The WTO Sea Turtle Decision

Suzanne Pyatt*

INTRODUCTION

The World Trade Organization’s (WTO) recent ruling in the Sea Turtle case," which precluded the United States from banning the importation of shrimp caught with nets that endanger sea turtles, uniquely illustrates a growing conflict between international trade and environmental protection. The ruling is the most recent in a line of WTO decisions favoring unencumbered trade over unilateral environmental policies. Despite the fact that the WTO has enforcement powers that far exceed any contained in environmental treaties, the WTO consistently interprets its environmental exceptions so narrowly that free trade inevitably excludes environmental protection. Although many changes to the WTO have been proposed, these modifications do not appear viable, leaving environmentalists to work with and around the WTO agreement to attain their goals. The appellate report in the Sea Turtle decision suggests some ways in which environmentalists can work within the WTO framework.

In Part I, this Note traces the development of the WTO, beginning with its makeshift forerunner under the 1947 General Agreement on Tariffs and Trade (GATT). Part II outlines the resolution of environmental disputes under the WTO, focusing particularly on two decisions concerning U.S. tuna embargoes. Part III specifically addresses the Sea Turtle decision. Finally, Part IV suggests possible methods for protecting endangered...
species internationally despite WTO precedent.

I

BACKGROUND

A. The Origins of GATT

The General Agreement on Tariffs and Trade (GATT)\(^2\) was adopted after the Great Depression and World War II, when it became apparent that multilateral treaties for the mutual reduction of tariffs were necessary to prevent a recapitulation of the outrageous tariffs of the 1930s.\(^3\) Recognizing also the role international economic relations played in causing World War II, the United States hoped to avoid future conflict by seeking an international agreement on trade.\(^4\) To further this goal, the United States and the other founding members of GATT intended to create a counterpart trade organization called the International Trade Organization (ITO).\(^5\) Isolationism in United States international policy made it difficult to join an international organization, however, and in 1947 the original contracting parties signed GATT without a separate implementing trade organization.\(^6\) By necessity, GATT thus became a makeshift trade organization as well as a treaty.

GATT contains several provisions focused on tariff reduction. The Most Favored Nation Clause requires each party to treat every nation equally with regard to imports or exports.\(^7\) The National Treatment Principle in Article III requires that each member country grant the same treatment to all other countries' goods as it gives its own goods, preventing non-tariff barriers to trade.\(^8\) GATT also includes exceptions to the general provisions, including a waiver authority,\(^9\) an escape clause,\(^10\) flexibility for


\( ^3 \) See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 293-94 (3d ed. 1995).

\( ^4 \) See id.

\( ^5 \) See id. at 293.

\( ^6 \) See id. at 296-98.

\( ^7 \) See GATT 1947, supra note 2, art. I.

\( ^8 \) See id. art. III.

\( ^9 \) Agreement Establishing the World Trade Organization, art. IX:3 (providing that a waiver to a GATT obligation may be granted by a three-fourths vote of the WTO
balance of trade problems, and allowances for health and safety regulations. The health and safety exceptions contained in Article XX were the main points of contention in the Sea Turtle decision and most other environmental and trade disputes.

B. Formation of the World Trade Organization

In an effort to strengthen GATT, which had become a makeshift organization with little power, the member states amended the treaty to form the World Trade Organization (WTO) in 1994. Unlike GATT, the WTO is a formal legal entity and is thus allowed to develop relations with other international government and non-governmental interests. The WTO Charter provides that, "Each member shall ensure the conformity of its law with its obligations," a clause that appears to strengthen the force of WTO obligations relative to national agendas. Most importantly, the WTO made important changes in the dispute

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10. Article XIX. An escape clause, or safeguard, was used in the past to protect against a flood of imports after a trade concession was made by the importing country. These days, safeguard measures are used to protect weak industries on a temporary basis. See JACKSON, supra note 3, at 596.

11. Article XII. Article XII allows GATT provisions to be overridden for the purposes of safeguarding a country's balance of payments. See JACKSON, supra note 3, at 561.

12. Article XX.

13. Article XX reads:

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.

Id. art. XX (General Exceptions).


15. In distinction to the WTO, GATT is legally only a treaty.

16. WTO Charter, supra note 9, art. XVI:4.
settlement process. Under the 1947 GATT, when the Panel made a decision on a trade dispute, the resulting panel report could not be adopted if any member of the general body dissented (including the defendant to a case). The WTO, in contrast, automatically adopts panel reports unless there is a consensus against adoption. The WTO also requires that members accept all agreements as a package, whereas GATT allowed members to pick and choose among side agreements.

In terms of international environmental advocacy, whether the WTO is an improvement over the 1947 incarnation of GATT is a matter of dispute. On the one hand, the WTO offers the benefits of institutionalism: a centralized, independent organization capable of dispersing information and issuing binding decisions. On the other hand, binding decisions are a double-edged sword when the adjudicating body values free trade over environmental protection.

C. Dispute Resolution under GATT and the WTO

Dispute resolution under the WTO regime is decidedly more effective than the mechanism under the previous system. The settlement process begins when one of the contracting parties complains that another member has acted inconsistently with GATT treaty obligations, nullifying or impairing the benefits accruing to them under GATT. The GATT/WTO panels have considered an infringement of the obligations under GATT a prima facie case of nullification or impairment. It is an absolute, not a rebuttable, presumption. Thus, even if a trade measure does not actually affect another country's exports, it is an actionable offense under the WTO if it is an infringement of treaty obligations. Even more confounding are the WTO panel decisions that have found that a "nullification or impairment" of a party's benefits has occurred as a result of a nonviolation, an action not claimed to be a GATT violation.

17. See Jackson, supra note 3, at 342.
18. See id. at 343.
21. See GATT 1947, supra note 2, art. XXIII (Nullification or Impairment).
22. See Jackson, supra note 3, at 349 (citing to Uruguayan Recourse to Article XXIII, GATT B.I.S.D. (11th Supp.) at 95, 100 (Panel Report adopted Nov. 16, 1962)).
24. See EEC Payments and Subsidies Paid to Processors and Producers of
The first stage in the GATT/WTO dispute settlement proceedings requires the parties to attempt to peacefully negotiate an agreement. If that fails, the parties must submit themselves to the WTO's mediation or conciliation services. If those talks fail, the WTO then establishes a panel to hear the dispute. The WTO Director General, in consultation with the parties, selects panel members from a roster of qualified panelists, both governmental and nongovernmental. The panel hears oral arguments by the parties, reviews their written submissions, and issues a report within six to eight months from the date of the panel's establishment. Barring consensus to the contrary, the WTO automatically adopts the panel report. If a party to the complaint brings an appeal, the case is sent to an appellate body. The WTO has a standing appellate body with seven members who are appointed for four-year terms and are drawn from WTO membership. When reviewing a case, the appellate body consists of a panel of three persons. Appeals take sixty to ninety days. The WTO adopts the appellate report in the same way as the panel report—automatically.

The questions of law considered by the original panel restrict the scope of the appellate body. If the appellate body finds the complaint valid, it will recommend that the offending country cease its violation of GATT rules. The Dispute Settlement Understanding (DSU) requires a losing defendant to report the actions it intends to take to comply with the ruling. If the losing defendant takes no action, the complaining party may revoke trade concessions previously made to the offending party. Unfortunately for developing countries in a dispute with a large trading partner, the cure can be worse than the disease:

25. For a concise summary of the dispute resolution process, see JACKSON, supra note 3, at 338-48.
26. The membership made the negative consensus rule to appease United States concerns about the dispute process weaknesses. The general membership of GATT hoped that this change would persuade the United States to stop acting unilaterally in trade matters.
27. A major change from the old system is the creation of an appellate body. See JACKSON, supra note 3, at 343.
28. See id. at 338-50.
29. The DSU is a separate written part of the treaty detailing the procedures of dispute resolution. See id. at 340.
30. DSU, supra note 14, at 1226-27.
31. See id. There are specific procedures for determining the level of a suspension of previously granted trade concessions. See JACKSON, supra note 3, at 344.
raising tariffs on goods from an industrialized nation will often damage the developing country, while the industrialized nation will hardly notice the change. There is some indication, however, that GATT/WTO has the potential to impose the economic wrath of multiple states on a renegade state if necessary. Of course, such an act could threaten the stability of the GATT/WTO regime, so the membership is unlikely to pursue such a measure.

II
ENVIRONMENTAL DISPUTES BEFORE THE WTO

Environmental measures clash with the WTO when states attempt to enforce them outside their jurisdiction through trade sanctions. The WTO has engaged in a public relations campaign of sorts, determined to appear more environmentally friendly from its beginnings. The idea of sustainable development attempts to reconcile free trade with the environment. The WTO has remained steadfast in support of free trade despite its sustainable development rhetoric, handing down decisions unfavorable to the environment in the case law leading up to the Sea Turtle dispute.

A. Tuna I

The United States—Restrictions on Imports of Tuna dispute involved restrictions imposed by the United States on imports of yellowfin tuna from Mexico caught in purse-seine nets in the eastern tropical Pacific. Under the Marine Mammals Protection Act (MMPA), the United States promulgated legislation in 1990 forbidding the importation of yellowfin tuna from any country with an incidental take rate of dolphins of more than 1.25 times that of the United States' tuna fleet (20,500 dolphins each year). The United States placed a total embargo on tuna from Mexico caught in dolphin-killing nets after determining that Mexico had exceeded this limit. After years of fruitless

32. See WTO Charter, supra note 9, Preamble to WTO Agreement.
33. See GATT Dispute Settlement Panel Report, United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter Tuna I]. Tuna, the intended catch, swim beneath schools of dolphins. Fishing boats using purse-seine nets spread the nets in a wide area around a school of dolphins and then pull the nets in like the drawstrings of a purse, catching tuna, dolphins, and whatever else may be in the way. See id.
35. This embargo went into effect on February 22, 1991.
negotiation between the United States and Mexico, GATT established a panel that held that the United States' measure violated both the National Treatment Principle as an internal regulation and the restriction on quotas as a quantitative restriction. The WTO allows internal regulation so long as it does not discriminate between products of other countries in violation of the Most Favored Nation Principle. Similarly, treatment must be no less favorable than the treatment given to domestic products in accord with the National Treatment Principle. Most importantly from an environmental perspective, the panel hearing Mexico's complaint found that the United States' measure did not fall under the exceptions in Article XX.

The panel's interpretation of Article XX(b) in the Tuna I case as necessary to protect "human, animal or plant life or health" only within the imposing state's territory was a severe disappointment to environmentalists:

It effectively destroyed the hope that Article XX(b) might function as a legitimate "green" exception for GATT obligations when the panel both severely limited the scope of "necessary" and held that these exceptions were intended to apply only to measures to protect animal life . . . within the jurisdiction of the party applying them.

The panel interpreted "necessary" to include only the one measure most consistent with the general provisions of GATT. Thus, no measure can fulfill the exception as long as there are less restrictive possibilities.

The jurisdiction limitation poses further problems for environmentalists because it makes it more difficult to protect cross-border resources. The panel held that both the Article XX(b) exception and the Article XX(g) exception "relating to the conservation of exhaustible resources" would not apply outside the United States' jurisdiction. In short, the decision foreclosed any attempt to unilaterally protect the world's animal life or

36. See supra note 8 and accompanying text.
37. See GATT 1947, supra note 2, arts. III, XI.
38. id. arts. II-XV.
39. id. arts. XVI-XVIII.
40. See supra note 13 and accompanying text.
41. Mark Edward Foster, Trade and Environment: Making Room for Environmental Trade Measures Within the GATT, 71 S. CAL. L. REV. 393, 428 (1998). The author concludes by saying that the Tuna I Interpretation of Article XX(b) weakens the power of the international agreement by precluding any measures that "contain some teeth and that can be applied beyond a state's borders" and that such a restriction "is out of place as a limit on the pursuit of environmental concerns." id.
42. Tuna I, supra note 33, at 127.
natural resources through the use of trade barriers. Understandably, GATT's preference for multilateral over unilateral measures troubles environmentalists. Critics of the decision in Tuna I have said, "[A]lthough that panel favored multilateral agreements over unilateral trade measures to protect the global environment, it failed to explain how countries are to induce others to join multilateral efforts." In sum, the panel decision in Tuna I whittled away almost to nothing the environmental exceptions promised by Article XX(b) and Article XX(g).

B. Tuna II

The Tuna II dispute again involved United States restrictions on imports of yellowfin tuna, but this case implicated the "intermediary country" provision of the MMPA. The MMPA forbids tuna imports from countries standing in as intermediary traders between the United States and countries that kill dolphins in excess of the United States unless those intermediary countries show that they have also banned the importation of tuna caught with unsafe nets. In contrast to Tuna I, the panel in Tuna II held that the "relating to" language in Article XX(g)'s "relating to the conservation of exhaustible natural resources" did apply to extra-territorial measures. Nonetheless, Tuna II limited measures to protecting those exhaustible resources as determined by GATT, meaning the least inconsistent measures. Tuna II also decided an important side issue: whether the WTO Dispute Settlement Panel could or would take into account multilateral environmental treaties. The United States argued that the Convention on International Trade in Endangered Species (CITES) allowed its actions because CITES specifically provides for "stricter domestic measures" in the preservation of protected species. Unfortunately, the GATT panel held that this treaty did not apply toward the

44. For a brief synopsis of the events leading up to the Tuna dispute, see GATT Dispute Settlement Panel Report, United States—Restrictions on Imports of Tuna, June 16, 1994, 33 I.L.M. 842 (1994) [hereinafter Tuna II].
46. Tuna II, supra note 44, ¶ 5.15.
47. Id. ¶ 5.18-5.20.
49. Id.
interpretation of the Article XX GATT exceptions.50

III

THE SEA TURTLE EXAMPLE

A. The History of the Sea Turtle Decision

The United States based its shrimp embargo on the 1973 Endangered Species Act (ESA), which forbids the taking of sea turtles as an endangered species within the United States, the U.S. territorial seas, or the high seas.51 In 1989, the United States expanded the ESA by enacting Section 609 of Public Law 101-162, calling for the Secretary of State, in conjunction with the Secretary of Commerce, to initiate negotiations for bilateral or multilateral agreements with nations engaged in commercial fishing operations likely to adversely affect sea turtles.52 Most importantly, Section 609 forbade the import of shrimp harvested with technology that could adversely affect sea turtles living in shrimp habitat.53

United States regulations protecting sea turtles have progressed through several implementation stages. Initially, turtle excluder devices (TEDs) were introduced for voluntary use by U.S. fishermen. TEDs are remarkably effective and simple trap-door mechanisms that are inexpensive, easy to install, and do not result in a significant loss of shrimp catch.54 The U.S. National Marine Fisheries Service has developed TEDs that exclude 97% of the turtles that would otherwise be trapped in the shrimp trawls.55 Thus, the use of TEDs avoids sea turtle mortality through the harvesting of shrimp with shrimp trawlers.56 Because voluntary implementation proved ineffective, the United States promulgated stricter domestic regulations in 1987.57 In 1989, the United States applied these regulations

50. Tuna II, supra note 44, ¶ 5.19.
55. See id.
internationally. The enactment of Section 609 required TED use in foreign fisheries by 1991, except in countries certified by the United States President.\(^5\) Certification could mean one of two things: either the nation could harvest shrimp in regions not populated by sea turtles (most cold water fisheries), or it could implement equivalent sea turtle conservation methods, resulting in an incidental taking rate comparable to that of the United States. Despite the clearly intended global reach of Section 609, in 1991 the State Department limited its application to Caribbean/Western Atlantic waters.\(^5\)

The United States Court of International Trade gave Section 609 its intended global scope, however, when it directed the State Department "to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles . . . ."\(^6\) After the Court of International Trade's decision, the State Department requested a one-year extension, protesting that countries not in compliance would need more time to adopt United States standards. The court refused, however, holding that the Court of International Trade "is not the proper forum for foreign accommodation or circumvention."\(^6\) As the WTO panel on the United States embargo convened, the impacts of this court decision became apparent. Countries affected by this ruling eventually sued and became the complaining parties in the WTO dispute, one aspect of which focused on the advance warning and adjustment period received by the Caribbean/Western Atlantic countries.\(^6\) Other countries had no such warning, and the complaining nations asserted that this discrimination between nations constituted a violation of the Most Favored Nation Principle.\(^6\)

The United States embargo primarily affected developing nations whose fisheries included sea turtle habitat. These states argued that the United States' unilateral measures were in fact a thinly disguised attempt at protectionism, which they labeled

\(^{24,244}\) (1987) (to be codified at 50 C.F.R. pts. 217, 222, 227).


61. Id.


63. See id. at 7.
"environmental imperialism." Embargoes are one of the more protectionist means of enforcing an environmental measure. Developing nations are an easy target in a protectionist scheme because they do not have the economic power to retaliate. The legislative history of Section 609 shows that the commercial advantages of an embargo to the United States shrimp industry were a consideration in Section 609's adoption. The shrimp embargo in the Sea Turtle decision, perhaps not coincidentally, did not affect developed nations in northern climatic regions where fisheries do not overlap the sea turtle habitat.

The complaining nations in the Sea Turtle decision—India, Pakistan, Malaysia, and Thailand—did not conform to the United States standard of requiring TED use on all shrimp trawlers. In response to the United States embargo on their shrimp products, these countries requested the WTO to set up a panel to examine the United States embargo. The plaintiffs asked that the Panel find that Section 609 was contrary to GATT Article I:1, the Most Favored Nation Principle. They argued that the phase-in period of three years given to initially affected countries produced an "advantage, favour, privilege or immunity" over like products originating in the territories of other Members. The complaining nations also asserted that the embargo constituted a violation of Article XI, the ban on quantitative restrictions, and a violation of Article XIII:1, differential treatment of "like products." In addition, the complaint argued that Section 609 did not fall under the exceptions of Article XX(b) or XX(g) of GATT 1994. Also, the complaining parties added that Section 609 "nullified or impaired" the benefits accruing to India, Pakistan, Malaysia, and Thailand under GATT.

In its defense, the United States asked the Panel to find that Section 609 fell under the health and safety exceptions of Articles XX(b) and XX(g) of GATT 1994. The Uruguay Round of 1994, the most recent in a series of negotiations among GATT members, sought to modernize GATT's environmental stance with the addition of Article XX. The report on GATT 1994 by the United States Trade Representative states, "When the General Agreement was originally drafted more than 40 years ago, environmental policy was in its infancy. Consequently, GATT

64. Floum, supra note 54, at 948.
66. See id. at 6-7.
67. Id. at 65.
68. Id. at 65-66.
does not refer to environmental measures as such. Instead, the general GATT obligations apply to environmental measures, just as they apply to measures imposed for other policy purposes.”

Similarly, although the language of Article XX seems more appropriate for the protection of general health and safety of a domestic population from possible diseases from imports, Article XX was intended to address general environmental concerns.

The United States argued that the shrimp embargo fell under XX(b) as a measure necessary to protect animal life, that of the sea turtle. Alternatively, the United States argued that sea turtles are an exhaustible natural resource and the embargo was thus covered under XX(g). Bolstering the United States’ argument in this case is the fact that all species of sea turtles are included in Appendix I of CITES and all species but one, the Australian Flatback, are listed in the 1979 Convention on Migratory Species of Wild Animals and appear in the International Union for the Conservation of Nature’s Red List as endangered or vulnerable. In contrast to the Tuna/Dolphin disputes, all parties agreed that the sea turtle was endangered. The weakness in the United States’ argument was the extra-jurisdictional element of Section 609.

On the other side, India, Pakistan, Malaysia, and Thailand argued that the United States embargo violated Article XX. The preamble of Article XX states that the above-mentioned exceptions may not be “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on International trade.” The complaining countries did not argue that “the same conditions prevail” in the sense that they also used TEDs, but that each of them, in various ways, had alternative programs for preserving sea turtles. India, for example, argued that “since [India] had adequate measures in place to protect and preserve endangered species of sea turtles, there was no need for the United States to impose its own agenda on third parties through the use of far-reaching, extraterritorial measures such as the one imposed by

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70. See Sea Turtle Panel Report, supra note 56, at 3.
71. See id. at 4. Section 609 directs the Secretary of State to negotiate with other countries.
72. Id. at 18.
73. GATT 1947, supra note 2, art. XX.
Section 609.74 Malaysia, Pakistan, and Thailand put forth similar statements about the adequacy of their own sea turtle protection programs.75 Malaysia argued that the United States restriction was not an environmental restriction, but a policy restriction because:

there were definitely other conservation methods or practices which were equally effective if not better to ensure the survival of sea turtles. . . . Therefore the import prohibition was arbitrary . . . nothing else but a disguised restriction on international trade with a view to protecting their domestic shrimp industry with a total disregard for international law.76

The developing countries' complaints in the Sea Turtle decision recall the arguments in the Tuna I and Tuna II cases, namely that Article XX exception measures must be the "least inconsistent" with GATT principles and that multilateral measures are favored over unilateral ones. Undoubtedly, these arguments are valuable safeguards against protectionism in the majority of panel disputes, but these same arguments may be inappropriate when applied to an environmental protection measure.

B. Analysis of the WTO Panel Ruling in the Sea Turtle Decision

The Panel found that Section 609 violated Article XI:1 of GATT 1994, which provides for the "general elimination of quantitative restrictions" on trade. The ban on the importation of shrimp restricted imports and was not a "duty, tax, or other charge[ ]" allowed under Article XI:1.77 The Panel Report relied upon Tuna I and Tuna II precedent and an admission by the United States that Section 609 was an import restriction that was not a duty, tax, or other charge.78 The core of the United States' argument was that the Article XX exceptions for environmental protection covered its trade restrictions.79 The complaining countries contended that the exception should apply only to animals within the jurisdictional limits of the country invoking the exception.80 The United States argued that Article XX(b) and XX(g) contained no jurisdictional limits, nor limitations on the location of the animals or natural resources to

75. See id. at 23-24.
76. Id. at 167.
77. See id.
79. See id.
80. See id.
be protected and conserved and that, under general principles of international law relating to sovereignty, states have the right to regulate imports within their jurisdiction.81

The WTO panel found that the United States' measure violated the preamble of Article XX and thus did not examine Article XX(b) or XX(g).82 Article XX(b) allows exceptions "necessary to protect human, animal, or plantlife or health."83 As mentioned above, the interpretation of Article XX(b) was largely set by the decision in Tuna I. Thus Article XX(b) does not apply to resources outside the jurisdiction of the member state and the definition of "necessary" has been narrowly tailored.

Article XX(g) is an exception for measures relating to the "conservation of exhaustible natural resources" if such measures are made effective "in conjunction with restrictions on domestic production or consumption."84 The argument of the United States in the Sea Turtle decision is that the ban on imports relates to the conservation of the exhaustible resource of turtles and that such measures are in conjunction to the domestic measures requiring TEDs. Article XX(g) has been interpreted differently in previous panel decisions, however. In Tuna I, the panel stated that XX(g) exceptions must be within the jurisdiction of the member country.85 Also, in the WTO panel regarding reformulated gasoline, a case in which the United States tried to justify its efforts to regulate imports of gasoline by claiming that protecting against toxic pollution was covered by Article XX, the Appellate Body found that the Article XX exception provided for the inquiry of whether the measure was "primarily aimed at" the conservation of a natural resource.86 As one critic noted, "[t]he Appellate Body Report on Reformulated Gasoline suggests that the WTO is beginning to recognize the negative repercussions that might be associated with an overly prohibitive Article XX."87 In the Sea Turtle decision, however, the panel avoided the language of Article XX(g) entirely after finding

81. See id.
82. See id. at 299. "We therefore find that the U.S. measure at issue is not within the scope of measures permitted under the chapeau of Article XX. . . . [W]e do not find it necessary to examine whether the U.S. measure is covered by the terms of Article XX (b) or (g)." Id.
83. Id. at 288.
84. Id. at 429.
85. Tuna I, supra note 33, at 127.
that the preamble of Article XX was not satisfied.\textsuperscript{88} The WTO Panel first considered whether Article XX allows a member to deny access to its market for a given product if the exporting member does not adopt certain conservation policies.\textsuperscript{89} The Panel then invoked the customary rules of interpretation from the Vienna Convention: "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."\textsuperscript{90} Focusing on "their context and the object of GATT 1994 and the WTO Agreement itself" rather than "ordinary meaning," the Panel announced that it would examine Section 609 in light of the "chapeau" (preamble or introduction) to Article XX and that the burden of proving an exception rested with the party claiming it, the United States.\textsuperscript{91}

Whether the United States measure passed the chapeau was a threshold test of whether it met the terms of an exception to XX(b) and XX(g). Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an "arbitrary" or "unjustifiable" manner.\textsuperscript{92} Article XX "may not be read so expansively as seriously to subvert the purpose and object of [the rest of the Agreement] . . . when invoking Article XX, a Member invokes the right to derogate certain specific substantive provisions . . . but . . . it must not . . . abus[e] the exception contained in Article XX."\textsuperscript{93} Thus, in invoking Article XX, a member must act in good faith. Good faith is defined as a state's "obligat[ion] to refrain from acts which would defeat the object and purpose of a treaty."\textsuperscript{94} The Panel discussion then turned to the preamble of the WTO Agreement, finding that:

While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.\textsuperscript{95}

The fatal flaw of the United States measure seems to have

\textsuperscript{88} Id. at 299.
\textsuperscript{89} See id. at 288.
\textsuperscript{90} Id. at 292 (quoting the Vienna Convention on the Law of Treaties (1969), art. 31(1)).
\textsuperscript{91} See id.
\textsuperscript{92} See id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. (quoting the Vienna Convention on the Law of Treaties (1969), art. 18).
\textsuperscript{95} Id.
been its unilateral nature. The WTO Panel remarked, "[T]he WTO Agreement favours a multilateral approach to trade issues." The Panel stated that the DSU rejects unilateralism as a substitute for multilateralism.

If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.

Other factors contributing to the panel's decision in the Sea Turtle decision include the fact that the United States measure was discriminatory not only between the United States and the complainants but between the complainants and other exporting countries because the measure was implemented with a three month deadline for the complainants instead of the three year time span for Caribbean countries. Additionally, the legislative history of Section 609 showed concern for the United States' shrimp industry's competitiveness, implying that the measure was in fact a disguised trade discrimination rather than an environmental concern. Finally, the overriding theme of the WTO in dealing with environmental/trade disputes played into the decision. The WTO disliked the measure's effect on comparative advantage, citing the "additional cost on the foreign industry, making it less competitive."

B. Report of the WTO Appellate Body

The United States appealed the Sea Turtle Panel decision in

96. Id. at 293.
97. See id.
98. Id. at 294 (quoting Tuna II, which was not adopted, but which provides "useful guidance").
99. See id. at 290.
100. See id.
101. See id.
102. Id. at 289.
1998. While the Appellate Body affirmed the Panel's decision striking down the United States embargo, its analysis offers hope for greater environmental protection in the future.\textsuperscript{103} The Appellate Body held that 1) Section 609 fell within the Article XX(g) exception, and that 2) the Panel could accept materials submitted by nongovernmental organizations (NGOs) in amicus curiae briefs.\textsuperscript{104} The Appellate Body also took pains to reaffirm the WTO's preference for multilateral negotiation efforts, such as the Inter-American Convention for the Conservation of Sea Turtles, a negotiation convention on the shrimp trade and sea turtles attended by the United States, various shrimp-exporting countries, and concerned NGOs.

The Appellate Body held that the Panel should not have disregarded the specific exceptions of Articles XX(b) and XX(g) in favor of the chapeau of Article XX.\textsuperscript{105} Based on a close examination of the language in Article XX(g), the Appellate Body found that sea turtles did constitute an exhaustible natural resource.\textsuperscript{106} This holding is significant not only in substance, but because of the reasoning the Appellate Body used to reach its conclusion. First, the Appellate Body declared that the GATT/WTO treaty should be interpreted "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."\textsuperscript{107} It then found that Section 609 was a measure 1) "relating to" the conservation of exhaustible natural resources within the meaning of Article XX(g), and 2) made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).\textsuperscript{108} After taking these strides, however, the Appellate Body returned to the fatal analysis of the Article XX chapeau. Agreeing with the original Panel, the Appellate Body, found the application of Section 609 to have resulted in "unjustifiable discrimination" in violation of the Article XX chapeau.\textsuperscript{109} The Appellate Body's focus on "the actual application of the measure" gives some hope for the future, however.\textsuperscript{110} The report again criticized the time lag in enforcing Section 609 for certain countries and the unilateralism with

\begin{footnotesize}
\begin{enumerate}
\item[103.] See Sea Turtle Appellate Report, supra note 1.
\item[104.] See id.
\item[105.] See id. at 32.
\item[106.] See id. at 36.
\item[107.] Id.
\item[108.] Id. at 38.
\item[109.] Id. at 46-48.
\item[110.] Id. at 46 (emphasis added).
\end{enumerate}
\end{footnotesize}
which the measure was adopted. Combined with the interpretation of Article XX(g), the Appellate Body's criticisms suggest that future environmental measures like Section 609 might succeed if their enactment does not cause "unjustifiable discrimination" between nations.

IV
WORKING WITHIN THE WTO FRAMEWORK: LESSONS FROM THE SEA TURTLE DECISION

A. Criticism of GATT/WTO as a Forum for Deciding Environmental and Trade Disputes

There are many critics of GATT's ability to decide environmental issues. One author has argued that the "substantive law of GATT/WTO ignores international law dealing with environmental protection and treats any law or treaty not embodied in GATT... as irrelevant." For example, GATT 1994, Article 3, Clause 4, states:

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements. All solutions... shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

Since GATT's original purpose was free trade, the WTO's sympathies are not often with the environment. As might be expected, its record illustrates this bias.

Some suggested alternatives to GATT/WTO have included channeling environmental and trade disputes to other judicial forums. Outside the GATT/WTO, international and

111. See id. at 48-49.
114. GATT 1994, supra note 2, art. 3:4.
115. See id. at 287. See generally Richard J. McLaughlin, Settling Trade-Related
environmental treaties abound. The best candidates are the United Nations Convention on the Law of the Sea (UNCLOS)\textsuperscript{116} and the International Court of Justice. UNCLOS is notably more favorable to the environment than the WTO.\textsuperscript{117} UNCLOS can recognize GATT law while GATT is unable to recognize UNCLOS or other environmental treaties.\textsuperscript{118} Moreover, the UNCLOS dispute settlement process includes negotiation and conciliation, and a choice of forums from among the International Court of Justice, a special International Tribunal for the Law of the Sea, an international arbitral tribunal, or a special technical arbitral tribunal.\textsuperscript{119} In particular, the International Court of Justice could determine whether international customary law prevails over GATT/WTO.

\subsection*{B. Working Within the WTO Framework}

Although economics and trade are far from constituting the only important issues in international law, the high level of attention they receive has made GATT/WTO one of the most powerful international tribunals. With its long history under the 1947 GATT and its newly strengthened dispute resolution process, including automatic adoption of panel decisions and the ability to revoke the trading privileges of a member country, the GATT/WTO regime is one of few international forums with teeth. As seen in the Sea Turtle decision, the GATT/WTO regime has posed problems for environmental concerns. "Some commentators have suggested that trade policies are not the first-best mechanism for achieving environmental goals. . . ."\textsuperscript{120}

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\textsuperscript{117} See generally Guruswamy, supra note 20.

\textsuperscript{118} See id. at 312.

\textsuperscript{119} See id. at 296.

\textsuperscript{120} Foster, supra note 41, at 433 ("They argue that the GATT's role with respect to the environment should be limited to making an additional contribution to environmental goals, and point out that the 1947 GATT was 'crafted to accommodate only a limited range of trade-environment intersections. . . . [and] for the most part treated environmental issues as peripheral."); see also Benedict Kingsbury, \textit{Environment and Trade: The GATT/WTO Regime in the International Legal System}, in \textit{ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH} 189, 190 (A.E. Boyle ed., 1994); Piritta Sorsa, \textit{GATT and the Environment: Basic Issues and Some Developing Country Concerns}, in \textit{WORLD BANK DISCUSSION PAPERS: INTERNATIONAL TRADE AND THE ENVIRONMENT} 325 (Patrick Low ed., 1992). Another perspective is that of Sanford E. Gaines:

Environmentally grounded analysts propose to resolve the trade-
Although environmentalists may be tempted to go "forum-shopping," the WTO's strength and legitimacy guarantee that it will continue to hold jurisdiction over many trade and environmental disputes. The Sea Turtle decision should thus serve as an instruction manual for how future environmental efforts may avoid the pitfalls of the United States trade embargo. What follows is a discussion of techniques the United States and others can use to reach a better result in future environmental disputes under the WTO.

The Appellate Body’s ruling in the Sea Turtle decision took into account the fact that the United States was able to enter into successful multilateral negotiations for sea turtle conservation. Unfortunately, in the Sea Turtle decision, it worked against the United States. Noting that the United States had entered into negotiations with some nations while continuing its embargo against others, the Appellate Body held that less intrusive measures were available for the conservation of sea turtles.121

Accordingly, in future efforts a country should gather international support for new laws and regulations before enacting them. One way of doing this would be to mirror in the international arena the domestic campaign of making TEDs a requirement on shrimp trawlers. As the WTO panel on Sea Turtles suggested:

[The best way for the parties to this dispute to contribute effectively to the protection of sea turtles [is to]] reach cooperative agreements on integrated conservation strategies, covering, inter alia, the design, implementation and use of TEDs while taking into account the specific conditions in the environment conflict through new trade rules to unshackle the authority of governments to respond to the world's urgent environmental challenges without forcing them to sacrifice the competitive position of their producers in the global marketplace. Trade-orientated analysts, who emphasize the national and global benefits of liberalized trade, respond that governments can and must find ways to protect the environment without threatening the carefully crafted rules of the World Trade Organization agreements, which form the essential foundation for efficient operation of the global economy and help satisfy the aspirations of billions of people for a decent life.


121. See Sea Turtle Panel Report, supra note 56, at 51 ("The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609.").
different geographical areas concerned.\textsuperscript{122} In other words, the United States must find a way to cooperate with other nations to bring about its environmental goals.

The problem with this approach is that without the threat of trade sanctions, it may be difficult to even bring states to the negotiating table. For example, the Inter-American Convention commenced only after Section 609 banned shrimp imports from countries without adequate sea turtle conservation measures. The Inter-American Convention, which has not yet been ratified, may even dissolve under the Appellate Body's ruling that the United States embargo is in violation of GATT/WTO. A related problem is that some states may enter negotiations in bad faith just to prevent trade sanctions.

C. The Inclusion of Nongovernmental Organizations into the Resolution of Disputes Before the WTO

An interesting sidenote to the Sea Turtle dispute was the increased involvement of NGOs in the case. Amicus briefs in favor of the United States embargo were submitted by the Center for Marine Conservation and the Center for International Environmental Law.\textsuperscript{123} Article 13 of the DSU governs the use of outside materials by the WTO: "Each panel shall have the right to seek information . . . from any individual or body which it deems appropriate."\textsuperscript{124} The original Panel interpreted "the right to seek information" as prohibiting the acceptance of materials that were merely submitted, rather than specifically sought out by a panel.\textsuperscript{125} The Panel noted that although it could seek information from any relevant source under Article 13 of the DSU, it declined to do so.\textsuperscript{126} Nonetheless, the Panel did allow the United States to supplement its own material with the two amicus briefs.

In the Appellate Report, however, part of the Panel's position on NGO submissions to cases was overturned.\textsuperscript{127} The Appellate Body held that "authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel."\textsuperscript{128}

\textsuperscript{122} Id. at 300.
\textsuperscript{123} See id. at 283.
\textsuperscript{124} DSU, supra note 14, at 1234.
\textsuperscript{125} Sea Turtle Panel Report, supra note 56, at 284.
\textsuperscript{126} See id.
\textsuperscript{127} See Sea Turtle Appellate Report, supra note 1, at 29.
\textsuperscript{128} Id. (emphasis added).
The Appellate Body was cautious, however, in retaining the WTO's discretionary power, stating that, "A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not." The Appellate Body affirmed the Panel's decision to allow a party to the case to attach NGO materials to its own submissions.

Arguments against the inclusion of NGOs focus on the fact that NGOs are not parties to the WTO agreement. The trade disputes that reach the WTO "exist between states, and at least theoretically, nonstates should not be involved." Commentators have pointed out, however, that this creates problems in the environmental area because "nonstate actors frequently have the best information on the current status of the issues at hand." NGO participation is also arguably more democratic and may encourage greater public interest in the workings of the WTO in environmental and trade disputes.

Domestic and international lobbying groups seem to be currently focused on a "Down with the WTO" campaign. For example, an advertisement in the New York Times encourages United States citizens to see the WTO as an evil organization determined to do away with United States sovereignty. With all the trade benefits the WTO/GATT regime has to offer, it is unlikely that these kinds of tactics will convince Congress to remove the United States from GATT.

A more constructive approach may be to lobby the WTO directly. Although the WTO may elect not to consider NGO briefs submitted directly to the panel, NGOs can convince environmentally friendly nations to attach the amicus briefs to their submissions. NGOs can continue to have their views considered in this manner. From the preamble of the WTO Marrakesh Agreement to the Article XX exceptions contested in the Sea Turtle decision, it is easy to see that there is some desire in the WTO to at least appear to be concerned about environmental issues. Lobbying groups should start there and

129. Id. (emphasis added).
130. See id. at 30.
131. Foster, supra note 41, at 435.
132. Id. at 435.
134. See Advertisement, N.Y. TIMES, Dec. 14, 1992, at A12 (noting that the WTO was a "sneak attack on democracy" that would increase "poisons and toxins" and was run by "faceless trade bureaucrats").
conduct more lobbying to give the preamble and the exceptions effect.

D. The Use of Economic Incentives

In the United States, the use of TEDs was first implemented on a voluntary basis, with TEDs provided free to shrimp trawlers who would agree to take them. Undoubtedly, however, even the small cost of TEDs is a concern to developing countries like the plaintiffs in the Sea Turtle decision. Especially when dealing with developing nations, the United States should realize the economic costs of its unilateral environmental regulations. In Tuna I, for example, it is obvious that far less protectionist measures could have been used to leverage Mexico to use dolphin-friendly fishing methods. The United States could have used the positive measure of inclusion in the North American Free Trade Agreement (NAFTA), offering trade benefits as an incentive to Mexico to change fishing methods. Voluntary trade regimes like NAFTA that extend trade benefits above WTO levels are not subject to WTO adjudication. Under the Dispute Resolution Understanding, the countries involved in the Sea Turtle case were required to go through at least two sets of negotiations before a panel would hear the case. As part of these negotiations, the United States could have offered to partially offset the cost of TED implementation (or offered some other trade incentive) in exchange for compliance.

After the EEC Oil Seeds case, the United States published in the Federal Register the products that would be affected by a possible boycott of European Union (EU) agricultural products. This threat caused mass confusion and a drop in demand in the market for EU goods, yet was not considered a "nullification or impairment" of the EU's trade benefits under GATT. Similarly, "dolphin-safe" tuna was a household phrase during Tuna I and Tuna II. In contrast, there is no such consumer awareness of the consequences of Pakistani, Indian, Malaysian, or Thai shrimping. Granted, the kind of campaign necessary to inform United States consumers of the negative environmental effects of certain products seems a Herculean task. The benefit to such a campaign is the ability to fight for social values with economic weapons and without protectionist measures. Additionally, the education of American consumers on environmental issues is

also likely to have lasting benefits. One of the greatest
difficulties in effecting environmental change is motivating the
colorful, who as individuals have little to gain in comparison to
special interest groups. Consumer awareness may provide a
feeling of political efficacy to the public, resulting in future
activism.

CONCLUSION

Although the rhetoric of the Appellate Report in the Sea
Turtle decision is more favorable to the environment, the end
result demonstrates that unilateral environmental measures
affecting the trade of member countries are still going to be
difficult to enact under the WTO. Constructive use of the WTO
demands that countries attempt coalition building and trade-
friendly efforts before a unilateral measure is enacted. In part,
because the WTO provides at least the appearance of fairness,
legitimacy, and universality, it is desirable for the United States
to work with or around the body rather than supersede it. In the
long run, the participation of NGOs and consensus building will
do more to modernize the environmental aspects of the WTO
than attempting to override it with unilateral measures.