is Article III's National Treatment obligation. As the Appellate Body would decide sometime later, the key distinction is whether a border measure is supported by an internal regulation.[114] The Panel ruled that the measures imposed by the United States were outside the ambit of Article XX and were precluded by the chapeau of Article XX as a threat to the integrity of the trading system.[115]

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106. *Id.* §§ 1531-1544 (2000).

107. *See* George Cavros, *The Hidden Cost of Free Trade: The Impact of United States World Trade Obligations on United States Environmental Law Sovereignty*, 9 ILSA J. INT'L & COMP L. 563, 568 (2003).

108. *See id.*

109. *See* 16 U.S.C. § 1537.

110. *Id.*

111. *Id.*

112. *Shrimp-Turtle I Panel Report*, *supra* note 110, ¶¶ 7.11, 7.12.

113. TREBILCOCK & HOWSE, *supra* note 53, at 529.

114. *See generally EC-Asbestos*, *supra* note 50.

115. *Shrimp-Turtle I Panel Report*, *supra* note 110, ¶ 7.51.

On review, the Appellate Body reversed the sequence of analysis undertaken by the Panel.[116] According to the Appellate Body, the more sound approach is to first determine whether the measure falls under the exceptions listed under Article XX (a)-(j). If it does, the next step is to examine whether the measure conforms to the chapeau's requirements. The Appellate Body concluded that the exceptions under Article XX exist in order to justify otherwise inconsistent trade measures as long as the policies of those measures are recognized as legitimate.[117] For this reason, the Appellate Body proceeded to analyze Section 609 under Article XX (g). Upon recognizing that sea turtles were an endangered species,[118] the conclusion that they were an exhaustible natural resource followed easily.[119] Thus, the first prong of the analysis was satisfied. Next, the Appellate Body determined that the measure was "related to" the conservation of an exhaustible natural resource.[120] The policy was a justifiable means to the end of protecting sea turtles and therefore satisfied the second prong of Article XX (g). After finding the measure to have been applied "in conjunction with" restrictions on domestic production or consumption, the Appellate Body proceeded to the final step of the analysis: the chapeau of Article XX.[121]

Using the chapeau's second tier analysis, the Appellate Body concluded that while the measure was provisionally justified under Article XX (g), it did not meet the conditions set out in the chapeau and therefore was not exempt. Notwithstanding the fact that a multilateral environmental agreement was in place,[122] the Appellate Body found the U.S. was guilty of unjustifiable discrimination because of

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116. *Shrimp-Turtle I AB Report, supra* note 110, ¶¶ 117-23.

117. *Id.* ¶ 121.

118. *Id.* ¶ 132.

119. *Id.* ¶ 134. The Appellate Body pointed out that "One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities." *Id.* ¶ 128.

120. *Id.* ¶ 142.

121. *Id.* ¶ 145.

122. The United States and all of the complaining parties in this case were and still are Contracting Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES (Mar. 3, 1973). The Agreement's aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. In fact, the Appellate Body adopted this multilateral environmental agreement as an interpretational tool to conclude that sea turtles were in fact an endangered species.

its failure to conduct bilateral or multilateral negotiations with the affected countries in its attempt to reach a cooperative agreement.[123] The Appellate Body noted that the U.S. did negotiate with some countries to produce the Inter-American Convention for the Protection and Conservation of Sea Turtles but not with other countries.[124] The result of the U.S.'s failure in this regard was a finding of unjustifiable discrimination.

Some observers take this part of the Appellate Body's ruling to impart a stand-alone duty to negotiate as a precondition to employing an environmental trade measure.[125] However, this interpretation does not comport with the specific wording of the Appellate Body's decision. The Appellate Body never asserted that the chapeau of Article XX imposed a "sui generis" obligation to negotiate.[126] Rather, it requires a member to negotiate in good faith with affected parties to the extent that it has already done so with other parties affected by the trade measure.[127] Supporting this interpretation is the Appellate Body's focus on the ordinary meaning of Article XX's text, specifically its chapeau.[128] There is nothing in the text of Article XX or its chapeau that can be read to impose a duty to negotiate in the absence of discrimination between countries where the same conditions prevail.[129] Although the Appellate Body relied on the Rio Declaration and other sources of international environmental law to hold that global environmental concerns should be dealt with cooperatively and not unilaterally, it did not incorporate into the chapeau a duty to negotiate.[130] Instead it used international environ-

123. The Appellate Body relied on Section 609's requirement that negotiations be conducted in an effort to come to a cooperative agreement with regard to sea turtle protection. *See* discussion, *supra*, at 17.

124. Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, 34 I.L.M. 1244 (1998).

125. *See* John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 41 (2004).

126. 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, 507 (2002).

127. *Id.* at 508.

128. *See Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 150.

129. *See* 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 47 (2005).

130. Howse, *supra* note 132, at 508.

mental law as a baseline to assess whether the U.S. measure was unjustifiable.[131]

In perhaps the most significant portion of the decision, the Appellate Body reversed the Panel decision on the issue of whether trade measures directed at other States' environmental policies was consistent with Article XX (g).[132] Consequently, these measures are no longer per se inconsistent with the objectives of the multilateral trading system.[133] The Appellate Body was careful not to unconditionally endorse the use of extra-jurisdictional measures in that it required "a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX (g)."[134]

In another significant departure from the prior decisions, the Appellate Body determined that unilateral trade measures were not *a priori* excluded from the protection of Article XX.[135] According to the judges, such a reading would render most if not all of the Article XX provisions "inutile."[136]

In rejecting the approach of the Panel decisions in both Tuna-Dolphin cases, the Appellate body emphasized the importance of the chapeau of Article XX in ensuring environmental measures are not applied without regard for the differences among countries. Further consideration must also be given to the manner in which a measure is applied. Should the application be found rigid and inflexible, the discrimination may constitute "arbitrary discrimination" within the meaning of the chapeau of Article XX.[137]

Interestingly, the Appellate Body gave weight to international environmental agreements signed after the GATT 1947 was negotiated. This practice, in contrast to the Tuna/Dolphin Panels, should give some comfort to environmental advocates regarding the development of the reasoning practices of the Appellate Body.

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131. *Id.*

132. *See Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 121; *see also* TREBILCOCK & HOWSE, *supra* note 53, at 531-32.

133. *See* TREBILCOCK & HOWSE, *supra* note 53, at 531.

134. *Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 133.

135. *Id.* ¶ 121.

136. *Id.*

137. *Id.* ¶ 177.

5. Shrimp Turtle II

At the conclusion of the first round of rulings on the Shrimp-Turtle I dispute, the Dispute Settlement Body made certain recommendations on measures necessary to enable the U.S. to come into compliance with GATT rules.[138] The U.S failed to change its applicable law and choose instead to change the manner in which it applied the law. Specifically, it developed criteria for the certification of exporting countries aimed at ensuring the protection of sea turtles by requiring measures "comparable in effect" to those of the United States.[139]

A second challenge was brought by a number of shrimp exporting countries as to the consistency of this modification with WTO rules.[140] The Appellate Body in Shrimp-Turtle II held the new rules were consistent with Article XX, concluding that the revised measure was sufficiently flexible to meet the standards of the chapeau.[141] It reasoned that the test of "comparable effectiveness" was sufficiently flexible to take into account special circumstances in the exporting country, while providing the necessary assurance to the country applying the environmental measure.[142]

In determining the rules were consistent with Article XX it considered the obligation to pursue negotiations before applying unilateral measures and the level of flexibility required for the measure to accord with the chapeau of Article XX. On the first issue it held that serious efforts to negotiate in good faith are sufficient, but that there is no obligation to conclude an agreement.[143] With its decision, the Appellate Body clarified any misconception of a duty to negotiate by concluding that the chapeau simply amounted to a requirement of a

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138. Meinhard Doelle, *Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change Through the World Trade Organization*, 13 R.E.C.I.E.L. 85, 91 (2004); *see also* Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/AB/R (Oct. 22, 2001) [hereinafter *Shrimp-Turtle II AB Report*]; Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/RW (June 15, 2001) [hereinafter *Shrimp-Turtle II Panel Report*].

139. *See* Doelle, *supra* note 144, at 91.

140. *Id.*

141. *Shrimp-Turtle II AB Report*, *supra* note 144, at ¶ 145.

142. *Id.* ¶¶ 144-48.

143. *Id.* ¶¶ 115-34.

"comparable negotiating effort."[144] Similarly, in a more recent case involving the United States and Aruba, the Appellate Body found that there was no duty to "consult" or "negotiate" with respect to measures taken by the U.S. to prevent certain gambling and betting services from being supplied by Aruban service providers.[145] Although the case was decided under the General Agreement on Trade and Services ("GATS"), the Appellate Body concluded that the general exceptions of Article XX were set out in the same manner as those under the GATS.[146] Accordingly, the Appellate Body found the Panels' requirement of consultations with a view to a negotiated settlement to be an inappropriate alternative for the Panel to have considered.[147] With respect to the flexibility of the new rules, the Appellate Body concluded that the test of "comparable effectiveness" was sufficiently flexible to take into account special circumstances in the exporting country while also providing the necessary assurance to the country applying the environmental measure.[148]

An interesting side note in the Shrimp-Turtle disputes is the fact that in a case brought by Earth Island Institute, before the Panel was even requested to evaluate Shrimp-Turtle I, the United States Court of International Trade ruled that the provisions of the Endangered Species Act, which covered only the Caribbean/Western Atlantic region, must be extended worldwide.[149] The court issued an order requiring the Secretary of Commerce to ban the importation of shrimp that were not harvested with fishing methods "comparable" to U.S. standards.[150] As a result of the Panel ruling in Shrimp-Turtle I, Congress modified the guidelines in 1998. Following the Appellate Body decision in Shrimp-Turtle I, the United States Court of International Trade ruled the 1998 revised guidelines permitting the importation of shrimp caught with TED's from non-certified nations violated U.S. law.[151] This intra-judicial clash raises an interesting question as to what extent the multilateral trading system may be

144. TREBILCOCK & HOWSE, *supra* note 53, at 536.

145. Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

146. *Id.* ¶ 291.

147. *Id.* ¶ 317.

148. *Id.* ¶ 146.

149. *See* Earth Island Inst. v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995).

150. Miller & Croston, *supra* note 61, at 92.

151. *See* Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064 (Ct. Int'l Trade 1999).

affected by a U.S. court, or conversely, to what extent U.S. legislation may be affected by declarations made by international tribunals.

6. Domestic Emissions Trading

The implementation of international and domestic emissions trading systems are widely accepted as significant weapons in the reduction of greenhouse gas (GHG) emissions in the most economically efficient manner possible.[152] In December 1997, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) agreed to the text of the Kyoto Protocol.[153] Kyoto is the first international agreement with legally binding commitments on the reduction of GHG emissions.[154] With its ratification, most of the developed world has pledged to meet modest reduction targets for the period of 2008-2012.[155] However, the two largest per capita emitters, the U.S. and Australia, have opted, up to now, not to join this effort to address climate change.[156] The reasons given by the U.S. for refusing to initiate the ratification process were the fear of injury to its economy and the extension of voluntary compliance to developing countries.[157]

Although the United States has thus far declined to ratify the Kyoto Protocol, it would be incorrect to assume that the U.S. has chosen not to deal with the issue of climate change and, in particular, the effect of greenhouse gas emissions.[158] In many respects, the U.S. has acted as a pioneer in the use of market-based policy instruments in the environmental arena.[159] A case in point is the American foray into domestic emissions trading. While the practice of domestic emissions trading does not directly implicate the WTO and the multilateral trading system, U.S. efforts in this regard illustrate

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152. *See* Brian Evans, *Principles of Kyoto and Emissions Trading Systems: A Primer for Energy Lawyers*, 42 ALTA. L. REV. 167 (2004-2005).

153. Kyoto Protocol to the Framework Convention on Climate Change, UNFCCCOR, 3d Sess., Annex, U.N. Doc. FCCC/CP/7/Add.1, 37 I.L.M. 22 (Dec. 10, 1997) *available at* http://unfccc.int/essential_background/kyoto_protocol/items/1678.php [hereinafter Kyoto Protocol].

154. Meinhard Doelle, *From Kyoto to Marrakesh; A Long Walk through the Desert: Mirage or Oasis?*, 25 DALHOUSIE L. J. 113, 118 (2002).

155. *Id.*

156. *See id.* at 120.

157. *Id.*

158. *See* Evans, *supra* note 158, at 169.

159. *See* discussion, *infra* pp. 26-27.

the government's resolve in reconciling an aggressive environmental protection agenda with its obligations under the WTO.

Before elaborating on these efforts, a brief description of emissions trading is in order. Emissions trading refers to the process by which parties can buy or sell permits to emit regulated substances.[160] Essentially, the benefit that accrues from entitlement to an allowance or permit becomes a commodity that can be traded among market participants.[161] Emissions trading significantly reduces the cost of controlling GHG's because it is based on the economic principle that if the relative cost of performing an activity differs among actors, there are potential gains to be made from trade.[162] There are a myriad of ways an emissions trading system can operate; the one fundamental approach that will be addressed in this paper is the cap and trade system.

A cap and trade system is created when a regulatory body sets a cap or limit on the absolute amount of emissions permitted from a source or group of sources.[163] Usually, the cap is designed to reduce the amount of emissions by setting maximum emissions at a lower level than historically allowed. For example, the Kyoto Protocol based the limits it imposed on levels from 1990.[164] Designated groups of emitters are then authorized to emit a certain proportion of the total amount allowed.[165] This policy may be practiced on a regional, national, or international level. The Kyoto Protocol is the standard by which emissions trading is practiced on an international scale. Emitters who successfully reduce their omissions below their allocated level may sell their unused permits to others who have exceeded their allocated allowance. Likewise, participants emitting beyond their allocated allowance and in excess of any additional permits purchased from others will be severely penalized.[166]

Emissions trading is not a new concept. For example, in 1982 the United States Environmental Protection Agency (EPA) introduced a new maximum lead content for leaded gasoline. Trading was introduced as part of the EPA's program to reduce the maximum lead

160. Evans, *supra* note 158, at 178.
161. *Id.*
162. *See id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

content for leaded gasoline.[167] Participants could create lead rights capable of being sold to other market participants during the same quarter the rights were created.[168] In addition, the EPA permitted these credits to be banked and used at a later date.[169] The lead trading program is credited with reducing the maximum lead content of gasoline much more rapidly than would have otherwise occurred.[170]

Amendments to the Clean Air Act exemplify more recent efforts by the U.S. to promote domestic emissions trading.[171] This legislation created a comprehensive market-based program for the control of sulphur dioxide (SO2) emissions from coal fired electric power plants. Also known as the Acid Rain Program, this program, is designed to achieve a significant reduction in SO2 emissions from electric utilities between 1995 and 2010.[172] The Clean Air Act identifies the sources subject to the legislation along with their allowance allocation. Initially, allowances were issued free of charge and were based on actual emissions from 1985, subject to certain adjustments.[173] The Acid Rain Program allowance market has been active since the early 1990s. As of 2007, the average price paid at the annual SO2 auction was $444.39 per tonne.[174] This program has successfully in reduced SO2 emissions from power plants in an economically efficient manner.[175]

At a regional level, the South Coast Air Quality Management District (SCAQMD) established the Regional Clean Air Initiatives Market (RECLAIM).[176] This program is intended to reduce emissions

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167. Regulation of Fuels and Fuel Additives; Banking of Lead Rights, 50 Fed. Reg. 13116 (Apr. 2, 1985) (codified at 40 C.F.R. § 80).

168. *Id.*

169. *Id.*

170. *See* Evans, *supra* note 158, at 180.

171. Clean Air Act, 42 U.S.C. § 7545(k)(7) (2000); *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2495 (1990).

172. *See* Evans, *supra* note 158, at 181. Under the Acid Rain Program, affected utility units are allocated allowances based on their historic fuel consumption and a specific emissions rate. Each allowance permits a unit to emit 1 ton of SO_2 during or after a specified year. For each ton of SO_2 emitted in a given year, one allowance is retired, in that it can no longer be used.

173. *Id.* at 182.

174. 2007 EPA Allowance Auction Results, *available at* http://www.epa.gov/airmarkets/trading/2007/07summary.html (last visited Mar. 28, 2008).

175. Evans, *supra* note 158, at 182.

176. Regional Clean Air Initiatives Market, 40 C.F.R. § 70 (1993), *available at* http://www.aqmd.gov/reclaim/reclaim.html [hereinafter RECLAIM].

of SO2 and NO2 in the Los Angeles basin via capping emissions and allocating allowances to emitters of SO2 and NO2. The program works by identifying facilities to receive an annual emissions allocation and an annual rate of reduction in emissions.[177] The allowances were initially issued free of charge to participants based on prior production levels.[178] Each year credits are assigned to the facilities and may be bought or sold for use within that year.[179] Facilities must hold credits equal to their actual emissions and they can sell excess credits to firms that cannot or choose not to meet their limits.[180] By 2003, this program reduced emissions in NO2 by seventy percent and SO2 by sixty percent.[181]

In assessing any emissions trading policy, whether it is domestic or international in scope, its comportment with WTO rules must be considered. If U.S. federal climate policy were to take the form of a cap and trade system, questions on its ability to impose a border tax adjustment under this system would be raised.[182] Under Article III:2 of the GATT, a border tax adjustment can be imposed on an imported product equal to an "internal tax or other internal charge of any kind."[183] This is significant in that if a cap and trade measure or similar measure (carbon tax) were to be applied domestically, the classification of the allowance as a tax or internal charge would conceivably allow the U.S. to impose a commensurate import levy on like foreign products.[184] Once again, U.S efforts at implementing domestic environmental policy would be influenced by how the Appellate Body ruled in this matter.

177. Evans, *supra* note 157, at 183.
178. RECLAIM, *supra* note 182.
179. *See id.*
180. *See id.*
181. *Id.*
182. *See* Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law* 21, (Nicholas Inst. for Envtl. Pol'y Solutions, Working Paper No. 07-02, 2007), *available at* http://www.nicholas.duke.edu/institute/knowledge-energy.html.
183. GATT, *supra* note 37, art. III.
184. *Id.*

IV. RECONCILING THE CONFLICT BETWEEN THE WTO, TRADE AND THE ENVIRONMENT

A. Article XX

During the ongoing conflict between environmental advocates and proponents of free trade, the decisions from the cases described supra have been relied on to highlight the concerns of environmentalists.[185] These concerns center on the fear that the goal of free trade will lead to the relaxation of U.S. environmental policy.[186] However, this pessimism does not take into account the existence and usefulness of Article XX of the GATT. These environmentalists predicate their outlook on the theory that there is no objective measure to overcome the requirements of the GATT in implementing environmental policy.[187] This could not be further from the truth. Notwithstanding the decisions in the cases already cited, it should be noted that the Appellate Body has acknowledged, in both EC-Asbestos and Shrimp Turtle I, the validity of unilateral trade measures aimed at protecting the environment.[188] While the decisions in these cases did not declare a per se rule against the environmental trade measures employed, they went lengths to clarify the standards required for these measures to be suitable for an Article XX exception. Thus, the Appellate Body recognized the validity of unilateral trade measures aimed at protecting the environment, but was also sensitive to their potential for abuse.

The WTO must engage in this type of nuanced balancing act in order to decide whether a measure is a disguised restriction on free trade or a legitimate exercise of self-governance.[189] The WTO has the unenviable task of advancing the goals of the multilateral trading system while concomitantly taking care not to dilute legitimate efforts of sovereign states to implement their environmental agenda. Therefore, rather than condemn dispute settlement bodies for con-

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185. *See generally* Nita Ghei, *Evaluating the WTO's Two Step Test for Environmental Measures Under Article XX*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 117 (2007).

186. *Id.*

187. *See* Brandon L. Bowen, *The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, 29 GA. J. INT'L & COMP. L. 181, 182 (2000).

188. *See EC-Asbestos*, *supra* note 50, ¶ 168; *see also Shrimp-Turtle II AB Report*, *supra* note 144, ¶ 144.

189. *See* Ghei, *supra* note 191, at 120.

clusions they did not reach, perhaps the more apt response is to examine those conclusions rendered.

Environmental advocates may ground their optimism in the Appellate Body's move away from the test of whether the measure in question is the *least* trade restrictive manner to achieve the environmental objective. Rather, the focus is now on whether there are *lesser* trade restrictive means to obtain the same goal.[190] The implications of this change in position are indicative of the emergence of the WTO's emphasis on "sustainable development" as a stated goal for the multilateral trading system. Towards this end, the Appellate Body has conceded the extraterritorial application of an environmental protection measure to be legitimate under WTO law.[191] Although this jurisdictional interpretation by the Appellate Body is relevant only to the discussion of Article XX (g), it is at the very least more generous than the interpretations put forth by the panels in Tuna-Dolphin I and Tuna-Dolphin II.

Although unilateral measures will be tolerated, the WTO dispute settlement bodies favor multilateral action over unilateral action.[192] With this in mind, it is easy to understand why U.S. attempts at applying its environmental protection measures failed. The U.S.' failure to extend its efforts at multilateral negotiation to *all* affected parties in Shrimp-Turtle I was at the heart of the Appellate Body's finding that the measure being evaluated was inconsistent with the chapeau of Article XX. This again was an immense departure from the Panel in its earlier decision of this case. The Panel in Shrimp-Turtle I clearly embraced the view that all unilateral environmental measures were inconsistent with the chapeau on the basis that they threaten the multilateral trading system.[193] The Appellate Body retreated from this position not just in its analysis of Shrimp-Turtle I, but also in its subsequent approval of the same measure in Shrimp-Turtle II.

Once again, in Shrimp-Turtle I, the Appellate Body expanded the scope of Article XX (g) when it overruled the Panel's view that a living resource should be distinguished from an "exhaustible natural resource" within the terms of Article XX (g). Moreover, the Appellate Body adopted several multilateral environmental agreements as

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190. *EC-Asbestos*, *supra* note 50, ¶ 172.

191. *See Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 133.

192. *See Shrimp-Turtle II AB Report*, *supra* note 144, ¶ 137; *see also Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 121.

193. FIONA MACMILLAN, WTO AND THE ENVIRONMENT 103 (2001).

interpretational tools to arrive at this conclusion.[194] The reliance on and reference to multilateral environmental agreements in the context of a WTO dispute is especially noteworthy and portend a new approach to the resolution of these types of disputes.[195]

The overall conclusion from the case law to date appears to be that measures that address environmental protection efforts will be acceptable under WTO law if those measures treat like products alike. If they do not, the different treatment will have to be justified under Article XX (b) or (g). The measures most likely to succeed under these provisions will be those with clear environmental objectives that leave much flexibility to meet those objectives. Measures applied without first consulting or deliberating with the countries affected by the measures are also less likely to be saved by Article XX, unless there is no less restrictive way of achieving the Article XX (b) or (g) objective.

B. Eco-Labeling

Part of the complaint against the U.S. in the Tuna-Dolphin I case has yet to be addressed in this note. The complaint concerns a labeling scheme established by certain provisions of the Dolphin Protection Consumer Information Act (DPCIA).[196] In response to the voluntary actions of some American companies to implement a "Dolphin-Safe" tuna label on their products, Congress enacted the DPCIA in 1990.[197] This statute established the requirements for labeling products as "Dolphin-Safe." Companies marketing tuna sold in or exported from the U.S. abided by the requirements on a voluntary basis. Once again, the use of purse seine fishing nets was discouraged and vessels in the Eastern Tropical Pacific Ocean could not intentionally set these nets on dolphins during their voyages.[198] The Panel in Tuna-Dolphin I found this labeling scheme to be consistent with the MFN obligation of Article I.[199] The scheme was consistent because the labeling regulations applied to all countries that fished in the Eastern Tropical Pacific Ocean and involved no

194. *Id.* at 92.
195. *Id.*
196. Dolphin Consumer Protection Information Act of 1990, 16 U.S.C. § 1385 (2000).
197. *See* Miller & Croston, *supra* note 61, at 99.
198. *Id.* at 100.
199. *See Tuna-Dolphin I*, *supra* note 59, ¶ 4.02.

distinction based on the products' origin.[200] As a result, the use of what is termed "eco-labeling" has essentially been adopted by the WTO.[201]

Eco-labeling schemes must comply with all WTO/GATT requirements; this includes the TBT Agreement that governs any regulation or standard. While there are areas of overlap between the GATT and TBT Agreement, any potential conflict is governed by the TBT.[202] While the majority of mandatory labeling measures will fall under both the GATT and TBT, the same cannot be said of voluntary measures. Voluntary eco-labeling related to product characteristics will fall under the TBT Agreement if they are "standards" within that defined term of the Agreement. This requires the measures to be set by a recognized body such as a governmental organization.[203] If the standard is set solely by private industry with no government involvement, it may not fall within the TBT definition of a "standard".[204] Mandatory standards, on the other hand, will fall within the term "technical regulation," and thus be subject to the requirements of the TBT.[205] Moreover, should the labeling scheme be found not "related" to the process and production method, this too would likely preclude its applicability to the TBT.[206] The TBT Agreement additionally emphasizes the use of international standards as a basis for technical regulations.[207] Article 2.5 of the Agreement creates a rebuttable presumption that a measure, "in accordance with relevant international standards," does not create an unnecessary obstacle to trade.[208]

The acceptance of the U.S. eco-labeling scheme with respect to dolphin-safe tuna seemed to be based primarily on the grounds that the program's requirements were voluntary and not mandatory.[209] The validity of an eco-labeling scheme with respect to WTO obliga-

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200. *See id.*

201. *See 2004 Report*, *supra* note 12, at 17.

202. *See* Agreement Establishing the World Trade Organization, General Interpretive Note to Annex 1A, 33 I.L.M. 1144, 1154 (1994).

203. *See* TBT Agreement, *supra* note 36, art. 1.2, Annex 1(2).

204. Green, *supra* note 58, at 163.

205. *See* TBT Agreement, *supra* note 36, art. 1.2, Annex 1(1).

206. *See* discussion *infra* pp. 33-38.

207. Green, *supra* note 58, at 180; *see also* TBT Agreement, *supra* note 36, art. 2.4.

208. *See* TBT Agreement, *supra* note 36, art. 2.5; *see also* Green, *supra* note 58, at 180.

209. *See* MACMILLAN, *supra* note 199, at 114.

tions would seem to hinge on whether or not it fits into the voluntary versus involuntary category. In addition, these two groups are generally the consequence of whether the labeling scheme is negative or positive in nature.[210] Mandatory schemes require producers or sellers to identify qualities that consumers may perceive as negative and would prefer to avoid.[211] Positive labeling, on the other hand, allows producers or sellers to identify characteristics that might be deemed desirable by consumers.[212] There is a dearth of case law in this regard. However, on the basis of the Panel decision in Tuna-Dolphin I, it would appear that voluntary (positive) labeling schemes stand the best chance of surviving a WTO challenge.[213] This does not mean that mandatory (negative) eco-label requirements would not be permissible under WTO rules. On the contrary, if these requirements are applied in a non-discriminatory manner and adhere to both the MFN and National Treatment obligations, they would likely be found consistent with both of these provisions.[214]

The position of the WTO on eco-labeling has evolved from the original decision in Tuna-Dolphin I. WTO member generally agree that "voluntary, participatory, market based and transparent environmental labeling schemes are economically efficient instruments to inform consumers about environmentally friendly products."[215] Furthermore, WTO members recognize that eco-labeling schemes tend to restrict trade less than other measures.[216]

The latest U.S. effort to implement an eco-labeling measure involves the "Energy Star" efficiency program.[217] Energy Star is a voluntary performance based labeling scheme covering more than 50 product categories.[218] It is a self-certification measure created with the objective of reducing greenhouse gas emissions and assisting

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210. *Id.*
211. *Id.*
212. *Id.*
213. *See Tuna-Dolphin I, supra* note 59.
214. *See* Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 294 (1997).
215. *2004 Report, supra* note 12, at 17.
216. World Trade Organization, Environment: Issues, Labeling, http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm (Last visited Mar. 11, 2008).
217. *Id.*
218. *Id.*

consumers in identifying and purchasing products with enhanced energy efficiency.[219]

The environmental labeling system is a process by which the market itself rewards the environmentally friendly producers. Thus the labeling system has the potential for achieving environmental objectives while minimizing interference with the multilateral trading system.[220] In light of the general acceptance of these types of measures, they should prove to be an invaluable resource to environmental advocates in reconciling the concerns of trade and the environment.

C. Process and Production Methods

A more problematic issue in the eco-labeling debate is the use of criteria linked to the Process and Production Methods (PPMs) of a given product.[221] WTO members agree that countries are within their rights under WTO law to establish criteria for the manner in which products are produced, if the method of production leaves a "trace" in the final product.[222] Member disagreement lies in whether a measure is consistent with WTO rules if it is based on "unincorporated" PPMs.[223] These non-product related PPMs leave no trace of the production method in the final product.[224] As a result, many developing countries contend that any discrimination between products based on non-product related PPMs, such as some eco-labels, is inconsistent with WTO law.[225] Those PPMs that are directly related to the characteristics of the product concerned, for example, pesticides used on crops or hormones used on cattle in the production of meat, are regulated by two separate codes.[226] The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the TBT Agreement govern the application of such measures [227]

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219. *Id.*
220. *See* Rich, *supra* note 35, at 21.
221. *See 2004 Report*, *supra* note 12, at 17.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *See* Schoenbaum, *supra* note 220, at 288.
227. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement]; TBT Agreement, *supra* note 36.

The SPS Agreement governs additives, contaminants, toxins and disease carrying organisms in consumable products, or damage caused by the entry, establishment or spread of pests.[228] The TBT Agreement covers all technical requirements, voluntary standards and the procedures to ensure that these are met, except when they are SPS measures as defined by the SPS Agreement.[229]

In Annex 1 of the TBT Agreement, a technical regulation is defined as "a document that lays down product and characteristics or their *related* processes and production methods."[230] The accepted interpretation of this clause is that this excludes non-product related PPMs.[231] The SPS Agreement includes, in its covered measures, those that apply to "process and production."[232] Yet, because SPS applies to measures seeking to protect life or health *within* the territory of the importing country, non-product related PPMs imposed on imported goods would seem to be excluded by this limitation.[233] These Agreements effectively serve to limit a State's ability to adopt different treatments for separate products with the same physical characteristics based on how the products were produced or harvested.[234]

Inherent in the provisions of the SPS Agreement is the question of the precautionary principle and its relevance in the interpretation of the Agreement. This is an important question especially in light of its existence in the Rio Declaration, which provides:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where 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 degradation."[235]

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228. SPS Agreement, *supra* note 233, art. 1.3 (adopting Annex A).

229. *Id.* art. 1.4.

230. TREBILCOCK & HOWSE, *supra* note 53, at 526; *see also* TBT Agreement, *supra* note 36, Annex 1 (emphasis added).

231. TREBILCOCK & HOWSE, *supra* note 53, at 526.

232. SPS Agreement, *supra* note 233, Annex A, ¶ 1.

233. *See* Steven Charnovitz, *The Law of Environmental "PPM's" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 65 (2002).

234. Schoenbaum, *supra* note 220, at 288.

235. Rio Declaration, *supra* note 11.

Its relevance in international law is underscored by its inclusion in the Maastricht Treaty.

Although it is included in the Maastricht Treaty, the precautionary principle is still the subject of some debate.[236] In WTO law, the principle is implicitly embodied in Article 5.7 of the SPS Agreement, which provides that where scientific evidence is insufficient, governments may "provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information."[237] Even though the precautionary principle is not explicitly provided for in WTO legal text, the Appellate Body has spoken on some of the key aspects of the principle's content in a case involving the European Community.[238]

Under the SPS Agreement, a member's health measure must be "based on" a scientific risk assessment.[239] In EC-Hormones, the Appellate Body understood the phrase "based on" to require a rational relationship between the measure and the risk assessment.[240] In so doing, the Appellate Body reversed the Panel's reading that a risk assessment must have actually been taken into account in the measure's implementation.[241] The decision in this case recognizes that where scientific evidence is insufficient, Article 5.7 will justify a measure not based on a risk assessment.[242] The Appellate Body was careful to note, however, that although the precautionary principle is embodied in Article 5.7, it cannot be invoked outside of Article 5.7 to override other provisions of the SPS Agreement.[243] Instead, the Appellate Body uses it as a tool to interpret those provisions to which it does apply.[244]

The Tuna-Dolphin I dispute brought the difficulties involved in accommodating non-product related PPMs to the forefront. The U.S. ban on the importation of tuna did not concern tuna as a product, but

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236. *See* Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 123, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC-Hormones*].

237. Jan Bohanes, *Risk Regulation in WTO Law: A Procedure Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT'L L. 323, 335 (2001-2002) (quoting SPS Agreement, *supra*, note 233, art 5.7).

238. *See generally EC-Hormones*, *supra* note 242.

239. *See* SPS Agreement, *supra* note 233, arts. 2.2, 5.1.

240. *See EC-Hormones*, *supra* note 242, ¶ 193.

241. TREBILCOCK & HOWSE, *supra* note 53, at 210.

242. *See EC-Hormones*, *supra* note 242, ¶ 124.

243. *Id.* ¶ 125; *see also* Bohanes, *supra* note 243, at 336.

244. *See* TREBILCOCK & HOWSE, *supra* note 53, at 210.

rather dealt with the way in which tuna was caught (purse sein fishing nets which caused the incidental deaths of dolphins). The Panel's like product analysis in both Tuna-Dolphin I and Tuna-Dolphin II, concluded that distinctions based on factors other than the physical characteristics of a product did not satisfy Article III:4's National Treatment obligation.[245]

Although a different approach has been taken in other panel decisions, the "trade policy elite has simply accepted the notion of a sharp divergence between measures on products and PPMs as if such a distinction had been written into the GATT all along and not simply invented in the Tuna-Dolphin case."[246] Since that dispute, developing countries have been sensitive to developed countries' extra-territorial application of their environmental standards. The relevant argument is that in their quest to become more developed, different countries have different optimum levels of pollution they are willing to sustain and trade off.[247] As these levels differ between countries, one country's standards should not be imposed on another.[248] Standardizing process and production methods can affect the comparative advantage that a developing country may enjoy.[249] Since a disruption of the cost structure for the production of various goods impacts less developed nations more negatively than it might impact the U.S., these distinctions are inherently unfair.[250]

An attendant argument against the use of PPMs in the environmental policies of developed countries stresses the need to preserve territorial sovereignty.[251] This concern was raised when the U.S. environmental trade measures, in the cases already discussed, were found inconsistent with WTO trade agreements. It is said that the

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245. *Id.* at 525.

246. *Id.* at 526. The authors discuss the unadopted Panel Report (*US-Taxes on Gasoline*) which took a contrary approach to that taken in the Tuna-Dolphin cases. Here, the Panel held that the distinction in question – automobiles that met federally mandated fuel economy requirements, as opposed to those that did not – served a legitimate non-protectionist objective, the conservation of fossil fuels. Thus, for purposes of Article III, imports that did not meet the standard were not considered 'like' products to those that did. This dichotomy of approaches has not expanded the ambit of non-product related PPMs.

247. *See* Duncan Brack, *Balancing Trade and the Environment*, 71 INT'L AFF. 497 (1995).

248. *Id.*

249. *Id.*

250. *Id.*

251. Motaal, *supra* note 6, at 333.

prevention of discrimination between products on the basis of PPMs means that choices made within national boundaries are respected.[252] Developing countries argue that many current global environmental problems were created by developed countries, not themselves. They thus contend it is those developed countries that should bear the greatest burden in their resolution.[253]

Critics of these arguments usually respond that other articles of the GATT do permit discrimination under certain circumstances.[254] Moreover, one nation's territorial sovereignty should not permit that State to engage in destructive practices that affect those outside of its borders without some form of remuneration.[255] Although the direct environmental impact of production methods based in a foreign land is difficult to assess, there is a fear that the economic consequences of the trade measure may be more direct.[256] One consequence is that domestic producers are encumbered by higher costs of compliance with the regulatory scheme of the importing country.[257] This raises the fear that they will be undercut by competition from companies based in countries with significantly less regulation and lower production costs.[258] This has often been referred to as the "race to the bottom," where manufacturers will be led to those countries where costs of production are ostensibly lower as a result of more lenient environmental policies.[259]

The WTO dispute settlement bodies' positions with respect to non-product related PPMs makes little sense. Domestic environmental regulations on PPMs are the norm. Factories are told how much pollution they may emit, lumber companies are told how and where they may harvest trees and chemical companies are told how they must treat their waste. Therefore, from an environmental perspective, it makes sense to also be able to discriminate at the border between otherwise like goods produced in environmentally different ways. Admittedly, allowing discrimination based on PPMs would present some difficulties for the trading system. It might provide

252. *Id.*
253. *Id.*
254. *See, e.g.*, GATT, *supra* note 37, art. XX.
255. *See* Brack, *supra* note 253, at 507.
256. *See id.*
257. *See id.*
258. *See id.* at 507-08.
259. *See* Schoenbaum, *supra* note 220, at 293.

governments a greater opportunity to protect their domestic industries unfairly against foreign competition.

Notwithstanding the potential for exploitation, non-product related PPMs are an important tool in managing one of the true global concerns we face today. They are a reflection of a failed multilateral response and the efforts to achieve consensus that have taken precedence over fixing our deteriorating environment. While it is easy to point fingers and characterize PPMs as a form of environmental imperialism, at some point discord has to give way to action. This is not to say that any PPM, product related or not, should not be subjected to scrutiny by the WTO to determine whether it is protectionist or not.[260] Rather, the inquiry should be whether the government of the importing country has a legitimate environmental concern about the production practices of the exporting country.[261] While special consideration should be given to those instances where a non-product related PPM was initiated at the behest of domestic producers, this should not be dispositive of protectionist intent.[262]

V. CONCLUSION

Over the years, decisions of the WTO Dispute Settlement Body have undergone a protracted but gradual metamorphosis. The early cases examining the scope of Article XX developed strict interpretations of the Article's provisions limiting the role for unilateral action in environmental protection. More recently, however, the Appellate Body has taken a position more consistent with the global environmental concerns associated with international trade. While this may be far from the ideal that is currently debated, it does signal a significant departure from the early case law involving environmental trade measures. The Appellate Body has recognized that while unilateral measures are not consistent with the stated goals of the WTO, they are justifiable when rooted in the purposes of Article XX and administered even handedly.[263]

Recent case law has resulted in a number of other changes with regard to how the WTO examines the environmental trade measures of its member countries. Diverging from earlier decisions, the Appel-

260. *See* Charnovitz, *supra* note 239, at 74.
261. *See id.*
262. *See id.*
263. *See* Bowen, *supra* note 193, at 201.

late Body now recognizes the significance of multilateral environmental agreements in its analysis of contested environmental measures. The proliferation of eco-labeling schemes is another area of common ground between the concerns of international trade and environmental protection. And in yet another variation from an earlier position, the WTO has come to recognize the validity of trade measures directed at another member's environmental policies.

The decisions effecting these changes reflected a need for the WTO to give specific recognition to environmental concerns to which the WTO responded accordingly. Although there is a sizable consensus that the decisions discussed in this paper were decided correctly, the WTO adeptly responded to the concerns of its member nations as well as to the international community at large. This process of accommodation will require an ongoing effort to respond to the conflicts that will continue to arise in the trade and environment arena.

While the jurisprudence of the Dispute Settlement Body has been the mechanism by which many of these changes have occurred, they were precipitated by a growing international concern regarding the impact of economic growth on the world's environment. These concerns were distilled in the WTO report on trade and the environment which reflects the evolving position of the WTO, and is indicative of the relative importance it now places on reconciling the conflict between trade and the environment.