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WTO Panel Decision on the U.S. Shrimp Embargo: Another Ruling against U.S. Enforcement of Species Protection in Trade, The

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The WTO Panel Decision on the U.S. Shrimp Embargo: Another Ruling against U.S. Enforcement of Species Protection in Trade

ABSTRACT

The survival of sea turtles is becoming more and more threatened as a result of the nets of the world's shrimping industry. In response to this threat, Congress placed an embargo on imports of shrimp caught without the use of turtle-safe technology. Recently, a World Trade Organization panel held that the U.S. embargo on shrimp imports violates the General Agreement on Tariffs and Trade. As a result of this decision, the U.S. may choose to either adhere to its shrimp embargo and pay economic penalties, yield to the World Trade Organization and repeal the embargo, or attempt to solve the problem diplomatically by actively negotiating bilateral or multilateral agreements among the countries involved in its shrimp trade. Regardless of what option is taken, the future of the sea turtle appears grim. Sea turtles migrate throughout the world and the existence of these creatures cannot be ensured without world-wide cooperation.

I. INTRODUCTION

In recent years, the United States has encountered conflict between international trade policies and its own wildlife laws. The U.S. Congress has attempted to conform the activities of the nations with which it trades to the standards of its Endangered Species Act (ESA) with the use of embargoes, many times violating international trade agreements such as the General Agreement on Tariffs and Trade (GATT) in the process. An example of this type of conflict was the United States' attempt to enforce its dolphin-safe tuna net regulations on all countries from which it bought tuna. In the 1980s, U.S. dolphin protection laws were brought before a GATT panel, which decided that the laws violated several articles of the GATT.[1] Today international agreements are in place to protect dolphins and U.S. laws give consumers the power to choose dolphin-safe tuna. The United States, however, continues to fight for compliance with its wildlife

1. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp./155-205) at § 7 (1993) [hereinafter Tuna Import Restrictions].

laws in international trade. The shrimping industry and sea turtle-safe nets are at the heart of this controversy.

As a member of the GATT and the World Trade Organization (WTO), the United States has been unable to force its environmental and species protection standards upon other nations and continues to trade with nations that have little or no wildlife protection measures. In May 1998, a World Trade Organization panel decision[2] held that a U.S. embargo of shrimp from countries not certified by the U.S. Secretary of Commerce under the ESA[3] violated Article XI of GATT[4] and did not fall under the exceptions in Article XX of GATT.[5]

This comment will look at the threat of international trade to wildlife protection under the WTO, and specifically at the threat to sea turtles. It will conclude with reasons for and against backing down from WTO pressure to halt wildlife protection through trade measures. Part II will look at the habitat and declining populations of the world's sea turtles and the efforts to protect them through use of turtle-excluder devices. Part III will examine wildlife protection under the GATT and the WTO and will also show the similarities of the GATT panel decision over the U.S. embargo on tuna with the recent WTO panel decision over the U.S. embargo of shrimp. Finally, part IV will look at possible solutions to the conflict between U.S. sovereign environmental law and the general agreement of the WTO and propose that multilateral trade agreements between the United States and other key countries are the best way to accomplish the goals of wildlife protection without sacrificing U.S. sovereignty.

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2. *See* World Trade Organization Dispute Resolution Panel Report on United States–Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, May 15, 1998, 37 I.L.M. 832 (1998) [hereinafter WTO I].

3. Endangered Species Act of 1973, 16 U.S.C. § 1371 (1994).

4. General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, A32-34, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XI §1 [hereinafter GATT] ("[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party...").

5. *Id.* at A-60 art. XX ("[s]ubject 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 made on domestic production or consumption").

II. BACKGROUND

Sea Turtle Habitats and Declining Populations

Sea turtles swam the oceans long before the first mammals appeared on dry land.[6] They are dignified, powerful, and graceful creatures.[7] While there is still much to be learned about these turtles and their migration patterns, we do know that they are a disappearing resource. Causes of death for the sea turtle due to human activity include incidental capture and drowning in fish nets; exploitation for their meat, shells, and eggs; destruction of their habitats; and pollution of the oceans.[8] Turtles often wash up on beaches, their bellies laden with plastic bags, which they mistake for their favorite food—jellyfish.[9] One of the most devastating threats to the sea turtle, however, is drowning in fish nets.[10]

Six of the seven existing sea turtle species are found in U.S. waters[11] and are listed as either endangered or threatened under the Endangered Species Act of 1973.[12] These species include the Kemp's ridley (*Lepidochelys kempi*), Leatherback (*Dermochelys coriacea*), and Hawksbill (*Eretmochelys imbricata*), which are listed as endangered.[13] The Loggerhead (*Caretta caretta*), Olive ridley (*Lepidochelys olivacea*), and Green sea turtles (*Chelonia mydas*) are listed as threatened, with the exception of Green breeding populations in Florida and on the Pacific coast of Mexico and breeding populations of Olive ridleys on the Pacific coast of Mexico, which are listed as endangered.[14]

Each species of turtle is different in appearance and migration pattern, although almost all live in the deep oceans at some point in their

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6. *See* Jack Rudloe & Anne Rudloe, *Shrimpers and Lawmakers Collide Over a Move to Save the Sea Turtles*, SMITHSONIAN, Dec. 1989, at 44, 46.

7. *See id.*

8. *See id.* at 45-46; WTO I, *supra* note 2, at § 2.2.

9. *See* Rudloe & Rudloe, *supra* note 6, at 47.

10. *See* WTO I, *supra* note 2, at § 2.5.

11. *See* Endangered and Threatened Wildlife; Recovery Plans for Listed Sea Turtles, 63 Fed. Reg. 28,359; 29,359 (1998) [hereinafter Recovery Plans]. The only turtle not documented in U.S. waters is the Flatback (*Natator depressus*). *See* WTO I, *supra* note 2, at § 2.1.

12. *See* Enumeration of Endangered Marine and Anadromous Species, 50 C.F.R. § 224.101(c) (1999).

13. *See id.*; Recovery Plans, 63 Fed. Reg. at 28,359; Sea Turtle Conservation; Shrimp Trawling Requirements, 63 Fed. Reg. 55,053; 55,053 (1998) (to be codified at 50 C.F.R. pts. 217, 227).

14. *See* 50 C.F.R. § 224.101(c); Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1999); Recovery Plans, 63 Fed. Reg. at 28,359; Sea Turtle Conservation; Shrimp Trawling Requirements, 63 Fed. Reg. at 55,053.

lives.[15] The Kemp's ridley is the smallest species, with a shell length not exceeding thirty inches and weighing from 80 to 100 pounds.[16] The number of Kemp's ridleys has been drastically reduced and it is now the most endangered sea turtle found in U.S. waters.[17] The Hawksbill has a colorful shell and a distinct hawk-like beak.[18] This turtle weighs between 100 and 200 pounds.[19] The Leatherback has a soft, black shell with white blotches and is the largest of the sea turtles, reaching up to six feet in length and 1,300 pounds.[20] It swims long distances throughout the Atlantic, Pacific, and Indian Oceans from Labrador, Iceland, the British Isles, Norway, Alaska, and Japan south to Argentina, Chile, Australia, and the Cape of Good Hope, and has been known to enter the Mediterranean Sea.[21]

The Loggerhead is the most common sea turtle in the waters of the southeastern United States.[22] It is also found in other parts of the Atlantic, in the Pacific and Indian Oceans, in the Caribbean and Mediterranean Seas, and even off the coast of Oman.[23] It has a reddish-brown, heart-shaped shell and averages thirty-six inches in length.[24] It weighs between 150 and 400 pounds.[25] The Olive ridley is found mainly in the tropical Pacific and Indian Oceans, with nesting sites in Mexico, Costa Rica, and India.[26] It also has been found off the west coast of Africa.[27] It is the smallest sea turtle and weighs less than eighty pounds, with a shell length of less than twenty-six inches.[28] The Green turtle has a greenish-brown shell with dark markings and a relatively small head.[29] Like the Leatherback, it migrates long distances, swimming throughout the Atlantic, Pacific, and Indian Oceans, primarily in the tropics.[30] Green turtles are medium-sized and have a shell length between thirty-six and forty-eight inches and weigh an average of 300 pounds.[31]

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15. *See* WTO I, *supra* note 2, at § 2.2; Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 258 (1995).
16. *See* Yaninek, *supra* note 15, at 259-60.
17. *See id.* at 259.
18. *See id.* at 260.
19. *See id.*
20. *See id.* at 261.
21. *See id.* at 260.
22. *See id.* at 262.
23. *See id.* at 262-63.
24. *See id.* at 263.
25. *See id.*
26. *See id.* at 261.
27. *See id.*
28. *See id.*
29. *See id.* at 262.
30. *See id.*
31. *See id.*

Presently, all seven existing species of sea turtles are included in Appendix I of the 1973 Convention on International Trade in Endangered Species (CITES).[32] All species, with the exception of the Australian Flatback (*Natator depressus*), are listed in Appendices I and II of the 1979 Convention on Migratory Species of Wild Animals (CMS)[33] and appear on the International Union for the Conservation of Nature (IUCN) Red List as endangered or vulnerable.[34] Populations of sea turtles are declining rapidly, and scientific research demonstrates that the accidental capture and drowning of sea turtles in shrimp trawl nets is the largest human-related cause of sea turtle deaths.[35]

The Turtle Excluder Device

The U.S. National Marine Fisheries Service (NMFS) designed the turtle excluder device (TED) to allow large animals such as sea turtles to escape from fishing nets.[36] These nets can drag the turtles under water for periods of more than seventy-five minutes, the maximum amount of time

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32. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (Appendix I is the list of species for which no trade is allowed and includes the Kemp ridley, Loggerhead, Green, Leatherback, Hawksbill, Olive ridley, and Australian flatback). *See also* WTO I, *supra* note 2, at § 2.3.

33. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (1980) [hereinafter CMS] (Endangered Migratory Species: Appendix 1). *See also* WTO I, *supra* note 2, at § 2.3. The Convention provides that Range States of a migratory species listed in Appendix I shall endeavor:

> a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction; b) to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating already introduced, exotic species.

See CMS, *supra*, at art III(4). Appendix II of the Convention lists "migratory species which have an unfavorable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement." *See id.* at art. IV(1).

34. *See* INT'L UNION FOR THE CONSERVATION OF NATURE, WORLD CONSERVATION MONITORING CENTRE, 1994 IUCN RED LIST OF THREATENED ANIMALS 75-76 (1993). *See also* WTO I, *supra* note 2, at § 2.3.

35. *See* Earth Island Inst. v. Daley, 48 F. Supp.2d 1064, 1069 (Ct. Int'l Trade 1999). *See also* WTO I, *supra* note 2, at § 2.5.

36. *See* WTO I, *supra* note 2, at § 2.5.

turtles can spend under water without drowning.[37] A TED is a gridded trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.[38]

The NMFS studied the effectiveness of the TED in the mid-1980s.[39] The NMFS placed observers on shrimp trawlers for more than 27,000 hours and documented 884 sea turtle captures in shrimp trawls fishing on offshore commercial grounds throughout the Gulf of Mexico and the U.S. South Atlantic.[40] Extrapolating from this data, the NMFS estimates that 47,973 sea turtles are captured and 11,179 are drowned in offshore commercial shrimp trawls in southeast U.S. waters each year.[41] Although the rate of sea turtle capture per hour of trawling is small and the capture of a turtle by a particular ship is uncommon, when several million total hours of shrimp trawling are considered, the total catch and mortality of sea turtles is considerable and perhaps enough to fatally deplete the shrinking populations.

These NMFS studies proved that net entanglements and mortalities are reduced by TEDs.[42] Based on several thousand hours of field tests, the NMFS estimated that TEDs would save about 97 percent of all sea turtles encountering trawl nets,[43] and found that TEDs did not affect the shrimp catch.[44] These tests compared the shrimp catch in TED-equipped trawls to the catch in trawls without TEDs.[45] If commercial shrimp trawlers properly install and use the NMFS TEDs, there should be no significant loss of shrimp.[46]

Although many of those that commented on the proposed regulations stated that the economic impacts of TED requirements would put shrimpers out of business and have disastrous effects on the local economies of a number of shrimping areas, little data was submitted to substantiate these claims.[47] The NMFS determined that the economic

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37. *See* Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244; 24,244 (1987) (to be codified at 50 C.F.R. pts. 217, 222, 227) [hereinafter June 1987 Regulations]. *See also Daley*, 48 F. Supp.2d at 1072; WTO I, *supra* note 2, at § 2.6.

38. *See* WTO I, *supra* note 2, at § 2.5.

39. *See* June 1987 Regulations, 52 Fed. Reg. at 24,244.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* Sea Turtle Conservation; Shrimp Trawl Requirements, 52 Fed. Reg. 6179, 6180 (1987) (to be codified at 50 C.F.R. pts. 217, 222, 227); *See* Earth Island Inst. v. Christopher, 19 Ct. Int'l Trade 1461, 1472 (Ct. Int'l Trade 1995).

44. *See* June 1987 Regulations, 52 Fed. Reg. at 24,244.

45. *See id.*

46. *See id.*

47. *See id.*

impacts of these regulations (cost of TEDs and installation and loss of catch) would be small compared to the total costs of shrimping.[48]

Protection of Sea Turtles Abroad

Because sea turtles are migratory animals that can and do travel thousands of miles during their lifetime, U.S. sea turtle populations are affected by the activities of other nations. In the late eighties, Congress adopted legislation aimed at the shrimping practices of foreign fleets. In 1989, the United States passed an appropriation act that contained a provision that would conserve sea turtles in foreign waters.[49] This provision is referred to as Section 609. Legislative history indicates that the statutory provision was also meant to protect the U.S. shrimping fleet from unfair competition since U.S. shrimpers were required to use TEDs and claimed that foreign shrimpers had an unfair advantage.[50] When section 609 was enacted, it was estimated that 124,000 sea turtles were drowning annually due to shrimping by countries other than the United States.[51]

Section 609 does two things. First, it calls upon the U.S. Secretary of State, in consultation with the U.S. Secretary of Commerce, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries that are engaged in commercial fishing opera-

48. *See id.*

49. *See* Act of Nov. 21, 1989, Pub. L. No. 101-162, Title VI, § 609, 103 Stat. 988, 1037 (codified at 16 U.S.C. § 1537 note (1994) (Conservation of Sea Turtles; Importation of Shrimp)). During the Congressional hearing preceding passage of § 609, Senator Breaux stated that "the amendment I am offering today is intended to promote the international conservation of sea turtles," and that "this amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation." 135 CONG. REC. S8335, S8373, S8374 (daily ed. July 20, 1989) (statement of Sen. Breaux).

50. *See* 135 CONG. REC. S8335, S8374-75 (daily ed. July 20, 1989) (statements of Sen. Breaux & Sen. Lott). Senator Breaux stated that he thought it "unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will give them our market." 135 CONG. REC. S12,191; S12,266 (daily ed. Sept. 29, 1989) (statement of Sen. Breaux). Senator Shelby expressed concern that "other countries have extensive commercial shrimp operations that are not subjected to turtle conservation. This places our shrimp industry in a noncompetitive situation because these countries still share the lucrative U.S. market with our domestic shrimpers. Our domestic shrimpers must have a level playing field." 135 CONG. REC. S8335, S8376 (daily ed. July 20, 1989) (statement of Sen. Shelby).

51. *See* Earth Island Inst. v. Christopher, 19 Ct. Int'l Trade 1461, 1482-83 (Ct. Int'l Trade 1995) (estimate of Plaintiff Todd Steiner).

tions likely to adversely affect sea turtles.[52] Second, it provides that after May 1, 1991, the President must certify a nation before it can export shrimp or shrimp products to the United States.[53] A country can be certified if it has adopted a regulatory conservation program that is "comparable" to the U.S. program and if the average rate of taking of sea turtles is "comparable" to that of the United States, or if there is no threat of incidental taking of sea turtles in that nation's waters.[54]

In 1991, the U.S. Department of State issued guidelines for assessing the comparability of foreign regulatory programs with the U.S. program.[55] To be found comparable, a foreign nation's program had to include a commitment to require all shrimp trawl vessels to use TEDs at all times or reduce tow times for vessels under 25 feet.[56] A program could also be comparable if there were a commitment to engage in a statistically reliable and verifiable scientific program to reduce the mortality of sea turtles associated with shrimp fishing.[57] These 1991 guidelines also

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52. *See* Conservation of Sea Turtles; Importation of Shrimp, § 609(a) ("[t]he Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987–(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles...").

53. *See id.* at § 609(b)(1).

> The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2). (2) Certification procedure.–The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that–(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to the United States; and (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Id.

54. *See id.* at § 609(b)(2)(A)-(C).

55. *See* Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines, 56 Fed. Reg. 1051, 1051 (1991).

56. *See id.*

57. *See id.* at 1052.

determined that the scope of section 609 was limited to the wider Caribbean/Western Atlantic region.[58]

A December 1995 U.S. Court of International Trade (CIT) decision rejected the State Department's interpretation of section 609 and ruled that Congress intended it to apply to all countries that harvest shrimp.[59] In April 1996, the State Department published revised guidelines to comply with the CIT order of December 1995.[60] The new guidelines extended section 609 to shrimp harvested in all foreign nations.[61] They permitted, however, the importation of shrimp from non-certified countries as long as the particular shipment of shrimp and shrimp products into the United States was accompanied by a declaration ("Shrimp Exporter's Declaration Form") attesting that the shrimp or shrimp product in question "was harvested either under conditions that do not adversely affect sea turtles...or in waters subject to the jurisdiction of a nation currently certified pursuant to section 609."[62]

The April 1996 Guidelines define "Shrimp [or products of shrimp] Harvested in a Manner Not Harmful to Sea Turtles" to include shrimp harvested by aquaculture, shrimp harvested by vessels using TEDs comparable to U.S. TEDs, shrimp harvested by hand, or shrimp harvested

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58. *See id.* at 1051. The 1991 guidelines stated that the statute was limited to this region because this is the turtle's migratory range:

> [s]ection 609 refers to sea turtles whose conservation is the subject of U.S. regulations that require, among other things, that shrimp trawl vessels fishing in U.S. waters in certain areas of the Gulf of Mexico and Atlantic use Turtle Excluder Devices (TEDs) or reduced tow times during certain seasons to reduce the incidental mortality of sea turtles in trawl operations. In passing section 609, Congress recognized that these conservation measures taken by U.S. shrimp fishermen would be of limited effectiveness unless a similar level of protection is afforded throughout the turtles' migratory range across the Gulf of Mexico, Caribbean and western central Atlantic (Wider Caribbean Region). It has been determined that nations in the wider Caribbean with commercial shrimp trawl operations, through whose waters these sea turtles migrate, are: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guiana, and Brazil.

Id.

59. *See* Earth Island Inst. v. Christopher, 19 Ct. Int'l Trade 1461, 1485-86 (Ct. Int'l Trade 1995).

60. *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342; 17,342 (1996).

61. *See id.* at 17,343.

62. *Id.*

in waters where sea turtles are not found.[63] Environmentalists were not satisfied with these State Department regulations because they allowed importation from countries that were not certified and encouraged these nations not to adopt their own sea turtle conservation laws while eliminating any incentive for countries to put TEDs on more than a handful of nets (those that caught shrimp to sell to the United States).[64] U.S. shrimpers were not happy with the regulation because it put them at an economic disadvantage, as they were required to put TEDs on each and every vessel.[65]

The Court of International Trade in Earth Island Institute v. Christopher, and again in Earth Island Institute v. Daley after Christopher II was dismissed on technical grounds, ruled that the new regulations promulgated by the Department of State pursuant to section 609(b) were not in accordance with the intent of section 609.[66] The Court of International Trade agreed with Earth Island Institute that simply requiring a shipment from an uncertified nation to be accompanied by a declaration was not enough.[67] Also, requiring anything less than what is required by U.S. regulation violates section 609.[68]

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63. *Id.*

> (a) Shrimp harvested in an aquaculture facility...(b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States. (c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program...would not require TEDs. (d) Species of shrimp...harvested in areas in which sea turtles do not occur.

Id.

64. *See* Earth Island Inst. v. Christopher, 20 Ct. Int'l Trade 1221, 1224 (Ct. Int'l Trade 1996), *order vacated on other grounds* by Earth Island Inst. v. Albright, 147 F.3d 1352, 1356 (Fed. Cir. 1998) [hereinafter *Christopher II*] (plaintiffs included Earth Island Institute, Todd Steiner, The American Society for the Prevention of Cruelty to Animals, The Humane Society of the United States, The Sierra Club, and the Georgia Fishermen's Association).

65. *See id.* TEDs have been found to cause some loss of catch. *See* Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance with Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries Fishing Operations, 57 Fed. Reg. 18,446; 18,455 (1992).

66. *Christopher II*, 20 Ct. Int'l Trade at 1229-30; *See* Earth Island Inst. v. Daley, 48 F. Supp.2d 1064, 1069, 1081 (Ct. Int'l Trade 1999).

67. *See Christopher II*, 20 Ct. Int'l Trade at 1229-30; *Daley*, 48 F. Supp.2d at 1068, 1081.

68. *See Daley*, 48 F. Supp.2d at 1068, 1081.

III. INTERNATIONAL TRADE AGREEMENTS AND ENVIRONMENTAL POLICY

History of GATT

The General Agreement on Tariffs and Trade (GATT), which was put into action in 1948, is a contract among 123 governments worldwide that regulates international trade.[69] When GATT was drafted, international environmental policy was in its infancy.[70] As a result, GATT contains few references to environmental protection measures.[71] One example of such a reference is article XX of the GATT, which provides for general exceptions from a country's GATT obligations for certain specified purposes, including environmental protection,[72] although the environmental provisions are very difficult to satisfy.[73]

Article XX(b) provides an exception for measures "necessary to protect human, animal, or plant life or health."[74] This provision has been restrictively defined by GATT dispute panels to justify deviation from GATT rules to implement environmental protections only if no "less GATT-inconsistent" policy tool is available to achieve the established goal.[75] Because there is almost always a method conceivably less inconsistent with GATT policy, this exception rarely justifies a trade measure that is necessary to protect human, animal, or plant life or health.[76]

In addition, article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources."[77] While on its own this clause may not be difficult to satisfy, both XX(g) and XX(b) are subject to the conditions set forth in the "chapeau clause" in article XX: no

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69. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES *4 (1994) [hereinafter U.S.T.R. REPORT] (*available at* 1994 WL 761804 (G.A.T.T.)).

70. *See id.* at *8.

71. *See id.*

72. *See id.*; GATT art. XX(b), (g), *supra* note 5.

73. *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 48 (1994).

74. GATT art. XX(b), *supra* note 5.

75. ESTY, *supra* note 73, at 48.

76. *See id.* For example, the tuna embargo did not fall under the protection of article XX(b) because the nation affected by the embargo was not the nation for which the United States was seeking changes in policies and practices. *See* Unpublished GATT Panel Report on United States Restrictions on Imports of Tuna, June 16, 1994, at §§ 5.28-5.39 (unadopted) [hereinafter EEC Tuna Restrictions Complaint] (*available at* 33 I.L.M. 839 (1991)). There were other available and less GATT-inconsistent solutions to the problem, and the embargo was not considered "necessary" for dolphin life or health. *See id.*

77. GATT art. XX(g), *supra* note 5.

measures may be applied in a manner that arbitrarily or unjustifiably discriminates between countries, nor can such measures be disguised restrictions on international trade.[78]

The Formation of the WTO

As world trade became significantly more complex, it became evident that the GATT rules were not adequate for all world trade and many countries were concerned that GATT's dispute settlement system was not functioning effectively.[79] In September 1986, a meeting was held in Punta del Este, Uruguay, that became known as the Uruguay Round of multilateral trade negotiations.[80] The nations in attendance agreed upon major reductions in trade barriers designed to boost the world economy and provided for the creation of the World Trade Organization (WTO).[81] The WTO, which entered into force on January 1, 1995, requires full participation by all members in the new trading system, and provides a permanent forum to address international trading issues.[82]

With the formation of the WTO, the United States could no longer choose to do nothing in response to an adverse panel decision. Previously, when a GATT panel found that a government's complaint of a GATT violation was justified, the defending country could indefinitely "block" adoption of the panel's report, leaving the matter unresolved.[83] The GATT panel was usually unwilling to authorize retaliation.[84] WTO countries, however, can no longer block adoption of adverse panel reports.[85] Countries that bring successful challenges are authorized to withdraw trade benefits from the offending country if the matter cannot be settled.[86] Consequently, the potential economic and political impact of losing a WTO dispute settlement challenge is greater than was true under the old GATT.

During the Uruguay Round negotiations, the United States successfully advocated for the adding of several amendments to the text of the Uruguay Round to make it more sensitive to environmental policy

78. *See id.* at art. XX.
79. *See* U.S.T.R. REPORT, *supra* note 69, at *4.
80. *See id.* at *5.
81. *See id.* at *6-7.
82. *See id.* at *7.
83. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE URUGUAY ROUND AGREEMENTS ACT, STATEMENT OF ADMINISTRATIVE ACTION: UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES *56 (1994) (*available at* 1994 WL 761797 (G.A.T.T.)).
84. *See id.*
85. *See id.*
86. *See id.*

considerations.[87] These changes were thought to ensure that the agreements more clearly safeguarded U.S. environmental, health, and safety standards.[88] One result of the United States' negotiations was the formation of the Committee on Trade and Environment, which was to focus on the trade-environment relationship.[89]

When the WTO was formed in 1995, some member countries thought it might have beneficial effects on wildlife conservation.[90] The idea behind the formation of the WTO was to increase export opportunities, particularly for developing countries.[91] Developing countries faced significant trade barriers, such as quotas and high tariffs in the markets of many developed countries.[92] Most WTO members reduced their barriers to the importation of many products. Developing countries hoped that this would have beneficial effects on wildlife populations in these countries because an increase in the export of other products would reduce their dependence on wildlife trade, particularly trade in endangered species to generate foreign exchange.[93] However, some countries worried that increased economic activity would result in increased international commerce in some wildlife products, which would increase the need for regulatory activities and conservation and management training in order to implement sustainable management policies.[94]

Another major change adopted in the Uruguay Round was the Dispute Settlement Understanding.[95] The dispute settlement provisions are more legalistic and less prone to political manipulation than the rules requiring a consensus of all members under GATT.[96] The WTO system requires disputants to negotiate prior to bringing a formal challenge.[97] If a complaining party requests consultation with another, the defending party has ten days to respond and must enter into good-faith negotiations within 30 days, otherwise the complaining party can request that a dispute panel be formed.[98] The Dispute Settlement Body (DSB) has the power to select

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87. *See* U.S.T.R. REPORT, *supra* note 69, at *9.
88. *See id.*
89. *See id.* at *9, *13-14.
90. *See id.* at *21.
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.* at *22.
95. *See* Richard J. McLaughlin, *Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29, 41 (1997).
96. *See id.* at 41-42.
97. *See id.* at 43.
98. *See id.*; Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex II, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND VOL. 31; 33 I.L.M. 112, 116

panels, which consist of three or five "well-qualified governmental and/or non-governmental individuals."[99]

In contrast to former GATT policy, WTO procedures provide that where scientific or technological issues are involved, "a panel may request an advisory report in writing from an expert review group."[100] Disputing parties cannot present their own non-requested scientific information to panels.[101] Only the panel itself can call on the expertise of fisheries biologists, economists, ecologists, or other professionals in rendering their decisions.[102]

Under WTO, a party may appeal any settlement panel report.[103] The appeal is taken to a seven-person appellate body that may uphold, modify, or reverse the legal findings and conclusions of the panel.[104] If the appellate body finds a violation of GATT, it shall recommend that the losing party "bring the measure into conformity with that [GATT] agreement."[105] Within 30 days of adoption of the decision, the losing party must inform the DSB of what it intends to do with regard to the ruling.[106] Retaliatory actions, such as compensation, are authorized if the losing party fails to come into agreement with the decision.[107] If no acceptable agreement or compensation can be negotiated within 20 days, the prevailing party may propose retaliatory measures and seek authorization from the DSB to have them enforced.[108] The level of compensation must be equivalent to the level of nullification or impairment of trade.[109] All of these changes were put in place by the Uruguay Round to better handle free trade between the member nations.

U.S. Wildlife Protection under GATT: The Tuna Embargo

The GATT panel decision over the U.S. embargo of tuna was an international attack on U.S. wildlife law.[110] As discussed below, the facts

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§ 4.3 (1994) [hereinafter Settlement of Disputes] (adopted by the United States with the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 101(d)(16), 108 Stat. 4809, 4814-15 (1994) (codified at 19 U.S.C. § 3501 note (1994))).

99. *Id.* at §§ 8.1, 8.5.
100. *Id.* at § 13.2.
101. *See id.*
102. *See id.*
103. *See id.* at §§ 16, 17.
104. *See id.* at § 17.1.
105. *Id.* at § 19.1.
106. *See id.* at § 21.3.
107. *See id.* at § 22.1.
108. *See id.* at § 22.2.
109. *See id.* at § 22.4.
110. *See generally* Tuna Import Restrictions, *supra* note 1.

and reasoning of the panel decision are very similar to the WTO sea turtle panel decision.

The Marine Mammal Protection Act prohibits the importation of tuna caught from any country using "commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[111] It requires the Secretary of Commerce either to certify that foreign governments are taking steps to prevent the killing of marine mammals or are prohibiting the importing of tuna products from offending countries.[112]

In 1991, Mexican officials brought the Marine Mammal Protection Act before a GATT dispute resolution panel.[113] The panel concluded that the U.S. ban improperly discriminated against certain nations because the United States had placed an embargo on tuna caught from countries that used netting techniques dangerous to dolphins.[114] This violated GATT's article III "national treatment" requirement, which obligates parties to treat imports from any GATT party no less favorably than other imports or domestic products.[115] First, the panel determined that article III of GATT allows a country to regulate a product only as a product, and it does not allow a country to regulate the process by which the product comes to be.[116] Therefore, the United States could only restrict the importation of tuna if there was a problem with the quality of the tuna itself.[117] The taking of dolphins incidental to the taking of tuna did not affect tuna as a product.[118]

Second, the GATT panel found that the embargoes under the MMPA violated GATT Article XI, which prohibits any quantitative restrictions on trade, because it was a restriction on imports other than a general duty, tax, or other type of allowable charge.[119] As it would attempt later in the WTO sea turtle case, the United States defended the MMPA with article XX, sections (b) and (g) of GATT, which allow for discriminatory measures "necessary to protect human, animal, or plant life or health" or "relating to the conservation of exhaustible natural resources" respectively.[120] The GATT panel found that the article XX(b) exception of GATT

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111. Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1371(a)(2) (1994).

112. *See id.* at § 1371(a)(3)(A).

113. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, at § 1.1 (unadopted) [hereinafter Mexico Tuna Restriction Complaint] (*available at* 30 I.L.M. 1594 (1991)).

114. *See id.* at § 7.1.

115. *See id.* at § 5.9.

116. *See id.* at § 5.11.

117. *See id.*

118. *See id.* at § 5.15.

119. *See id.* at § 5.18. *See also* GATT art. XI §1, *supra* note 4.

120. Mexico Tuna Restriction Complaint, *supra* note 113, at § 5.22; GATT art. XX(b), (g), *supra* note 5.

did not cover actions outside the jurisdictional borders of the United States, and, even if it did, the United States had not used all reasonable options to pursue dolphin protection objectives consistent with the General Agreement.[121] Also, the ban could not fall under the exception of the GATT article XX(g) because there was no agreement upon such measures by the affected member nations outside of U.S. jurisdiction.[122]

Mexican officials chose not to pursue formal adoption of the panel findings because of the difficulties it would pose to the pending NAFTA negotiations.[123] Instead, the United States and Mexico tried to work out a solution between themselves.[124]

Because Mexico did not pursue formal adoption, another complaint was brought before the GATT panel by the European Union (EU) and the Netherlands.[125] These countries objected to the secondary embargo imposed by the United States on countries that traded in tuna with Mexico.[126] The panel again found that the MMPA violated GATT.[127]

Change in U.S. Laws after the GATT Tuna Decision

Despite the United States' battle with Mexico before the GATT panel, in 1992 Congress amended the MMPA with the passage of the International Dolphin Conservation Program Act (IDCPA), which temporarily lifts the tuna embargo against the banned countries in the Eastern Tropical Pacific (ETP).[128] This Act placed a five-year moratorium on setting nets on and encircling of dolphins in return for tuna exporters' exemption from the MMPA tuna embargo.[129] Under the amended Act, the Secretary of Commerce was called upon to evaluate both the success of Eastern Tropical Pacific countries in adopting alternative fishing practices and the effects of setting nets on today's dolphin population, in order to

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121. *See* Mexico Tuna Restriction Complaint, *supra* note 113, at §§ 5.25 to 5.29.

122. *See id.* at §§ 5.30-5.35. Mexico's second challenge against the Dolphin Protection Consumer Information Act (DPCIA) did not succeed. *See id.* at §§ 5.41 to 5.44. The GATT panel upheld the "dolphin-safe" provisions as consistent with the General Agreement, since the labeling requirements were voluntary and did not hamper access to the U.S. market. *See id.* at §§ 5.43 to 5.44.

123. *See* Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1, 12 (1994).

124. *See id.* at 12-13.

125. *See* EEC Tuna Restrictions Complaint, *supra* note 76, at § 1.1.

126. *See id.* at §§ 2.12 to 2.15.

127. *See id.* at § 3.1.

128. *See* International Dolphin Conservation Program Act, 16 U.S.C. §§ 1411-16 (Supp. IV 1998).

129. *See id.* at §§ 1412, 1415.

determine whether the embargo should be lifted indefinitely.[130] The Act instructs the Secretary of State to seek, through negotiations and discussions with appropriate foreign governments, to reduce and eliminate the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins.[131]

The United States met with the countries of the Eastern Tropical Pacific in 1995 and drafted the Panama Declaration.[132] This agreement obligated the twelve signatory countries to protect dolphins in the ETP.[133] In return, the United States also agreed to revise its definition of "dolphin-safe" under the Dolphin Protection Consumer Information Act.[134] The United States made efforts to negotiate bilateral terms with the nations affected by the tuna embargo.[135] Tuna imports would be allowed if fishing methods were determined not to be harmful to dolphins and time was given to develop new dolphin-safe technology.[136]

Wildlife Protection under the WTO: The U.S. Shrimp Embargo

Soon after the tuna agreements, problems with lack of agreements concerning shrimping nets, TEDs, and sea turtle mortality rose to a head. On April 10, 1997, at the request of India, Thailand, Malaysia, and Pakistan, the DSB established a panel to resolve whether the U.S. embargo of shrimp and shrimp products was a violation of GATT.[137] These four countries requested that the WTO panel find section 609 and its implementing measures

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130. *See id.* at §§ 1413-14.

131. *See id.* at § 1411.

132. *See* Declaration of Panama, Oct. 4, 1995, *reprinted in* 143 CONG. REC. S379-01, S397 (1997). The International Dolphin Conservation Program Act gives effect to the Panama Declaration, which was signed October 4, 1995, in Panama City. *See* 16 U.S.C. § 1361 note (1994) (Purposes and Findings of 1997 Amendments).

133. *See* Declaration of Panama, *supra* note 132, at S397. The 12 nations that agreed to the Panama Declaration were Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States, Vanuatu, and Venezuela. *See id.*

134. *See id.* at Annex I; *House Subcommittee Sends Tuna-Dolphin Bill to Full Panel*, 14 INT'L TRADE REP. (BNA) 697, 697 (1997). The definition was to be changed so that "any given haul of tuna that had no associated dolphin mortality (as certified by an observer) could bear the dolphin-safe label." *Id.* If the Secretary of Commerce determines that purse seine practices do not adversely affect dolphin populations, the dolphin-safe label will simply provide that no dolphins were "observed killed or seriously injured" in that particular tuna haul. *Id.*

135. *See generally* Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June, 1992, 33 I.L.M. 936 (1994).

136. *See* International Dolphin Conservation Program Act, 16 U.S.C. § 1385(d) (Supp. IV 1998). The Secretary of Commerce has until December 2002 to decide if purse seine practices harm dolphin populations. *See* § 1385(g)(2).

137. *See* WTO I, *supra* note 2, at § 1.3.

(a) were contrary to articles XI:1 and XIII:1 of GATT 1994, and
(b) were not covered by the exceptions under article XX(b) and (g) of GATT 1994.[138]

Three of the countries, India, Pakistan, and Thailand, additionally requested the Panel to find that section 609 was contrary to article I:1 of GATT 1994.[139]

The WTO panel found a violation of GATT article XI and, thus, decided it was unnecessary to resolve the other claims brought against the United States.[140] India, Pakistan and Thailand argued that the scope of

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138. *Id.* at § 3.1.

139. *See id.* These countries first complained that information submitted by non-government third parties could not be considered under the DSU. *See id.* at § 3.130. Two amicus briefs were submitted by non-governmental organizations, one by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL) and the second by the World Wide Fund for Nature (WWF). *See id.* at § 3.129. The United States argued that according to the DSU the panel could seek information from any relevant source under DSU Article 13. *See id.* The panel noted that pursuant to Article 13 of the DSU, they had the right to seek any relevant information; however, they had not requested this information. *See id.* at § 3.130. Since only WTO members could be parties or third parties and submit information directly to the panel, accepting non-requested, non-governmental sources would be incompatible with the provisions of the DSU. *See id.* The Panel, however, did not entirely strike the information but decided to accept any of the information the parties would adopt as their official position. *See id.* at § 3.129. The United States availed itself of this opportunity and adopted a small section of the CIEL brief. *See id.*

140. *See id.* at § 7.17. It found that consistent with the practices of GATT and WTO panels, it was only necessary to decide the issues needed to resolve the dispute. *See id.* at §§ 7.22 to 23. India, Pakistan, and Thailand argued that § 609 violated articles I and XIII of GATT. *See id.* at § 7.18. According to India, Pakistan, and Thailand, initially affected countries in the Caribbean/Western Atlantic were given the opportunity to implement the required use of TEDs without substantially interrupting shrimp trade to the United States. *See id.* Products from these countries have, therefore, been given an "advantage, favor, privilege or immunity" over like products originating in the territories of other member countries, in violation of article I:1. *See id.* at § 7.19. India, Pakistan, Thailand, and Malaysia argued that § 609 is inconsistent with article XIII:1 of GATT 1994. *See id.* at §§ 7.19 to 20. The differential treatment of like products from certified and non-certified countries violates article XIII:1. *See id.* Section 609 restricts the importation of shrimp and shrimp products from countries that have not been certified, while like products from other countries that have been certified can be imported freely into the United States. *See id.* at § 7.20. The United States denies entry of shrimp and shrimp products based on the method of harvest, even though it does not affect the nature of the product. *See id.* at § 7.21. Indeed, all foreign shrimp and shrimp products have the same physical characteristics, end-uses, and tariff classifications and are perfectly substitutable. *See id.* at § 3.137. Thus, shrimp products, which may be imported into the United States pursuant to § 609, are like shrimp products from non-certified countries, which are denied entry. *See id.* Even assuming that the method of harvest does affect the nature of the product, the embargo violates article XIII because wild shrimp harvested by use of TEDs are forbidden entry into the United States if harvested by a national of a non-certified country, while shrimp

article XI:1, which provides for general elimination of trade restrictions, prevents all trade measures instituted by a member that prohibit or restrict the importation or exportation of products other than through monetary measures such as duties, taxes, or other charges.[141] These nations claimed that the embargo applied by the United States on the basis of section 609 constituted a prohibition or restriction on the importation of shrimp or shrimp products and was not in the nature of a "duty, tax, or other charges" within the meaning of article XI:1.[142] The United States admitted that section 609 was a restriction prohibited by article XI, but argued that article XX provided exceptions to this type of restriction.[143] The United States claimed that the measures at issue adopted pursuant to section 609, which were found to be inconsistent with article XI:1 GATT 1994, were justified under article XX(b) and (g) of GATT 1994.[144]

The Panel found that the regulation was not an acceptable measure under article XX because it arbitrarily and unjustifiably discriminated between countries.[145] The arbitrary and unjustifiable discrimination resulted from unilaterally imposed standards (or standards imposed without any agreement by the affected nations) on imports of shrimp and shrimp products, which was a threat to the multilateral trading system.[146] The panel thus recommended to the Dispute Settlement Body that it request the United States to bring this measure into conformity with its obligations under the WTO agreement.[147]

The Findings of the Appellate Body

The United States appealed the panel's decision that section 609 was outside the scope of article XX.[148] The United States stressed that under the Panel's factual findings and undisputed facts on the record, section 609

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harvested by use of TEDs by a national of a certified country are permitted entry into the United States. *See id.* at § 3.138. Malaysia further argued that, while newly affected nations generally received only a four month notice, Malaysia actually was given three months (i.e., until 1 April 1996) to adopt a program complying with the U.S. requirements. *See id.* at § 7.19. For Malaysia, this differential treatment was also discriminatory and inconsistent with article XIII:1. *See id.*

141. *See id.* at § 3.136. *See* GATT, *supra* note 4 (text of art. XI).

142. WTO I, *supra* note 2, at § 3.136.

143. *See id.* at § 7.24.

144. *See id.* at § 7.24. See GATT, *supra* note 5 (text of art. XX).

145. *See* WTO I, *supra* note 2, at §§ 7.49, 7.62.

146. *See id.* at § 7.61.

147. *See id.* at § 8.2.

148. *See* World Trade Organization Dispute Resolution Panel Report on United States–Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body, WT/DS58/AB/R, Oct. 12, 1998, 38 I.L.M. 118 (1999) [hereinafter WTO II].

was within the scope of article XX (g) and alternatively article XX(b).[149] It argued that the Panel interpreted the article as requiring a determination of whether a measure constitutes a threat to the multilateral trading system and that this interpretation has no basis in the text of the GATT 1994.[150] It further argued that such an interpretation has never been adopted by any previous WTO panel or appellate body report, and would impermissibly diminish the rights that WTO members reserved under article XX.[151]

The appellate body again struck down the U.S. law, although its reasoning differed from that of the Panel.[152] With regard to article XX, the appellate body found that the Panel did not inquire into how the application of section 609 constituted arbitrary or unjustifiable discrimination between countries in which the same conditions exist or how it constituted a disguised restriction on international trade.[153] Instead, the Panel focused on the design of the measure itself.[154] The Panel stressed that it was addressing a situation in which the United States had taken unilateral measures that could put the multilateral trading system at risk.[155] The appellate body stated that the Panel was wrong to look into the object and purpose of the entire GATT 1994 and the WTO agreement instead of the object and purpose of article XX itself.[156] It ruled a panel could not use the maintenance of the multilateral trading system as an interpretive rule to appraise a measure under article XX.[157]

The appellate body, however, found that the U.S. measure was unjustifiable because it coerced foreign nations to use TEDs.[158] Section 609 requires other member nations to adopt essentially the same sea turtle-safe policy that the U.S. applies to its domestic shrimp trawlers, along with an approved enforcement program.[159] The appellate body reasoned that the

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149. *See id.* at ¶ 10.

150. *See id.*

151. *See id.*

152. *See id.* at ¶¶ 122, 181-87.The Appellate Body found that the Panel erred in its finding that accepting non-requested, non-governmental sources was against the provisions of the DSU. *See id.* ¶¶ 110, 187(a). It reasoned that according to Article 13 a panel could request *any* relevant information it wanted; that meant a panel has the discretionary authority to accept and consider the information that is actually submitted, whether requested by the Panel or not. *See id.* at ¶¶ 104-09. The Appellate Body concluded that the panel had acted within their authority in deciding to accept any non-requested information the parties chose to adopt as their official position. *See id.* at ¶ 110.

153. *See id.* at ¶ 115.

154. *See id.*

155. *See id.* at ¶ 116.

156. *See id.*

157. *See id.*

158. *See id.* at ¶ 161.

159. *See id.*

statute alone may appear to be somewhat flexible in the standards for comparability, but that flexibility is eroded by the regulations, which require all commercial trawl vessels operating in areas where turtle interception is likely to use TEDs in all circumstances that are "comparable" to the circumstances in which they are used in the United States.[160] Their conclusion was that although the guidelines indicate that the Department of Commerce shall take into consideration other conservation measures employed by a country, in reality, the U.S. officials look only to see if the nation's regulations require the use of TEDs or whether they come within one of the extremely limited exceptions available to the U.S. shrimp trawl vessels.[161] The appellate body found that it is not acceptable for a WTO member to use an economic embargo to require other members to adopt the same regulatory program as that member has adopted in its own territory, without taking into consideration the different conditions which may exist in the territories of those other members.[162] To do so unjustifiably discriminates against those nations with other types of conservation programs.[163]

The appellate body also found that the U.S. measure was unjustifiably discriminatory under article XX because the United States undertook no efforts to negotiate treaties with the nations who brought the complaint or with other member nations exporting shrimp to the United States before enforcing the embargo.[164] Instead, the United States had proposed a negotiation after the deadline for imposing the embargo.[165] The appellate body's conclusion was supported by the finding that Congress had expressly recognized the importance of obtaining international agreements for the protection and conservation of the sea turtle in enacting section 609.[166] Section 609(a) directs the Secretary of State to initiate negotiations and develop bilateral and multilateral agreements as soon as possible with affected nations.[167]

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160. *See id.*

161. *See id.* at ¶ 162.

162. *See id.* at ¶¶ 163-64.

163. *See id.* at ¶¶ 164-65.

164. *See id.* at ¶ 166.

165. *See id.*

166. *See id.* at ¶ 167; Act of Nov. 21, 1989, Pub. L. No. 101-162, Title VI, § 609(a), 103 Stat. 988, 1037 (codified at 16 U.S.C. § 1537 note (1994) (Conservation of Sea Turtles; Importation of Shrimp)).

167. § 609(a) states:

> (a) Secretary of State...shall...(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles; (2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial

As part of their analysis of unjustifiable discrimination, the body emphasized that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.[168] Clearly, the United States negotiated with some members, but not with other members that export shrimp to the United States.[169] Also, some countries received deferential treatment. The fourteen Caribbean/Western Atlantic countries that were first determined to be subject to the embargo had a phase-in period of three years before they were required to use TEDs.[170] By the time the Department of Commerce changed the guidelines to apply the law to all countries, the additional countries had only four months to implement a requirement of compulsory use of TEDs.[171]

The appellate body also found that the U.S. measure was applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail."[172] It found there was no predictable certification process followed by U.S. government officials.[173] The U.S. certification process provided no formal opportunity for a country applying for certification to be heard, or to respond to any arguments that may be made against it before a decision to grant or deny certification is made.[174]

> fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles; (3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles; (4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and (5) provide to the Congress by not later than one year after the date of enactment of this section...(C) a full report on: (i) the results of his efforts under this section....

Id.

168. *See* WTO II, *supra* note 148, at ¶¶ 166, 168.

169. *See id.* at ¶ 172. The United States did negotiate in The Inter-American Convention for the Protection and Conservation of Sea Turtles, which concluded in 1996. *See id.* at ¶ 169. Five countries have signed on to the convention: Brazil, Mexico, Costa Rica, Venezuela, and Nicaragua. *See id.* n.170. However, this convention has not yet been ratified by any of its signatories. *See id.*

170. *See id.* at ¶ 173 (Caribbean/Western Atlantic countries: Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guiana, and Brazil).

171. *See id.* at ¶ 173.

172. *Id.* at ¶ 177.

173. *See id.* at ¶ 180.

174. *See id.*

IV. RESOLVING THE CONFLICT

The WTO shrimp embargo decision has aroused protest among Americans over the surrendering to foreign tribunals of U.S. sovereignty in its domestic environmental laws. The United States must decide between enforcing its own endangered species law and being perceived by the other members of the WTO as snubbing the general agreement and as unwilling to support free trade and the principles for which the WTO stands.

There are three ways in which the United States can proceed with world trade and concurrently attempt to protect the endangered sea turtle. First, it can choose to adhere to its current shrimp import regulations and comply with any economic repercussions placed upon it by the WTO. Second, the United States could conform its administrative regulations to the WTO Appellate Body's interpretation of its trade obligations and reject section 609, or have section 609 repealed by Congress. If this route is chosen, launching a campaign for consumers similar to that of dolphin-safe shrimp may be an effective way of maintaining some level of protection for the turtle. Finally, it could solve the problem diplomatically by either actively negotiating bilateral or multilateral agreements among the countries involved in its shrimp trade or by advocating for a change in the WTO General Agreement for better protection of sea turtles and other endangered species. This solution would best protect the sea turtle.

Adhere to the Current Sea Turtle Laws and Regulations

The United States may choose to follow the current laws and regulations and adhere to any conditions placed upon it by the WTO Dispute Settlement Body. For example, the United States could offer trade compensation such as lower tariffs. If the United States makes no attempt to find such a solution, the countries bringing the complaint will retaliate and suspend trade concessions to the United States equivalent to the trade benefits lost as a result of this U.S. trade measure.[175] Pursuing this option will not only be economically harmful to the United States, but will most likely fail to ensure any protection against the world-wide extinction of sea turtles. Other nations will continue to legally use trawl nets without TEDs and any country wishing to contribute to the protection of sea turtles will have to establish and enforce its own domestic laws. While a few nations may do so, many will have greater social and economic concerns to deal with and will not have the desire or the resources to enact their own domestic laws and make such laws effective.

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175. *See* Settlement of Disputes, *supra* note 98, at § 22.2.

Since the CIT decision[176] and the WTO appellate body decision, the U.S. Department of State has reinstated the regulations only allowing for imports of shrimp caught with turtle-safe technology, although a few suggestions for modifications have been made.[177] The Department of State is of the view that foreign governments themselves should require TEDs to be used on shrimp trawl vessels wherever there is a likelihood of ensnaring sea turtles.[178] Presently, there is no evidence to substantiate concerns of environmentalists and others that permitting the importation of TED-caught shrimp from uncertified nations will cause foreign governments to abandon or refrain from adopting regulatory programs requiring TEDs to be used.[179] But to assure that these regulations do not undermine the establishment of such national programs around the world, the Department has promised to review the effects of this decision every six months for a three-year period beginning May 1, 1999.[180] If it concludes from the evidence gathered during that time period that the decision has adversely affected sea turtle species by encouraging foreign governments to abandon or limit TED programs, the Department will reassess the decision.[181]

Submit to the WTO

The second option is for the Departments of State and Commerce to change their regulations to conform to the WTO's decision. While this approach will satisfy the other countries of the WTO such as India, Pakistan, Thailand, and Malaysia, many Americans would consider such submission a serious sacrifice of U.S. sovereignty and democracy in favor of free trade.

This option would require the United States to administer its import regulations in a way that does not arbitrarily or unjustifiably discriminate, as that term has been interpreted by the WTO. To prevent unjustifiable discrimination, the United States must consider more closely the programs that countries have in place along with the different conditions that are prevalent in each country.

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

177. *See generally* Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (1999).

178. *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094; 46,095 (1998).

179. *See id.*

180. *See id.*

181. *See id.*

India, for example, claims to have a well-established tradition of protecting endangered species, including sea turtles.[182] It asserts that the essential harmony between the environment and man has always been an important principle in Indian society because constant replenishment of natural resources has been critical to the livelihood of most of its people for centuries.[183] The objectives of environmental protection have been deeply ingrained in its people.[184] Environmental resources have traditionally been protected through the teachings of India's major religions.[185] The sea turtle is seen by many Indians as a divine incarnation; therefore, fishermen are careful not to catch turtles in their nets.[186]

Part of India's effort to protect sea turtles includes two training programs for shrimpers to discuss fabricating and installing TEDs.[187] Still, India, along with many other countries, does not accept the U.S. assertion that the use of TEDs is the only way to keep sea turtle species found in India's territorial waters from becoming extinct.[188] India asserts that TEDs alone cannot protect the sea turtles, and that other conservation programs undertaken by India, such as protection of nesting areas, are also essential for conserving sea turtles.[189] However, just how much consideration the United States must give to India's alternative efforts remains questionable.

Other countries that brought the shrimp embargo before the panel had similar complaints. Most claimed to share the concerns of the United States over the fate of sea turtles. They argued that the U.S. requirement that TEDs be installed on commercial fishing vessels not only violated U.S. obligations under the GATT, but was completely unnecessary given the protection afforded endangered species by these countries.[190]

Ecuador argued that the use of TEDs in its waters would not be beneficial to the conservation of sea turtles.[191] Most of its species of sea turtles live 30 to 40 miles off the coast, whereas shrimp are harvested between eight to ten miles offshore.[192] The U.S. certification procedures did not give them the opportunity to argue that this fact should be taken into

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182. *See* WTO I, *supra* note 2, at § 3.4.
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.* at § 3.5.
188. *See id.*
189. *See id.*
190. *See id.* at § 1.6. Other countries that did not bring the complaint but made similar arguments in third party briefs were Australia, Ecuador, El Salvador, the European Communities, Guatemala, Hong Kong, Japan, Nigeria, the Philippines, Singapore, and Venezuela. *See id.* No third party countries intervened on behalf of the United States.
191. *See id.* at § 4.20.
192. *See id.*

consideration.[193] To prevent arbitrary discrimination, the United States would have to allow hearings during which a country to be embargoed would have the opportunity to have its protest heard.

Different countries have different natural resource endowments and different demands for environmental amenities based on income levels and values. Poorer countries argue that they cannot afford the same strict environmental controls as those of a country like the United States. They posit that harmonization of environmental standards is unfair because of the comparative advantage of richer countries and that it overrides the legitimate differences in environmental policies that may derive from variations in climate, weather patterns, resources, existing population densities, risk preferences, and environmental priorities,[194] all of which should be taken into account in devising environmental controls. These are factors that the U.S. Department of State would have to consider when issuing or denying certifications to foreign countries.

Changing the regulations to satisfy the WTO would not leave the U.S. wholly without a way to protect sea turtles. One way Congress has chosen to protect dolphins is through the Dolphin Protection Consumer Information Act (DPCIA).[195] The labeling of tuna cans played a major part in the ability of the United States to protect dolphins without using unilateral trade restrictions, and, thus, violating GATT. In the GATT tuna

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193. *See id.*

194. *See* ESTRY, *supra* note 73, at 101-02, 106.

195. *See* Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (1994).
(d)(1) It is a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains–(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or (B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe under paragraph (2). (2) For purposes of paragraph (1)(B), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a fishing vessel using purse seine nets is dolphin safe if–(A) the vessel is of a type and size that the Secretary has determined is not capable of deploying its purse seine nets on or to encircle dolphins; or (B)(i) the product is accompanied by a written statement executed by the captain of the vessel which harvested the tuna certifying that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphin; (ii) the product is accompanied by a written statement executed by–(I) the Secretary or the Secretary's designee, or (II) a representative of the Inter-American Tropical Tuna Commission....

Id.

case, Mexico had challenged the U.S. Dolphin Protection Consumer Information Act (DPCIA), which promoted consumer awareness by allowing for labeling of tuna caught using "dolphin-safe" techniques.[196] The GATT panel, however, upheld the "dolphin-safe" provisions as consistent with the General Agreement, since the labeling requirements were voluntary and did not hamper access to U.S. markets.[197]

Perhaps a consumer awareness law can do the same for the sea turtle; however, such legislation has yet to be proposed. Before such a law can be enacted and become effective, massive awareness campaigns must be launched about these disappearing sea turtles and the importance of refraining from the purchase of shrimp and shrimp products caught by means that threaten these creatures. Making the U.S. public fully aware that sea turtles are disappearing and allowing the public to act directly and individually to preserve them may be a more immediate solution while nations sit down at the table to agree among themselves how best to save the sea turtle from extinction.

Bilateral and Multilateral Agreements

Amending the GATT to allow for trade barriers based on practices that seriously threaten endangered species would be an ideal solution for the United States and those countries that have their own endangered species protection laws. Although amendments have been proposed, many WTO members are likely to oppose this type of amendment because they will encourage protectionist trade measures.

A more feasible solution lies in negotiation of multilateral and bilateral trade agreements to protect the sea turtle. The State Department is required by section 609(a) to initiate serious efforts to negotiate bilateral or multilateral agreements with other nations to protect sea turtles.[198] The State Department has indicated its desire to strengthen its efforts to protect sea turtles through negotiation and implementation of multilateral agreements.[199] One of its announced goals is to secure the implementation of the Inter-American Convention for the Protection and Conservation of Sea Turtles throughout the Western Hemisphere as soon as possible.[200] This

196. *See* Mexico Tuna Restriction Complaint, *supra* note 113, at §§ 3.1(a), 5.41.

197. *See id.* at § 5.42.

198. *See* Act of Nov. 21, 1989, Pub. L. No. 101-162, Title VI, § 609(a), 103 Stat. 988, 1037 (codified at 16 U.S.C. § 1537 note (1994) (Conservation of Sea Turtles; Importation of Shrimp)).

199. *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094; 46,095 (1998).

200. *See id.*

convention has not yet been ratified by any of it signatories.[201] So far this has been the only agreement attempted between the U.S. and other WTO members for protection of the sea turtle.

Because sea turtles are migratory species, the use of TEDs by U.S. trawlers is useless without similar protection by other countries. It is imperative that all nations cooperate. Many countries have expressed their disappointment in the United States' failure to initiate negotiations for development of bilateral or multilateral agreements with other nations or to amend existing international treaties to include protection of sea turtles.[202]

There are many countries with shrimping industries. Securing agreements with all of them will undoubtedly require a great deal of time and resources. Securing a single multilateral agreement involving all countries with major shrimping industries, while still very consuming of time and resources, would be the most efficient solution.

While many of these shrimping nations will have agendas filled with issues much more important in their eyes than the sea turtle, the United States could offer incentives to them, and even to shrimping industries, through a combination of monetary incentives and TED technology that ensures no loss of shrimp while protecting the sea turtle. If the United States wants to enforce its section 609, it will have to pay, either through sanctions imposed upon it by the WTO or through incentives for securing multilateral or bilateral agreements.

CONCLUSION

As it has in the past, GATT and the WTO will continue to afford less protection to the world's endangered species than they need to maintain their existence. Defiance of the General Agreement by the United States may offer some protection to the endangered sea turtle. However, only the collective efforts of the nations around the world where sea turtle populations are indigenous can save the turtles from the ultimate threat of extinction. By initiating multilateral and bilateral agreements and perhaps offering financial incentives to more needy countries, the United States can both adhere to its domestic wildlife law and enforce section 609 without violating its agreement as a member of the WTO.

SUSAN BISONG

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201. *See* WTO II, *supra* note 148, at ¶ 169.
202. *See id.* at ¶¶ 166-68.