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CATHERINE JEAN ARCHIBALD*

Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare

ABSTRACT

Sometimes countries make distinctions between seemingly identical products because of the different impact that each product's processing method has on the environment and/or on animal welfare. When used appropriately, these distinctions can be a powerful force toward positive environmental change, sustainable development, and increased animal welfare. This article shows how environmental and animal welfare process and production (PPM) distinctions can and should exist within the framework of the international trade regime.

INTRODUCTION

The way that a product is made can impact the environment, or animal welfare, or both. Different production processes often have different levels of impact. Thus, in order to help the environment or animal welfare, a country may decide to prohibit the importation of a product from one producer or country, even while allowing the importation of a seemingly identical product from a different producer or country. For example, a country may decide to ban the import of shrimp that are caught using methods that kill endangered sea turtles while allowing the import of shrimp that are caught using methods that do not harm turtles.¹ When used appropriately,² these process and production method (PPM) distinctions

* Catherine Jean Archibald is a graduate of Michigan State University College of Law where she earned her J.D. with concentrations in International and Environmental Law. She holds a bachelor's degree in Ecology and Evolutionary Biology from Princeton University. Currently, she is completing an L.L.B. with a certificate in International Law at the University of Ottawa Faculty of Law, as part of the J.D.-L.L.B. program run jointly by Michigan State and the University of Ottawa. She can be reached at catherine.archibald@gmail.com. Thanks to Raahool Watchmaker and Yasir Naqvi for their encouragement in writing the first draft of this article for their International Trade Remedies class at the University of Ottawa. Special thanks also to N. Kathleen (Sam) Banks for her comments.

1. See *infra* Part II-III.

2. See *infra* Part I.F (discussing inappropriate discrimination).

have been and continue to be a powerful force toward positive environmental change and increased animal welfare.³

The world trade regime was created in order to prevent governments from restraining trade.⁴ PPM distinctions should not be prohibited by the World Trade Organization (WTO) regime, and, indeed, there are several places within the regime where they fit—namely in the General Agreement on Tariffs and Trade (GATT) Articles III.4, XI.2(b), XX(a), XX(b), and XX(g).⁵ This article will demonstrate how environmental and animal welfare PPM distinctions can exist within the framework of the international trade regime.

The *Tuna/Dolphin I* dispute⁶ in 1991 involved a U.S. law that, in an effort to protect dolphins, prohibited the import of tuna that was caught using methods that killed dolphins. Mexico challenged the U.S. law as an illegal trade embargo, and the dispute was brought before a GATT panel. A GATT panel, which is now no longer used, was a panel of three or five neutral trade experts who would decide whether a party was in violation of its international trade treaty obligations under the GATT.⁷ If the panel found a violation, the Contracting Parties of the GATT could vote (consensus was required) to adopt the panel report.⁸ Under this system, it was relatively easy for a losing party to vote to block the adoption of the report and thus avoid the legal obligation to follow the panel's direction. However, if the report were adopted, the party found in violation of the treaty obligation was legally obligated to change its law to conform to the panel's decision.⁹

3. See Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 70 (2002) (giving examples of environmental PPMs throughout history that have acted to help the environment); see also *infra* notes 100–103 and accompanying text.

4. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 22–23 (1998).

5. General Agreement on Tariffs and Trade 1944, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT], available at http://www.wto.org/English/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#general (last visited Apr. 7, 2008). See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

6. Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R, GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS 39S/155 (Sept. 3, 1991) [hereinafter *Tuna/Dolphin I*], available at http://www.wto.org/gatt_docs/English/SULPDF/91530924.pdf.

7. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 115 (2d ed. 2000) (1997) (explaining the GATT dispute resolution processes).

8. *Id.* at 117.

9. See *id.* at 117, 126.

The *Shrimp/Turtle I* dispute¹⁰ in 1998 involved a different but similar U.S. law that prohibited the import of shrimp caught in a manner that killed sea turtles. Four Asian countries challenged the U.S. law, and the dispute was brought in front of first a WTO panel, and then the WTO Appellate Body.

In 1995, the WTO was formed as an evolution of the GATT system, and the dispute resolution system was strengthened.¹¹ The GATT Agreement became part of the WTO Agreement. A WTO panel, like the GATT panels before it, is a panel of three neutral trade experts who decide whether a party is in violation of its international trade treaty obligations. Unlike a GATT panel report, once a WTO panel report is issued, it is *automatically* adopted unless there is consensus among the WTO member countries to block adoption. Thus, it is much harder for a country to block a decision that it does not like under the WTO than under the former GATT system. A losing party may appeal to the WTO Appellate Body, a panel made up of three neutral trade experts. Once the Appellate Body issues its report, it also is automatically adopted unless there is consensus among WTO members to block the adoption. Once a panel report or an Appellate Body report is adopted, a losing party to a dispute is legally obligated to change its law to conform to the report's decision.¹² A decision of the panel or of the Appellate Body is not binding on future decisions, although it may be persuasive.

While the *Tuna/Dolphin I* dispute panel held that an environmentally and animal-welfare motivated PPM distinction was forbidden by the world trading regime, the final outcome of the more recent *Shrimp/Turtle* dispute upheld such a PPM distinction.¹³ This more recent case means that environmental and animal welfare goals need not be thwarted by the WTO/GATT trade regime. The *Shrimp/Turtle II* interpretation allows the regime to strike an appropriate balance between trade and the environment, and trade and animal welfare. Part I of this article will examine in detail the *Tuna/Dolphin* dispute and show why the reasoning of the panel was faulty

10. Appellate Body Report, *United States – Import Prohibition of Shrimp and Certain Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle I*], http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (follow “Appellate Body Report” hyperlink; then follow “preview (HTML)” hyperlink) (last visited Apr. 7, 2008).

11. See JACKSON, *supra* note 7, at 124–27 (explaining the WTO dispute resolution process).

12. *Id.* at 126 (noting that although the WTO Agreement does not make this obligation explicit, it is implied through a combination of clauses read together).

13. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle II*], http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (follow “Article 21.5 Appellate Body Report” hyperlink; then follow “preview (HTML)” hyperlink) (last visited Apr. 7, 2008); see also *infra* Part III.

when it interpreted the GATT provisions. Parts II and III will examine the *Shrimp/Turtle* dispute and explain how the outcome of this dispute paints a hopeful picture for countries that wish to adopt trade measures to protect the environment and/or animal welfare.

Future disputes brought before the WTO should continue the trend initiated by the *Shrimp/Turtle* decisions and interpret any ambiguities in the regime in a way that is favorable to protecting the environment and/or animal welfare. There are two reasons for this. First, the WTO preamble itself, in tune with contemporary understandings of the dire straits that the environment of the planet is in,¹⁴ specifically states that the WTO Agreement should allow for "the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to *protect and preserve the environment*."¹⁵ This purpose can be contrasted with the GATT Agreement that had as its object "the full use of the world's resources."¹⁶ Thus, perhaps the *Tuna/Dolphin* panel can be excused for its animal welfare and environmentally unfriendly decision because it was interpreting the GATT provisions in the context of a treaty whose object was simply the full use of resources. However, there can be no such excuse for future disputes interpreted under the WTO Agreement, a treaty whose object recognizes the need to balance trade with other important considerations. The Appellate Body has recognized that any ambiguities in the WTO Agreement should be interpreted in such a manner as to fulfill the objective and purpose of the WTO Agreement, which includes the purposes of fostering sustainable development and a healthy environment.¹⁷ Further, the Appellate Body has noticed that trade restrictions are the "heaviest weapon" a country has to prevent a harmful process.¹⁸ Since trade restrictions can help solve environmental and animal welfare problems, they should not be banned if used appropriately.¹⁹

14. See generally DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (3d ed. 2007) (describing numerous serious international environmental problems such as global warming, hazardous wastes, and endangered species).

15. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Preamble, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (emphasis added) [hereinafter WTO Agreement].

16. See GATT Agreement 1947, *supra* note 5; *Shrimp/Turtle 1*, *supra* note 10, ¶ 152.

17. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 39, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan – Taxes on Alcohol*], http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm (follow "Appellate Body Report" hyperlink; then follow "preview (HTML)" hyperlink) (last visited Apr. 7, 2008).

18. See *Shrimp/Turtle I*, *supra* note 10, ¶ 171; see also Virginia Dailey, *Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO*, 9 J. TRANSNAT'L & POL'Y 331, 377 (2000) (stating that "trade sanctions are the best arrow in the environmentalists' quiver").

19. For examples of inappropriate use, see *infra* Part II.B.

There is no doubt that in order to fix the world's numerous environmental problems and animal welfare atrocities, attention must be paid to the way that products are made. Few things are made with the desire to harm the environment or animals. Rather, such harm is caused incidentally in the process of working toward other goals. Thus, it is vital that governments intervene to provide incentives for producers to change harmful processes. Sometimes the best way a government can do this is by forbidding trade in products made with animal-unfriendly or environmentally harmful processes.²⁰

I. TUNA/DOLPHIN I (1991)

The *Tuna/Dolphin I* dispute between Mexico and the United States arose in 1990 when the United States banned the importation of yellowfin tuna and yellowfin tuna products from Mexico.²¹ Historically, in order to catch tuna, fishers would specifically set their nets over areas where dolphins swam. This was because dolphins swim near schools of tuna. However, because dolphins are mammals and need to come up periodically for air, they would drown when caught in the nets. In 1986, over 130,000 dolphins died in the Eastern Tropical Pacific Ocean as a result of such fishing methods.²² By 1991, due to changes in fishing law and methods, this number was down to below 30,000.²³

The U.S. Marine Mammal Protection Act of 1972 (MMPA) set dolphin protection standards for both domestic and foreign fishing boats to ensure the protection of dolphins.²⁴ The MMPA was passed because of the close connection between fishing for tuna and harming dolphins, at least in the Eastern Tropical Pacific Ocean.²⁵ The MMPA provided for an importation ban on yellowfin tuna from any country that could not demonstrate that its standards for protecting dolphins were comparable to U.S. standards.²⁶ In 1990, the United States banned the importation of yellowfin tuna products from Mexico under this law.²⁷

20. See *supra* notes 3, 18 and accompanying text; see also Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 5.1, DS29/R (June 16, 1994) [hereinafter *Tuna/Dolphin II*], http://www.wto.org/gatt_docs/English/SULPDF/91790155.pdf (describing how forced changes in production processes resulted in a dolphin death rate that was one fifth of what it had been before the changes).

21. *Tuna/Dolphin I*, *supra* note 6, ¶ 2.7.

22. *Tuna/Dolphin II*, *supra* note 20, ¶ 5.1.

23. *Id.*

24. *Id.* ¶¶ 2.5–2.8.

25. *Id.* ¶ 2.2.

26. *Id.* ¶ 2.9.

27. *Tuna/Dolphin I*, *supra* note 6, ¶ 2.7.

United States law required that the average dolphin death rate for Mexico's tuna fleet not exceed 1.25 times the average annual dolphin death rate of U.S. vessels.²⁸ United States law also required that the share of Eastern spinner dolphin and coastal spotted dolphin relative to total killings of dolphin by Mexico's fleet during each one-year fishing season must not exceed 15 percent and two percent respectively. Meanwhile, the U.S. fleet had absolute numbers of Eastern spinner dolphin and coastal spotted dolphin above which it could not kill.²⁹

Mexico argued that the embargo was a quantitative restriction, in violation of GATT Article XI.³⁰ The United States argued that its measure was not a quantitative restriction, but rather an internal regulation affecting the sale or distribution of a product, consistent with GATT Article III.4.³¹ In the alternative, the United States argued that its measures were consistent with GATT because they were covered by the animal welfare and environmental exceptions found in GATT Articles XX(b)³² and XX(g).³³ The

28. *Id.* ¶ 2.6.

29. *Id.* ¶¶ 2.4, 2.6.

30. *Id.* ¶ 3.1. GATT Article. XI.1 provides that

[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 5, art. XI.1.

31. *Tuna/Dolphin I*, *supra* note 6, ¶ 3.6. GATT Article III.4 provides in part, The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT, *supra* note 5, art. III.4.

32. *Tuna/Dolphin I*, *supra* note 6, ¶ 3.6(b). GATT Article XX(b) provides, 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.

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

33. *Tuna/Dolphin I*, *supra* note 6, ¶ 3.6(b). GATT Article XX(g) provides, 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... (g) relating to the conservation of exhaustible natural

panel found that the import restriction violated GATT Article III and Article XI.1 and was not justified by either GATT Article XX(b) or Article XX(g).³⁴

The GATT panel was correct in deciding that the U.S. measures were inconsistent with the GATT, but its reasoning was flawed, as will be shown below.

A. GATT Article III: National Treatment Is Required, but "Likeness" Should Be Interpreted to Allow PPM Distinctions

GATT Article III lays out a "national treatment" obligation requiring each contracting country to treat foreign products no less favorably than it treats "like" domestic products.³⁵ Article III aims to ensure equality of treatment between imported and domestic products so that a country cannot unfairly protect and favor its domestic products over products from another country.³⁶ Article III.4 requires that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."³⁷

One author asserts that Article III does not "allow for differential treatment based on characteristics of the production process rather than the product itself."³⁸ However, this assertion is based on an old GATT case, *Belgian Family Allowances*, which prohibited differential treatment of products based on whether the other country followed a particular social policy of giving monetary breaks to families.³⁹ As will be shown below, Article III should allow for differential treatment based on production process differences in certain circumstances, particularly when the differences in production processes cause different environmental or animal welfare impacts.

resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

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

34. *Tuna/Dolphin I*, *supra* note 6, paras 5.15, 7.1.

35. See Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT'L L.J. 421, 425 (1998) (explaining the GATT/WTO system).

36. WTO APPELLATE BODY REPERTORY OF REPORTS AND AWARDS 1995-2005, at 324 (compiled by the Appellate Body Secretariat, 2006).

37. GATT, *supra* note 5, art. III.4 (emphasis added).

38. JACKSON, *supra* note 7, at 218.

39. *Id.* at 218 n.19; Report of the Panel, *Belgian Family Allowances*, G/32 (Nov. 6, 1952), GATT BASIC INSTRUMENTS & SELECTED DOCS. 59 (1st Supp. 1953), available at http://www.wto.org/gatt_docs/English/SULPDF/90670110.pdf.

The *Tuna/Dolphin I* panel decided that U.S. and Mexican tuna were like products because the products were indistinguishable.⁴⁰ The panel reasoned that the way the products were produced did not affect their quality as products; therefore, the United States must treat both types of tuna equally.⁴¹ This became known as the notorious process versus product distinction.⁴² Thus, the panel found that two products are "like" no matter how each is made. The panel should have found that the U.S. measures violated Article III, not because dolphin-safe tuna is a "like product" to dolphin-unsafe tuna, but rather because the measures unfairly afforded protection to domestic production.

1. *The Text of Article III Shows PPM Distinctions Should Be Allowed*

The panel decision is flawed because Article III is mainly concerned with measures taken by countries that have as their aim the protection of domestic industry. Indeed, Article III explicitly contemplates countries making distinctions between products based on processing.⁴³ Article III.1 states that "[t]he contracting parties recognize that...internal quantitative regulations requiring the mixture, *processing* or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."⁴⁴ Article III.5 states that "[n]o contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, *processing* or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources."⁴⁵ Article III.7 provides that "[n]o internal quantitative regulation relating to the mixture, *processing* or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply."⁴⁶ By forbidding particular types of processing regulations, Article III implies that if a processing regulation is not applied in one of the forbidden ways (*i.e.*, is not applied in order to protect domestic production, does not require use of domestic resources, and does not require the use of certain proportions of external supply), it

40. *Tuna/Dolphin I*, *supra* note 6, ¶ 5.15.

41. *Id.*

42. See, e.g., Michael Gregory, *Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective*, 7 J. ENVTL. L. & LITIG. 99, 136 (1992).

43. See Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 320 (1994).

44. GATT, *supra* note 5, art. III.1 (emphasis added).

45. *Id.* art. III.5 (emphasis added).

46. *Id.* art. III.7 (emphasis added).

should be valid.⁴⁷ The *Tuna/Dolphin I* panel found that the process used to produce a product is irrelevant in determining whether two products are “like products” under Article III.4. Instead, the panel should have found that the U.S. measures violated Article III, not because dolphin-safe tuna is a “like product” to dolphin-unsafe tuna, but rather because the measures unfairly afforded protection to domestic production, as will be explained shortly.

Indeed, several GATT and WTO decisions since *Tuna/Dolphin I* have affirmed the right of a country to make PPM distinctions for legitimate policy purposes not related to protecting internal markets. A 1992 GATT panel, examining U.S. alcohol import laws under prohibition, explained that Article III is limited in purpose: “Article III is...not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production.”⁴⁸

Similarly, a 1994 GATT panel, *United States – Taxes on Automobiles*, found that automobiles sold above and below \$30,000 were not “like products” to each other. The panel reasoned that the purpose of Article III was set out in Article III.1 and that “Article III serves only to prohibit regulatory distinctions between products applied so as to afford protection to domestic production. Its purpose is not to prohibit fiscal and regulatory distinctions applied so as to achieve other policy goals.”⁴⁹ The panel also noted that the practice of panels had been to analyze differences in treatment under Article III using factors such as: product end-use, consumer tastes and habits, and the nature and quality of the product.⁵⁰ The panel noted that “[n]on-protectionist government policies might, however, require regulatory distinctions that were not based on the product’s end use, its physical characteristics, or the other factors mentioned.”⁵¹ The panel noted that “a primary purpose of the General Agreement was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them”; therefore, the panel reasoned that “Article III could not be interpreted as prohibiting government policy options, based on products, that were not taken so as to afford protection

47. Charnovitz, *supra* note 3, at 86.

48. GATT, *Report of the Panel on United States – Measures Affecting Alcoholic and Malt Beverages*, 16 March 1992, GATT Doc. DS23/R, § 5.25, GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS 39S/206, available at http://www.wto.org/gatt_docs/English/SULPDF/91610002.pdf.

49. Report of the Panel, *United States – Taxes on Automobiles*, § 5.7, GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS DS31/R (Oct. 11, 1994), available at http://www.wto.org/gatt_docs/English/SULPDF/91810174.pdf.

50. *Id.* § 5.8.

51. *Id.*

to domestic production."⁵² The panel then decided that the "aim and effect" of the distinction should be analyzed in determining likeness to see if the aim and effect was to protect domestic products unfairly.⁵³

Under the reasoning of the panel in *United States – Taxes on Automobiles*, both the purpose and the effect of a measure should be analyzed to determine whether the measure violates Article III. If the purpose of the measure is not domestic protectionism, but rather some other legitimate regulatory goal such as environmental or animal welfare protection, then the measure should not violate Article III, even if the measure incidentally hurts international trade.

The 1996 WTO Appellate Body Decision in *Japan – Taxes on Alcoholic Beverages*⁵⁴ disagreed with the "aim and effect" test, stating that it does not matter what the intent of a country is in making a law; if its effect is to protect domestic production, then it violates Article III.⁵⁵ This disagreement can be explained by the ambiguous language of Article III.1 that reads, "internal charges, and laws, regulations...should not be applied...so as to afford protection to domestic production."⁵⁶ It is not clear whether "so as to afford" means "intended to afford" or "in effect affording." However, changes in regulations affecting trade can be expected to incidentally impact the comparative advantage of one country over another.⁵⁷ Further, conditions may change such that a regulation that once helped the foreign industry now helps the domestic industry. Therefore, the interpretation of the 1994 GATT panel in *Taxes on Automobiles* finding that a measure will not violate Article III unless both its aim and effect is protectionism, is preferable and should be followed by future panels. This interpretation allows governments to make appropriate policy regulations without being constrained by how their decisions might incidentally affect international comparative advantage. Additionally, this interpretation will reduce the number of claims possible under Article III and will enable countries to take regulatory action they deem appropriate. This is especially so considering that some regulatory measures may be taken to protect the environment and/or animal welfare, such as the ones at issue in the *Tuna/Dolphin* and *Shrimp/Turtle* disputes. As the Appellate Body has emphasized, the words in the WTO treaty should be given their ordinary meaning, read in light of the objective and purpose of the treaty.⁵⁸ Here, since the ordinary meaning

52. *Id.*

53. *Id.* § 5.10.

54. *Japan – Taxes on Alcohol*, *supra* note 17.

55. *Id.* § 57.

56. GATT, *supra* note 5, art. III.1 (emphasis added).

57. See generally Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998).

58. *Japan – Taxes on Alcohol*, *supra* note 17, § 39.

of the phrase “so as to afford protection” in Article III.1 is not clear, any future panel should look to the objective and purpose of the WTO treaty, which includes the promotion of sustainable development and environmental protection.⁵⁹

Both the WTO Appellate Body in *Japan – Taxes on Alcoholic Beverages* and the GATT panel in *United States – Taxes on Automobiles* agreed that the term “like products” in Article III.2 should be construed narrowly.⁶⁰ The Appellate Body said that whether products are “like” should be determined on a case-by-case basis and should take into account “the product’s end-uses in a given market; consumers tastes and habits, which change from country to country; the product’s properties, nature and quality.”⁶¹ Consumer-citizens often have tastes and desires that include protecting the environment and/or animal welfare. These preferences can be expressed by legislation passed by their governments that includes measures such as PPM trade distinctions.

2. Consumers Are Likely to Prefer Products Made by Less Harmful Methods

The *Tuna/Dolphin I* panel’s reasoning that dolphin-unsafe tuna is a “like product” to dolphin-safe tuna is faulty because it was internally inconsistent with other parts of the panel’s decision. In finding that the United States may have standards regarding the labeling of tuna as “dolphin-safe,” the panel recognized that consumers may have a preference for “dolphin-safe” tuna over “non-dolphin-safe” tuna.⁶² Australia, a third party to the dispute, recognized that for the concerned consumer, tuna labeled as “dolphin-safe” was not comparable to tuna not so labeled.⁶³

59. The preamble to the WTO Agreement states that the trade regime should be carried out so as to allow “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment. . . .” WTO Agreement, *supra* note 15.

60. *Japan – Taxes on Alcohol*, *supra* note 17, § 43.

61. *Id.* § 44 (citations omitted); see also Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, ¶ 36, WT/DS31/AB/R (June 30, 1997), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds31_e.htm (follow “Appellate Body Report” hyperlink; then follow “preview (HTML)” hyperlink) (recognizing three things to look at in determining whether two products are “like products”: (1) the product’s end-uses in a given market; (2) consumers’ tastes and habits; and (3) the product’s properties, nature, and quality). Later decisions added a fourth criterion: the tariff classification of the product. See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, § 73, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Measures Affecting Asbestos*], http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm (follow “Appellate Body Report” hyperlink; then follow “preview (HTML)” hyperlink) (last visited Apr. 7, 2008).

62. *Tuna/Dolphin I*, *supra* note 6, § 5.42.

63. *Id.* § 4.6 (argument of Australia).

If consumers have an ethical preference for one over the other, then surely the products are not "like products" to those consumers. Thus, because the panel recognized that consumers were likely to have a preference for dolphin-safe tuna, it should also have recognized that dolphin-safe and dolphin-unsafe tuna should not be considered "like products" under Article III. Indeed, as discussed, later dispute panels have specifically recognized that consumer preference should impact whether two products are considered "like products" under Article III.⁶⁴

3. *All Other Relevant Factors Should Be Considered When Determining "Likeness"*

In the *Asbestos* dispute, the WTO Appellate Body found that even though "health risk" was not an included factor in the traditional list considered to determine whether products are "like products" under Article III.4, "health risk" was a relevant factor in deciding whether the two products at issue were "like products."⁶⁵ "[I]n examining the 'likeness' of products, panels must evaluate all of the relevant evidence."⁶⁶ Relevant to "likeness," the Appellate Body noted that "asbestos fibres have been recognized internationally as a known carcinogen...."⁶⁷ The Appellate Body also noted that, although there was no evidence on the matter, "[w]e consider it likely that the presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product."⁶⁸ Similarly, when there are known differences in environmental and animal welfare effects, this too should be considered likely to have an impact on consumer tastes and habits.

The *Asbestos* Body recognized that, even though not traditionally analyzed, "health risk" to humans was a relevant factor to consider in deciding whether two products are "like products" in the particular case before it. Similarly, even though not traditionally analyzed, "health risk" to the environment or animal welfare should be considered a relevant factor in cases where the production of two seemingly identical products results in significant differences in environmental or animal health. Just as the Appellate Body found that the knowledge of a known carcinogen in a product would likely influence consumers' desire for the product, so too would knowledge of a known negative animal welfare or environmental impact probably influence consumers' desire for that product. This reasoning is particularly strong for future disputes where environmental

64. See *supra* note 61 and accompanying text.

65. *Measures Affecting Asbestos*, *supra* note 61, ¶ 113.

66. *Id.*

67. *Id.* ¶ 135.

68. *Id.* ¶ 145.

health is implicated for at least three reasons. First, it is internationally recognized that the environment is suffering from severe stress.⁶⁹ Second this severe stress has direct implications for human as well as animal health.⁷⁰ Third, the preamble to the WTO specifically recognizes the goals of sustainable development and environmental protection, which should influence the interpretation of the ambiguous term “like products.”

4. However, the U.S. Measures Were Unfairly Discriminatory

The U.S. provisions at issue in *Tuna/Dolphin I* should have been found to violate Article III, not because Mexican tuna was a “like product” to U.S. tuna, but because under Article III.1, the U.S. provisions should have been seen as “laws, regulations and requirements affecting the internal sale [and] offering for sale, . . . applied to imported or domestic products so as to afford protection to domestic production.” As the panel found, the U.S. regulations did not treat domestic and foreign producers equally or fairly. The domestic producers were told a maximum number of dolphins they could kill, in advance of the fishing season. By contrast, the foreign producers were given a number retroactively and only after the numbers of dolphin deaths from U.S. ships had been counted.⁷¹ This made it harder for the foreign producers to know in advance whether they were meeting the U.S. requirements, a problem that the U.S. producers did not have. This distinction, having no possible legitimate policy reason, should have been judged a violation of Article III.1 because it favored domestic production over foreign production.

Arguably, the U.S. measures also violated Article III because they did not give Mexican producers who used dolphin-safe methods an opportunity to sell to consumers in the United States, unlike U.S. producers who used dolphin-safe methods. Canada, a third party, made this argument and said that the embargo was not an internal measure under Article III because it forbade all imports of yellowfin tuna products from a specific country.⁷² It could be argued that Mexican dolphin-safe tuna is a “like product” to U.S. dolphin-safe tuna. Under this type of analysis, the United States would be able to ban imports of dolphin-unsafe tuna, wherever it came from, but should not ban all tuna from an individual country.

69. See generally HUNTER ET AL., *supra* note 14 (describing numerous serious international environmental problems such as global warming, hazardous wastes, and endangered species).

70. See, e.g., IPCC, 2007, *Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 12 (M.L. Parry et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf> (describing the negative health effect on humans caused by global warming).

71. *Tuna/Dolphin I*, *supra* note 6, ¶ 5.16.

72. *Id.* ¶ 4.7.

Certainly, this type of system is preferable where it would work.⁷³ However, it may not be practical for a country to regulate the producers of another country. If that is the case, the Mexican dolphin-safe tuna can be seen as not a "like product" to the U.S. dolphin-safe tuna because while one product is regulated under a system of law that guarantees that it is dolphin-safe, the other product is not so regulated and therefore carries no corresponding guarantee.

B. Article XI: Quantitative Restrictions Are Prohibited, but PPM Distinctions Should Be Permitted as Standards Necessary to Classify Goods According to the Harm Caused During Production

GATT Article XI.1 forbids quantitative restrictions of products from other countries, whether they are in the form of quotas, bans, or license requirements.⁷⁴ Thus, in order to liberalize trade, Article XI prevents any country from limiting the number and amount of products coming from another country. The *Tuna/Dolphin I* panel found that the U.S. restriction on imports from Mexico was a quantitative restriction that therefore violated Article XI.⁷⁵ Unfortunately, the United States did not offer any Article XI arguments, asserting that because its measure was a valid regulation under Article III, there was no need to address Article XI.⁷⁶ However, the U.S. ban on imports to Mexico should have been argued as and judged compliant with Article XI.2(b), which provides an exception to Article XI.1. Article XI.2(b) provides that "[t]he provisions of paragraph 1 of this Article shall not extend to the following:...[i]mport and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." This exception allows a country to maintain standards for products sold within its borders that other countries do not share. For example, under this exception a country could keep out all toys that exceed a certain level of lead paint.

73. See Charnovitz, *supra* note 3, at 67 (discussing the difference between a "how-produced" product standard and a "government policy" product standard).

74. See GATT, *supra* note 5, art. XI.1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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 or on the exportation or sale for export of any product destined for the territory of any other contracting party.").

75. *Tuna/Dolphin I*, *supra* note 6, ¶ 5.18.

76. *Id.* ¶ 3.11.

No WTO disputes have invoked Article XI.2(b), and only one GATT dispute, the *Canada-Salmon* dispute, involved this measure.⁷⁷ In the *Canada-Salmon* dispute, Canada imposed an export ban on unprocessed herring and salmon to the United States and claimed that its ban was justified under Article XI.2(b) as being necessary to uphold Canadian quality standards on unprocessed herring and salmon.⁷⁸ However, this was not a convincing argument, and the panel rejected it because Canada also prohibited the export of fish that met its quality standards.⁷⁹

The *Tuna/Dolphin I* panel should have recognized the U.S. requirement that minimal dolphins should be killed while catching tuna as a standard relating to the classification and grading of tuna and, therefore, a valid requirement under Article XI.⁸⁰ Measures requiring that food be prepared in sanitary conditions relate to the process by which food is made and are valid standards that protect health. Similarly, measures requiring that tuna be caught in a manner that does not harm dolphins relates to the process by which tuna is produced and should be judged as a valid standard that protects environmental health and animal life. Just as human health is an important concern, so too is environmental and animal health.⁸¹ For example, just as the United States has a system of health and safety laws to protect human health, so too does it have systems of laws to protect the environment and animal welfare. There is no reason that these concerns should not be relevant when it comes to international trade. In fact, human health and environmental health are intricately entwined and human activity harming the environment is having "profound consequences" for human health.⁸² The United States should have argued and the panel should have found that an import prohibition from a country that has

77. Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BASIC INSTRUMENTS & SELECTED DOCUMENTS L/6268 (Nov. 20, 1987), available at http://www.wto.org/gatt_docs/English/SULPDF/91330016.pdf.

78. *Id.* ¶ 4.2.

79. *Id.*

80. When a country sets processing standards for products, those standards may have to comply with certain requirements under other parts of the WTO Agreement outside of the GATT Agreement. For example, the measure may have to comply with the *Agreement on the Application of Sanitary or Phytosanitary Measures* and/or the *Agreement on Technical Barriers to Trade*, set out in Annex 1A of the WTO Agreement. See JON R. JOHNSON, *INTERNATIONAL TRADE LAW* 172, 174 (1998). However, those other agreements are outside the scope of this article, which focuses on the GATT Agreement.

81. See generally HUNTER ET AL., *supra* note 14 (describing numerous serious international environmental problems caused by degraded environmental and animal health).

82. *Id.* at 2.

shown that it cannot meet dolphin-safe standards is necessary to uphold the U.S. standards of dolphin safety for tuna sold within its borders.⁸³

C. Article XX(a): The Public Morals Exception Should Allow PPM Distinctions That Protect the Environment or Animal Health

GATT Article XX provides exceptions to the general trade requirements for a variety of reasons so long as the measures are not unjustifiable or arbitrary discrimination and are not a disguised restriction on trade.⁸⁴ Article XX(a) provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...necessary to protect public morals.” Neither the parties to the dispute nor the panel considered whether Article XX(a) could justify an import ban on Mexican tuna. However, Australia, a third party, expressed the opinion that Article XX(a) could justify measures taken to prevent the inhumane treatment of animals.⁸⁵

No GATT or WTO dispute resolution panel has analyzed, nor has a party invoked Article XX(a).⁸⁶ In its wording, it is similar to Article XX(b) in requiring that the measure be “necessary” before it can be invoked. Thus, it is likely that when Article XX(a) is invoked a similar analysis will be used as that used to analyze Article XX(b).⁸⁷

83. However, the panel could reasonably have found that the differences in treatment in setting Mexican and U.S. levels of permitted dolphin kill was an import prohibition that was not necessary because it was discriminatory. The panel used this reasoning under XX(b) to determine that the measure was not necessary. See *infra* Part I.D.3.

84. GATT Article X provides,

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:

- (a) necessary to protect public morals;
- (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.

GATT, *supra* note 5, art. XX.

85. *Tuna/Dolphin I*, *supra* note 6, ¶ 4.3 (argument of Australia, a third party to the dispute).

86. See Miguel A. Gonzalez, *Trade and Morality: Preserving “Public Morals” Without Sacrificing the Global Economy*, 39 VAND. J. TRANSNAT’L L. 939, 968 n.283 (2006) (“There is no GATT or WTO jurisprudence on the interpretation of Article XX(a.”); Alison G. Jones, *Australia’s Damaging International Trade Practice: The Case Against Cruelty to Greyhounds*, 14 PAC. RIM L. & POL’Y J. 677, 703 (2005) (“[N]o panel has yet interpreted Article XX(a).”).

87. For a discussion on what “necessary” means, see *infra* Part I.D.2.

Dolphins are one of the most intelligent species of mammals on earth.⁸⁸ There is no doubt that they suffer when they drown in fishing nets.⁸⁹ Indeed, it is likely that so many people support saving dolphins⁹⁰ because there is a sense that it is morally wrong to kill such complex and intelligent creatures when using different fishing methods could save their lives. Reducing demand for Mexican tuna would reduce its production, saving dolphin life.⁹¹ By banning tuna from Mexico because Mexico did not enforce dolphin-protection standards comparable to the United States, the United States should have argued and the panel should have found that the United States was taking a measure “necessary” to save animal life and, thus, a measure “necessary” to protect public morals.

D. Article XX(b): The Protection of Life and Health Exception Should Allow PPM Distinctions That Protect the Environment or Animal Health

Under GATT Article XX(b), countries may take measures “necessary to protect human, animal or plant life or health.” The United States claimed that its measures were necessary to protect dolphin life and health.⁹² However, the panel found that there were three reasons why the U.S. measure could not meet the requirements of XX(b): (1) this measure was a measure to protect the life and health of animals located extra-territorially from the United States, (2) the United States had not tried to negotiate a multilateral treaty to solve the dolphin death problem, and (3) the measures unreasonably discriminated between foreign and domestic producers.⁹³ Each of these reasons will be addressed in turn.

88. See Donald W. McChesney, *Dolphin-Safe or Fisherman-Friendly? Abuse of Discretion in Amendment of the Dolphin-Safe Tuna Labeling Standard*, 38 U.C. DAVIS L. REV. 1725, 1727 (2005).

89. See ROD PREECE & LORNA CHAMBERLAIN, *ANIMAL WELFARE AND HUMAN VALUES* 269 (1995) (discussing an animal’s capacity to suffer).

90. See *Bower v. Evans*, 257 F.3d 1058, 1060 (9th Cir. 2001) (describing public outrage over dolphin deaths).

91. See Christopher D. Stone, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 *ECOLOGICAL Q.* 495, 502 (describing how decreasing the quantity of dolphin-unsafe tuna bought shifts the demand curve and reduces dolphin deaths); see also Spero News, *Vegetarians Adopt Turkeys for Thanksgiving: Farm Sanctuary Lets People Adopt Turkeys Instead of Eating Them*, SPERO NEWS, Nov. 8, 2004, <http://speroforum.com/site/article.asp?idarticle=1159&t=Vegetarians+adopt+turkeys+for+Thanksgiving> (last visited Apr. 10, 2008) (estimating that a vegetarian, by reducing demand for meat, saves about 93 animals per year from “the cruelty of factory farms and slaughterhouses”).

92. *Tuna/Dolphin I*, *supra* note 6, ¶ 3.33.

93. *Id.* ¶ 5.29.

1. *Extraterritorial Reach Should Not Be a Barrier*

The panel noted that the text of Article XX(b) did not address explicitly whether a country could act to protect human, animal, or plant health or life outside its own borders.⁹⁴ In deciding that a country could not act to protect life or health outside its borders, the panel reasoned that if the interpretation of Article XX(b) suggested by the United States were followed, each contracting party could unilaterally determine the life or health protection regulations from which other contracting parties must not deviate if they wished to avoid a trade sanction.⁹⁵ However, because the language of Article XX(b) requires that a measure be "necessary," as discussed below in Part I.D.2, the number of such unilateral measures will be limited.

The panel analyzed the history of the drafting of the GATT and determined that the measure was intended only to protect life or health within a country's own borders.⁹⁶ However, the panel's analysis is faulty. The plain reading of the text sets no limits and instead lets each country decide which life or health it wishes to protect.⁹⁷ In addition, the drafting history that the panel cites does not support its contention that the GATT drafters only intended to allow countries to protect the life or health of beings within their jurisdiction. An earlier draft of the provision allowed parties to adopt measures that would otherwise be prohibited under the GATT "[f]or the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country."⁹⁸ The panel concluded that because the drafters dropped the second half of the clause in the final draft, they intended countries to protect only *domestic* life and health.⁹⁹ It is unclear how the panel reached this conclusion. Instead, it is more likely that the additional words were dropped because they were unnecessary. After all, the Chapeau of Article XX prohibits "unjustifiable discrimination between countries where the same conditions prevail." Thus, the Chapeau already requires that so long as similar conditions prevail in the domestic country and the foreign country, similar measures must be taken domestically as are required of the foreign country.

In fact, long before the GATT was negotiated, countries were using trade bans to protect the environment and health beyond their borders. For

94. *Id.* ¶¶ 5.25, 6.3.

95. *Id.* ¶ 5.27.

96. *Id.* ¶ 5.26.

97. See Charnovitz, *supra* note 43, at 349. For the text of Article II, see *supra* note 84.

98. *Tuna/Dolphin I*, *supra* note 6, ¶ 5.26.

99. *Id.*

example, in 1906, the United States banned the import of sponges caught in a manner that damaged sponge beds more than was necessary.¹⁰⁰ Australia, in 1908, and the United States, in 1921, banned the importation of white phosphorus, a product that caused a horrible occupational disease to those making the product.¹⁰¹ In 1925, the United States and Mexico agreed to prohibit the import of fish caught in a way that harmed marine life in the Pacific Ocean.¹⁰² In 1931, Denmark and Sweden signed a treaty agreeing to prohibit the sale of seabirds caught in a way that harmed migratory birds.¹⁰³ It is unlikely that the GATT parties, whose main goal was to lower tariffs, would have chosen to so radically alter their rights to make the PPM distinctions they had long been making.

Later cases have, correctly, not read into Article XX(b) a requirement that a measure must not affect things located extraterritorially. Indeed, only three years later, in *Tuna/Dolphin II*, an extension of *Tuna/Dolphin I*, the panel found that nothing in the text of the agreement supported the contention that the animals the country sought to protect had to be within the boundaries of the country making the regulation.¹⁰⁴ The *Shrimp/Turtle* dispute panels also rejected this assertion.¹⁰⁵

In conclusion, it is unreasonable to assert that under Article XX(b) a country cannot seek to protect animal or human health or life beyond its borders. Such reasoning does not comport with the plain reading of Article XX or the long practice of countries. Additionally, not allowing PPM distinctions could render domestic environmental or animal welfare measures ineffective as the harmful practices forbidden at home could simply be outsourced to other countries.

2. Multilateral Negotiation Attempts Should Be Required Concurrent with the PPM Distinction

Mexico claimed that the United States should have promulgated an international treaty on dolphin protection instead of taking unilateral action.¹⁰⁶ Thailand and Venezuela agreed.¹⁰⁷ The Panel found that the United States had not demonstrated that a trade embargo was necessary because the United States had not tried multilateral negotiations first, and, therefore, remedies consistent with the GATT had not been exhausted.¹⁰⁸ It

100. See Charnovitz, *supra* note 3, at 70.

101. See Charnovitz, *supra* note 43, at 340.

102. See Charnovitz, *supra* note 3, at 70.

103. *Id.*

104. *Tuna/Dolphin II*, *supra* note 20, ¶ 5.33.

105. See *infra* Part II.A.2.

106. *Tuna/Dolphin I*, *supra* note 6, ¶ 3.34.

107. *Id.* ¶¶ 4.25, 4.27 (argument of Thailand and Venezuela, third parties).

108. *Id.* ¶ 5.28.

is reasonable that countries should try to conclude a multilateral negotiation before, or at least concurrent with, taking unilateral action to ban a particular trade item.

Because Article XX(b) requires measures taken to protect life or health to be "necessary," it seems difficult for a country to justify a ban as "necessary" if that country is not also, at the same time, trying to reach a negotiated solution with the other side. However, the country should only be required to make a good-faith effort to negotiate and should not be required to water down its requirements. In fact, Mexico for years resisted diplomatic efforts to protect dolphins.¹⁰⁹ Countries should not have to rely solely on international treaty making because the other country may not respond favorably.¹¹⁰ Countries should be given some leeway in interpreting "necessary," and "necessary" should not be interpreted to be "absolutely necessary."¹¹¹ It is easy to theorize other solutions that "might work," but that does not mean that they will work or that they are practical.¹¹² In fact, multilateral treaties are often extremely difficult to make.¹¹³ In addition, sometimes it is the threat of unilateral action or a country taking unilateral action that provides the motivation necessary to conclude a treaty.¹¹⁴

3. *The Unreasonable Discrimination Analysis Should Have Occurred Under the Chapeau of Article XX Instead of Under XX(b)*

The panel found that the U.S. regulations did not treat domestic and foreign producers equally. For domestic producers, a ceiling number was set in advance, telling them how many dolphins they could legally kill that season. By contrast, foreign producers were given a number retroactively, only after the numbers of dolphin deaths from U.S. ships were counted.¹¹⁵ Thus, the condition was unreasonable because the Mexican fishers could not know ahead of time what was required of them.¹¹⁶ While this was unreasonable discrimination that should have rendered the U.S. measures GATT-inconsistent under Article XX, this analysis should have been done under the Chapeau of Article XX, which prohibits "arbitrary or unjustifiable discrimination" rather than under the main part of Article

109. Charnovitz, *supra* note 43, at 327.

110. *Id.* at 349.

111. *Id.* at 327.

112. *Id.*

113. See Charnovitz, *supra* note 3, at 71.

114. *Id.* at 72 (describing how a successful treaty to protect sea turtles did not happen until after the United States instituted its unilateral ban, even though countries had been trying for years to negotiate one).

115. *Tuna/Dolphin I*, *supra* note 6, ¶ 5.16.

116. *Id.*

XX(b).¹¹⁷ Article XX(b) simply allows measures “necessary to protect human, animal, or plant life or health,” whereas the Chapeau of Article XX prohibits “arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”¹¹⁸

E. Article XX(g): The Conservation of Exhaustible Natural Resources Exception Should Allow PPM Distinctions

The United States claimed that its measures were necessary to protect an exhaustible resource—dolphins—and that without these embargo provisions, its actions regulating domestic producers’ take would have minimal effect.¹¹⁹

The panel found similar problems with the U.S. measures as it had found under Article XX(b). The panel did not approve of the extraterritorial nature of the U.S. measures, which “unilaterally determin[e] the conservation policies from which [Mexico] could not deviate without jeopardizing [its] rights under the General Agreement.”¹²⁰ Similar to the criticism above in Part I.D.1, since the text of Article XX(g) does not limit a country to protecting resources solely within its own jurisdiction, Article XX(g) should not be so limited.

The panel found that even if a state could make laws that have extraterritorial influence, the measures fail XX(g) because they do not treat Mexican and U.S. producers equally. Similar to the reasons stated above,¹²¹ this analysis and finding should have occurred under the Chapeau of Article XX instead of under the body of XX(g).

Interestingly, the panel did not mention that the United States should have attempted multilateral negotiations before imposing the import restrictions under Article XX(g), whereas the panel did find that negotiations should have taken place before the ban under Article XX(b). This difference in requirements under Article XX(b) and Article XX(g) is reasonable because while measures under Article XX(b) must be “necessary” to protect life or health, measures under Article XX(g) need only be “relating to” the conservation of natural resources.¹²²

117. See discussion *supra* Part I.D.3. Although the result of a finding of “arbitrary or unjustifiable discrimination” is the same whether found under the Chapeau of Article XX or under Article XX(b)—the measure is GATT-inconsistent—it makes more sense to do the analysis under the Chapeau of Article XX because it is there that such discrimination is explicitly forbidden.

118. GATT, *supra* note 5, art. XX.

119. *Tuna/Dolphin I*, *supra* note 6, ¶¶ 3.40–3.41.

120. *Id.* ¶ 5.32.

121. See *supra* Part I.D.3.

122. GATT, *supra* note 5, art. XX.

F. The Chapeau of Article XX Prohibits Arbitrary or Unjustifiable Discrimination and Thus Can Prevent PPM Distinctions from Being Applied Unfairly

To accommodate concerns such as national security, health, morals, and the environment, Article XX lays out a number of exceptions to the trade constraints contained within the rest of the GATT provisions.¹²³ The Chapeau of Article XX forbids measures taken pursuant to Article XX(a) through (j) from being “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.” This is to ensure that countries do not use the exceptions in Article XX to advance the protectionist goals that the rest of the treaty is meant to dispel. The *Tuna/Dolphin* panel did not address the Chapeau, or introductory phrases, of Article XX. Subsequent WTO panels have ruled that the Chapeau analysis should come after the analysis of whether the challenged measure fits into the lettered exceptions of Article XX(a) through (j).¹²⁴

The U.S. law required that the average dolphin death rate for Mexico’s tuna fleet must not exceed 1.25 times the average dolphin death rate of U.S. vessels in the same period.¹²⁵ While at first it may seem that such a law was favorable to Mexican producers, in practice it meant that the Mexican producers could not know at any point in time how many dolphins they were allowed to kill, whereas the U.S. producers did. Thus, the panel should have found, under the Chapeau of Article XX, that the law unjustifiably discriminated against Mexican producers as compared to U.S. producers, even though the same conditions applied (fishing for tuna while trying to reduce incidental dolphin deaths).¹²⁶

Additionally, the U.S. law automatically shut down exports from Mexico if its producers did not meet the requirements but did not shut down U.S. sales to U.S. consumers if U.S. producers did not meet the requirements.¹²⁷ Thus, while Mexican producers lost the U.S. market for at least an entire season if they failed to comply with the U.S. standards, no

123. *Id.*; see JACKSON, *supra* note 4, at 22–23.

124. See *Shrimp/Turtle I*, *supra* note 10, ¶¶ 118–20; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/ AB/R (Apr. 29, 1996) pt. IV, ¶ 1, at 22, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm (follow “Appellate Body Report” hyperlink; then follow “preview (HTML)” hyperlink) (last visited July 30, 2008).

125. *Tuna/Dolphin I*, *supra* note 6, ¶ 2.6.

126. Instead it found it unjustifiable under Article XX(b) and Article XX(g). See *supra* text accompanying notes 113 and 120.

127. *Tuna/Dolphin I*, *supra* note 6, ¶ 4.7 (argument of Canada, a third party).

such drastic economic penalty was imposed upon U.S. producers who failed to comply with the U.S. standards.¹²⁸ Although the panel did not address this issue, the panel should have found this measure to be unjustifiable discrimination under the Chapeau of Article XX.

Finally, the U.S. law required that before a foreign country's tuna fishing regulations could be considered comparable to U.S. regulations, the share of Eastern spinner dolphin and coastal spotted dolphin killed relative to total incidental killing of dolphin during each one-year fishing season must not exceed 15 percent and two percent respectively, although no such percentages applied to the U.S. fleet.¹²⁹ Instead, the U.S. fleet had absolute numbers of Eastern spinner dolphin and coastal spotted dolphin that it could kill, which corresponded to 15 percent and two percent of the total absolute number of dolphin it was permitted to kill.¹³⁰ This difference should have been found to be arbitrary discrimination by the panel because, while the U.S. fleet could kill 100 percent Eastern spinner dolphin (so long as that 100 percent was below the numerical limit for Eastern spinner dolphin—for example, by killing only 20 dolphins all year and all those dolphins being Eastern spinner dolphin), the Mexican fleet could not. In that way, Mexico's fleet was more constrained than the U.S. fleet. This should have been judged arbitrary discrimination because it unnecessarily disadvantaged the Mexican fleet as compared to the U.S. fleet.

G. The Effect of the Panel's Ruling Could Have Been to Prohibit a PPM Distinction

Mexico decided not to press the GATT members to adopt the panel decision because at that time Mexico was trying to negotiate NAFTA and it was widely thought that pressing the tuna/dolphin issue would harm the public opinion of NAFTA and make its passage less likely.¹³¹ The panel's ruling was unpopular with environmental groups and contributed toward anti-globalization and anti-trade sentiment in portions of the population, adding fuel to the fire that exploded in the anti-globalization protests in Seattle in 1999.¹³²

However, if the panel decision had been adopted, Mexico could have obtained one of two remedies against the United States: (1) Mexico could have retaliated with trade barriers that would have harmed the United States to the equal extent that Mexico was harmed or (2) the United

128. *Id.*

129. *Id.* ¶ 2.6.

130. *Id.* ¶¶ 2.4, 2.6.

131. Charnovitz, *supra* note 43, at 302.

132. See JACKSON, *supra* note 7, at 238.

States would have had to conform to the panel's decision by amending its law.¹³³ Had the United States amended its laws to conform with the panel's decision, it would have had to end the embargo against Mexican tuna and treat tuna from Mexico's producers exactly the same as tuna from U.S. producers, even though doing so would mean a higher rate of dolphin death.

If instead the panel had decided the case using the reasoning outlined above, the United States would simply have had to make minor changes to its law so that Mexican and U.S. producers were treated equally and fairly. This would have involved giving both Mexico and the United States numerical maximums of permissible dolphin death before the fishing year began. It would also have included the possibility of a sale ban against U.S. producers, on the same footing as the embargo possibility against Mexican producers, or otherwise equalizing the consequences for U.S. and Mexican producers if they did not conform to the dolphin death standards.

II. SHRIMP/TURTLE I (1998)

By the time the next PPM dispute came around, the WTO had been created.¹³⁴ Within just a few short years after the *Tuna/Dolphin* dispute, the United States was back before an international trade panel over a very similar measure. In this case, endangered sea turtles were being killed when they were trapped in fishing nets used to capture shrimp. In response, U.S. law required the use of "turtle excluder devices" (TEDs) by domestic industry when catching shrimp.¹³⁵ The law also prohibited the importation of shrimp from vessels under the jurisdiction of countries not certified as having comparable methods for protecting sea turtles.¹³⁶ India, Pakistan, Thailand, and Malaysia challenged the law at the WTO.¹³⁷

The United States argued that its measure was allowable under GATT Article XX(g) and, in the alternative, under Article XX(b).¹³⁸ The opposing parties asserted that a party must seek multilateral negotiations to an environmental problem and should never unilaterally prohibit trade of a certain product simply because of the process used to make the product.¹³⁹ Third-party participants Australia, Ecuador, and the European Community agreed that the United States should have engaged in

133. See, e.g., *id.* at 116 (discussing the case of The Netherlands against the United States).

134. See JACKSON, *supra* note 7, at 124-27 (explaining the WTO dispute resolution process).

135. Conservation of Sea Turtles, Importation of Shrimp Act, Pub. L. No. 101-162, 103 Stat. 1037 (Nov. 21, 1989).

136. *Id.*

137. *Shrimp/Turtle I*, *supra* note 10, ¶ 8.

138. *Id.* ¶ 10. For the text of these provisions, see *supra* note 84.

139. *Id.* ¶ 35.

multilateral negotiations before passing this law.¹⁴⁰ A WTO panel report found that the measure violated GATT Article XI and was not saved by Article XX.¹⁴¹ The United States appealed to the Appellate Body of the WTO, which reversed the panel's findings but nevertheless found that the U.S. measures, while provisionally justified under Article XX(g), violated the Chapeau of Article XX.¹⁴²

A. Article XX(g) Allows PPM Distinctions That Protect Endangered Species

The Appellate Body found that the U.S. measures met the requirements of Article XX(g).¹⁴³

1. *The WTO Agreement Was Interpreted in Light of Its Goals of Sustainable Development and Environmental Protection*

The Appellate Body, in determining whether sea turtles could be considered an exhaustible resource, looked to the Preamble of the WTO Agreement and noted that it explicitly listed the goals of sustainable development and preserving the environment.¹⁴⁴ Citing an International Court of Justice decision that discussed treaty interpretation,¹⁴⁵ the Appellate Body stated that those words of XX(g) "must be read...in light of contemporary concerns."¹⁴⁶ In the face of Malaysia's argument that when the GATT Agreement was originally signed the word "resource" only applied to non-living things, the Appellate Body found that in light of more modern treaties, the word also applies to living things.¹⁴⁷ The Appellate Body concluded that sea turtles are an exhaustible resource because they are listed as an endangered species in the Convention on International Trade in Endangered Species (CITES).¹⁴⁸

Thus, the Appellate Body reasoned that the WTO Agreement should be interpreted in light of its plain meaning, its preamble, the context of current concerns, and other international treaties. Under this reasoning, PPM distinctions made by individual countries to improve the environment

140. *Id.* ¶¶ 54, 64, 68.

141. *Id.* ¶ 7.

142. *Shrimp/Turtle I*, *supra* note 10, ¶ 187(c).

143. *See supra* note 33 for the text of Article XX(g).

144. *Shrimp/Turtle I*, *supra* note 10, ¶ 129.

145. *Id.* ¶ 130 & n.109 (citing *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep. at 31 and *Aegean Continental Shelf Case* (1978) I.C.J. Rep. at 3).

146. *Id.* ¶ 129.

147. *Id.* ¶ 130.

148. *Id.* ¶ 132. CITES acts to protect endangered and threatened species worldwide. *See HUNTER ET AL.*, *supra* note 14, at 1096.

and/or animal welfare outside their territories should not be judged as violating the WTO Agreement. Indeed, these PPM distinctions can often work to radically improve conditions important to current concerns.¹⁴⁹

2. *Extraterritoriality Was Not a Barrier*

As discussed earlier, the panel decision below found the U.S. measure unjustifiable under Article XX, reasoning that the measure required other countries to adopt standards comparable to standards within the United States.¹⁵⁰ The panel then used a slippery slope argument to conclude that this could lead to every country taking such measures, resulting in a complete blockage of trade.¹⁵¹ The Appellate Body reversed this interpretation, saying that the panel had failed to abide by the plain meaning of Article XX(g) and that the WTO treaty should be interpreted according to its plain meaning.¹⁵²

At the same time that the Appellate Body reversed the reasoning of the panel, it also contradicted the reasoning of the *Tuna/Dolphin I* GATT panel.¹⁵³ The Appellate Body found that for the Article XX exceptions to have meaning within the treaty, Article XX must allow some government measures that restrict imports based upon the policy decisions of the exporting country.¹⁵⁴ Indeed, in a later decision, *Shrimp/Turtle II*, the Appellate Body upheld such measures taken to protect the environment and animal welfare beyond the country's own borders.¹⁵⁵

The Appellate Body did not decide whether there was an implied jurisdictional limit to Article XX(g) but found that, because the sea turtle species at issue migrate into U.S. waters, there was a "sufficient nexus" between the United States and the turtles for the purposes of Article XX(g).¹⁵⁶ In future disputes, the Appellate Body should definitively hold that there is no jurisdictional limit to Article XX(g), especially so far as it applies to environmental concerns. This is because, as the international community has recognized by treaty, the environment everywhere is a "common concern of humankind."¹⁵⁷

149. See Charnovitz, *supra* note 3, at 70, 340 (giving examples of environmental PPMs throughout history that have acted to help the environment).

150. See *Shrimp/Turtle I*, *supra* note 10, ¶ 112.

151. See *id.*

152. *Id.* ¶ 114.

153. See *supra* Part I.D.1.

154. *Shrimp/Turtle I*, *supra* note 10, ¶ 121.

155. See *infra* Part III.A.

156. *Shrimp/Turtle I*, *supra* note 10, ¶ 133.

157. Secretariat on the Convention on Biological Diversity, *Convention on Biological Diversity Preamble*, <http://www.biodiv.org/convention/articles.shtml?a=cbd-00> (last visited Apr. 7, 2008).

B. The Chapeau of Article XX Was Used to Prohibit Arbitrary and Unjustifiable Discrimination

The Appellate Body pointed out that the preamble to the WTO Agreement was different from the preamble of the GATT Agreement.¹⁵⁸ Whereas the preamble of the GATT Agreement had stated that its goal was “the full use of the world’s resources,” the preamble of the WTO Agreement states that its goal is “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”¹⁵⁹ The Appellate Body used the language of the WTP Agreement preamble to interpret the Chapeau of Article XX.¹⁶⁰

1. *The U.S. Measures Were Unfairly Inflexible*

The Appellate Body found that the measure failed the Chapeau of Article XX because, in practice, only countries that adopted substantially the same measures that the United States had adopted were approved for certification.¹⁶¹ This was unlike the measures at issue in *Tuna/Dolphin I*, where foreign countries simply had to show that their fishing methods killed a low number of dolphins. There it did not matter what methods the foreign countries used to obtain the desired result. However, in this case, as the Appellate Body noted, the U.S. measure required countries to impose almost exactly the same measures as the U.S. measures. Thus, the Appellate Body found that the discrimination was unjustifiable and arbitrary because the United States did not take into account the different conditions that may be present in different countries.¹⁶²

Thus, in this case, coercion or pressure on a country to change its production methods for a particular product was not found to be a problem by the Appellate Body. Instead, the problem was the lack of flexibility in the requirements for change. To the Appellate Body, performance standards—those standards that require a certain performance, such as a certain number of turtle killed per shrimp caught—are acceptable. By contrast, design standards—those standards that require that a certain technology be used in the production of a product, such as the use of a certain kind of fishing net—are unacceptable. This distinction by the Appellate Body is reasonable for two reasons: (1) performance standards, because they encourage ingenuity and invention, are inherently more economically

158. *Shrimp/Turtle I*, *supra* note 10, ¶ 152.

159. *Id.*; see also WTO Agreement, *supra* note 15.

160. *Shrimp/Turtle I*, *supra* note 10, ¶ 155.

161. *Id.* ¶ 161.

162. *Id.* ¶¶ 164, 177.

efficient than design standards¹⁶³ and (2) performance standards, because they allow a country to come up with its own methods of accomplishing a goal, are more respectful of the sovereign decision-making authority of each country.

2. *The United States Instituted Other, Unjustifiable Trade Sanctions*

The Appellate Body noted that the United States did not allow the import of shrimp that were caught by TED-using boats that were fishing in waters of non-certified countries.¹⁶⁴ Thus, the United States was boycotting shrimp caught using methods that it knew were turtle-safe. The Appellate Body found that this was a direct measure to influence another country's laws, which was unacceptable.¹⁶⁵ The Appellate Body also found that the action taken by the United States was difficult to reconcile with the stated purpose of conserving sea turtles.¹⁶⁶ However, the U.S. action, by trying to change the laws of another country, could be seen as attempting to further a conservation goal. This type of measure can be seen as analogous to an individual boycotting all products of a company, whether or not they are tested on animals, in an effort to pressure the company to stop testing on animals. It is unclear whether the Appellate Body was right in finding that this type of action by the United States was in violation of Article XX. After all, the United States issued its trade sanction in the same area as the policy it was trying to influence. However, if countries were allowed to use trade sanctions in this way, it may be difficult to draw the line between acceptable and unacceptable trade measures. For example, taken to its limit, this kind of trade measure could justify the United States in banning imports of toys from Thailand until Thailand started fishing with turtle-safe nets.

One thing worth noting is that several international environmental treaty regimes use trade sanctions in order to influence the policy choices of other countries, even countries that are not parties to the treaties.¹⁶⁷ It is unclear whether such treaties would or should be found to violate the WTO Agreement.¹⁶⁸

163. See Sidney A. Shapiro & Robert L. Glicksman, *Goals, Instruments, and Environmental Policy Choice*, 10 DUKE ENVTL. L. & POL'Y F. 297, 307 (2000) (describing the advantages that performance standards have over design standards).

164. *Shrimp/Turtle I*, *supra* note 10, ¶ 165.

165. See *id.*

166. *Id.*

167. See Charnovitz, *supra* note 43, at 334–35 (citing the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on Hazardous Waste).

168. A discussion on this topic is outside the scope of this article.

3. Attempts at Multilateral Treaty Making Were Required Concurrent to a PPM Distinction

The Appellate Body found that because the United States had not attempted to make multilateral agreements to conserve sea turtles, the United States had unjustifiably discriminated against the countries against whom it had instituted a shrimp import ban.¹⁶⁹ The Appellate Body cited many multilateral treaties that call for the use of multilateral negotiations to solve the world's environmental problems.¹⁷⁰ The Appellate Body noted that the United States did negotiate and conclude one treaty for the protection of sea turtles: The Inter-American Convention.¹⁷¹ This agreement indicates that the parties thought that multilateral negotiations were the solution to conserving turtles.¹⁷² The Appellate Body found that the existence of this treaty between the United States and some WTO members showed that an alternative course of action was open to the United States with respect to other WTO members.¹⁷³ However, the Appellate Body did note that import prohibitions are the heaviest weapons a country has.¹⁷⁴

On the one hand, this analysis by the Appellate Body is troubling. First, the Appellate Body was analyzing the U.S. measure under Article XX(g), which requires only that the measure "relat[e] to the conservation of natural resources," not that the measure be "necessary" to the conservation of natural resources. In *Tuna/Dolphin I* it seems that the panel took note of this difference in terminology by requiring that the United States first try multilateral negotiations before instituting a measure under Article XX(b), which uses the "necessary" language, but not under Article XX(g), which does not.¹⁷⁵

On the other hand, in practicality, it is probably better if nations try to come to some sort of negotiated agreement before or concurrent with instituting a unilateral trade ban upon the products of one country. Additionally, it can be interpreted under the Chapeau of Article XX that, if a country is not given warning that there is a problem and not consulted for possible negotiations before a trade ban is instituted against it, that country has been unjustifiably discriminated against as compared to the home country. Arguably, the same conditions prevail because both countries are producing a product for sale, but one is consulted in the decision-making process (because it is the home country, it is naturally consulted in domestic

169. *Shrimp/Turtle I*, *supra* note 10, ¶ 166.

170. *Id.* ¶ 168.

171. *Id.* ¶ 169.

172. *Id.* ¶ 170.

173. *Id.* ¶ 171.

174. *Id.*

175. *See supra* note 122 and accompanying text.

legislative and regulatory decision making), whereas the other is not. This can be seen as analogous to a due process argument that before a person's statutory entitlements are taken away, that person is entitled to notice and a chance to be heard.¹⁷⁶ Here, before a country's treaty entitlements (to export its products) are taken away, perhaps it is reasonable that it too should be entitled to notice and a chance to be heard, in the form of being consulted for negotiations.

While it may be reasonable to require that a country attempt to negotiate a multilateral agreement before or concurrent with instituting a unilateral trade ban, conclusion of a multilateral treaty should not be a prerequisite for a country taking an environmental or animal welfare trade measure.¹⁷⁷ Otherwise, a country wishing to avoid changing its policy while at the same time wishing to avoid a trade ban could simply block negotiations with no consequence. Further, if a country becomes aware of an environmental issue, it should not have to wait the years that it sometimes takes to negotiate a treaty before taking action. Instead, an interim trade measure or a trade measure concurrent with negotiations should be permitted.

4. *The U.S. Measures Unfairly Discriminated Between Different Countries*

The Appellate Body in *Shrimp/Turtle I* found that the United States discriminated among WTO members because it provided financial assistance and longer timelines for compliance for Caribbean and Western Hemisphere countries than for the four Asian countries that brought the case.¹⁷⁸ Additionally, the Body found that the United States made greater efforts to transfer technology to some countries than to others.¹⁷⁹ The Appellate Body was correct to reason that these measures were unjustifiable discrimination between countries where the same conditions prevail, in violation of the Chapeau of Article XX.

5. *The U.S. Process Violated Due Process of Law*

In the U.S. certification process, there was no way for a country to be heard, to appeal the administrative decision not to certify its producers

176. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (holding that before a statutory entitlement is taken away, a person is entitled to due process, which includes notice and a right to be heard).

177. Cf. Dailey, *supra* note 18, at 377 (arguing that governments should not have to negotiate and attempt to make a treaty with other nations before using Article XX); see also decision of *Shrimp/Turtle II* discussed *infra* Part III.A.1.

178. *Shrimp/Turtle I*, *supra* note 10, ¶ 173 (some countries had three years to implement the changes, whereas others had four months).

179. *Id.* ¶ 175.

as importers, or even to get a reason why it was rejected for certification.¹⁸⁰ Therefore, the Body found that there was no due process for countries whose certification was denied, in violation of GATT Article X, which requires transparency in matters that affect trade.¹⁸¹ This added to the Body's conclusion that the discrimination was arbitrary under the Chapeau of Article XX.¹⁸²

C. Article III and Article XI: National Treatment and Quantitative Restrictions Were Not Argued

Because it did not put forth any arguments to say otherwise, the United States apparently conceded that its measures violated Article III, the article requiring like treatment for like products, and Article XI, the article forbidding quantitative restrictions on foreign products.¹⁸³ The *Shrimp/Turtle I* Appellate Body apparently adopted the report of the panel and the finding that the U.S. measures violated Article XI because it found that the United States should amend its laws to conform with the panel's finding on Article XI insofar as the Appellate Body found the U.S. law inconsistent with Article XX.¹⁸⁴

This failure to put forth arguments and address Article III and Article XI by the United States was perhaps due to the experience at the *Tuna/Dolphin* GATT panels.¹⁸⁵ However, these arguments should have been raised in light of the faulty reasoning of the *Tuna/Dolphin* panel report as discussed above.¹⁸⁶

Additionally, the *Shrimp/Turtle I* Body may have looked favorably on these kinds of arguments, because in interpreting Article XX(g) it explained that if a piece of a treaty is not clear, that section should be interpreted in light of the treaty's purpose and objective.¹⁸⁷ Here, sustainable development and environmental protection are part of the object and purpose of the WTO Agreement, whereas they were not in the GATT Agreement.¹⁸⁸ Therefore, any future WTO panel confronted with the issue should include "environmental impact" in its assessment of whether two products are "like products." In addition, in light of more modern treaties, the words "like products" should not refer to two products whose produc-

180. *Id.* ¶ 180.

181. *Id.* ¶ 181.

182. *Id.* ¶ 184.

183. *See supra* Part I.A-B.

184. *Shrimp/Turtle I*, *supra* note 10, ¶ 188.

185. *See supra* Part I.A-B.

186. *See supra* Part I.A-B.

187. *See supra* Part II.A.1.

188. *See supra* note 15 and accompanying text.

tion methods result in vastly different "ecological footprints" (environmental cost of production).¹⁸⁹ This is especially true when consumers and citizens are increasingly concerned about the ecological impact of the products they buy.¹⁹⁰

III. SHRIMP/TURTLE II (2001)

In order to comply with the findings in *Shrimp/Turtle I*, the United States made changes to its regulations so that they would no longer constitute unjustified and arbitrary discrimination in violation of the Chapeau of Article XX. Among other things, the United States amended its laws so that countries denied certification to sell their shrimp in the United States now have an appeal process and are provided reasons for the denial.¹⁹¹ Additionally, U.S. law now requires importing countries to fish for shrimp in a manner that is only "comparable in effectiveness,"¹⁹² not "essentially the same" to the U.S. methods.¹⁹³ In addition, the United States began serious efforts at concluding a multilateral treaty. Nonetheless, Malaysia appealed to the WTO under Article 21.5 of the Dispute Settlement Understanding (DSU), challenging the U.S. changes as insufficient. A WTO panel found that the United States had made sufficient changes so that its law was no longer discriminatory. Thus, the law was justified under GATT Article XX. Malaysia appealed, and in *Shrimp/Turtle II* the Appellate Body upheld the panel's finding.¹⁹⁴ However, the Body did require the United States to continue "ongoing serious good faith efforts to reach a multilateral agreement."¹⁹⁵

A. The Appellate Body Found That the U.S. Measures No Longer Constituted Unjustified Discrimination Under the Chapeau of Article XX

1. *The United States Was Conducting Adequate Multilateral Negotiations*

The Appellate Body elaborated on the duty to negotiate a multilateral agreement, and concluded that it was not a duty to *conclude* a treaty, as Malaysia argued, but rather simply a duty to negotiate.¹⁹⁶ The Appellate Body reiterated and agreed with the finding in *Shrimp/Turtle I* that the fact that the United States had negotiated with some WTO members but not all

189. Charnovitz, *supra* note 3, at 70.

190. *Id.*

191. *Shrimp/Turtle II*, *supra* note 13, ¶ 147.

192. *Id.* ¶ 141.

193. *Id.*

194. *Id.*

195. *Id.* ¶ 152.

196. *Id.* ¶ 115.

was unjustifiable discrimination.¹⁹⁷ It concluded that if comparable efforts are made at negotiating with different WTO members, then it is unlikely that unjustifiable discrimination will be found because of differences in negotiation efforts.¹⁹⁸ The Appellate Body found that because the United States was now conducting good faith negotiations with all relevant parties, it was not acting in a manner constituting arbitrary or unjustified discrimination.¹⁹⁹

2. *Performance Standards Are Acceptable Whereas Design Standards Are Not*

The Appellate Body agreed with finding of the panel below that a measure by one WTO country conditioning access to that country's markets on the adoption of policies "essentially the same" as that country's policies would be unjustifiable discrimination, whereas requiring the policies to be "comparable in effectiveness" would not be arbitrary discrimination.²⁰⁰ The Appellate Body noted that the "comparable in effectiveness" standard automatically takes into account the different conditions that exist between countries.²⁰¹

3. *The New Measures Provided Adequate Due Process of Law*

The United States' revised guidelines provided for detailed reasoning to be supplied to any country that did not meet the certification requirements. Additionally, the new guidelines provided an opportunity for such a non-certified country to reply and have additional information considered.²⁰²

B. The Effect of the Appellate Body's Ruling: Positive Implications for Future Cases

This is the first example in the history of GATT and the WTO that a unilateral extraterritorial national measure was upheld on environmental grounds. This ruling should make countries more secure in knowing that they can implement measures to protect the environment or animal life that exist beyond their borders.²⁰³ The ruling should also assist nations in knowing whether they are in compliance with or in breach of international law. This decision shows that countries may place restrictive measures or

197. *Id.* ¶ 121.

198. *Id.* ¶ 122.

199. *Id.* ¶ 134.

200. *Id.* ¶ 141.

201. *Id.* ¶¶ 142, 144.

202. *Id.* ¶ 147.

203. This reasoning would probably also apply to PPM distinctions made to affect human rights abroad, but that topic is beyond the scope of this article.

bans on products from other countries if those measures "relat[e] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."²⁰⁴ Examples of exhaustible natural resources that may be protected are endangered or threatened animal or plant life, forests, clean air, the ozone layer, and clean water.²⁰⁵ Some restrictive trade measures that would now seem possible for a country to take would be such things as restricting imports of electricity, oil, or other products from a country that does not regulate and limit the greenhouse gas emissions released in the production of such materials;²⁰⁶ prohibiting the importation of wood products grown in an unsustainable manner; and prohibiting the importation of materials that release ozone-depleting substances into the atmosphere.

However, the *Shrimp/Turtle* decisions also show that countries wishing to take such measures must do so carefully: they must not unjustifiably or arbitrarily discriminate against the products from the other country as this would violate the Chapeau of Article XX.²⁰⁷ Thus, any country wishing to take a trade restrictive measure in order to conserve a natural resource should do such things as make sure that the standards imposed on the other country are no harsher than the standards imposed domestically, attempt to start bilateral or multilateral negotiations before or concurrently with the trade measure, have full transparency of the decision-making process and appeal rights for the country judged not to comply with the standards, and allow "sufficient flexibility" in the standard so that a country has the option to meet the environmental or animal welfare goal through different methods than those used by the importing and restricting country.²⁰⁸

C. Questions Left Unanswered

The *Shrimp/Turtle* dispute panels addressed GATT Article XI and Article XX(g) and the Chapeau of Article XX in the context of protecting endangered sea turtles that were argued by the United States to be "an

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

205. See HUNTER ET AL., *supra* note 14, at 1-17.

206. Among other things, this type of trade restriction would help reduce climate change and thus help protect endangered arctic species such as the polar bear. See Sarah Rachel Morgan, *Polar Bears and the Laws Governing Them in the Five Arctic States* (Michigan State University College of Law Animal Legal and Historical Center, 2007), <http://www.animallaw.info/articles/dduspolarbears.htm> (describing how polar bears are threatened with extinction by climate change).

207. See *supra* Parts II.B, III.A.

208. See *supra* Parts II.B, III.A.

exhaustible natural resource."²⁰⁹ Thus, there are some questions left unanswered by the decision.

1. *Can Article III Be Interpreted So That PPM Distinctions Are Upheld?*

Article III was not addressed in the *Shrimp/Turtle* dispute. Article III requires that "like products" from different countries be treated alike.²¹⁰ Because the United States had placed a complete trade ban on shrimp from certain countries, the parties and the panels reviewed the U.S. measure under Article XI, which forbids quantitative restrictions on goods from a country. However, in future disputes, a similar measure could be challenged under Article III, as it was in the *Tuna/Dolphin* dispute.²¹¹ Additionally, it is conceivable that some trade measures would not put a complete ban on all products from a certain country, but rather put a de facto ban or a partial ban on goods from a specific country. For example, a country may ban packaging. Furthermore, it may be infeasible for producers in the neighboring country to change their factories and equipment to produce biodegradable packaging.²¹² In such a case, an argument could be made under Article III that such a ban is not on a "like product" because of the differences in environmental impacts of the two products. While this article has argued that such an argument should be successful,²¹³ whether this type of argument would in fact succeed is a question that has been left for another day.

2. *Can Article XI.2 Be Interpreted to Permit PPM Distinctions Necessary to Meet Environmental or Animal Welfare Goals?*

GATT Article XI prohibits quantitative restrictions on products from abroad. However, in Article XI(2)(b) there is an exception made for "[i]mport and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."²¹⁴ In the *Shrimp/Turtle* disputes, the United States did not make the argument that its ban on shrimp from countries that did not meet its turtle-protection standards was necessary to meet a "standard...for the classification" of a commodity in international trade. Instead, the United States chose to rely on the Article XX(g) exception to justify its import restriction measure. However, in the future it could be argued by a country with a similar restriction that the restriction does not

209. *Shrimp/Turtle II*, *supra* note 13, ¶ 3.38.

210. *See supra* Part I.A.

211. *See supra* Part I.A.

212. Example taken from JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 420 (2000).

213. *See supra* Part I.A.1.

214. *See supra* Part I.B.

violate Article XI at all because it falls within the exception of Article XI(2)(b).²¹⁵ Thus, there would be no need to argue that the measure is saved by Article XX(g).

3. *Can Article XX(a) or Article XX(b) Be Used to Protect Animal or Plant Life?*

In the *Shrimp/Turtle* dispute, the Appellate Body did not decide whether the trade measure was valid under Article XX(a) or Article XX(b). Article XX(a) provides protection for trade measures "necessary to protect public morals," whereas Article XX(b) provides protection for trade measures "necessary to protect human, animal or plant life or health."²¹⁶ The United States could have, but did not argue that it goes against public morals to allow sea turtles to be killed unnecessarily.²¹⁷ By contrast, under Article XX(b), the United States did argue that its measure was necessary to protect animal life and health; however, this was only an alternative argument, which the Body did not reach.²¹⁸ Perhaps these arguments were not made, or made only in the alternative, because of the higher burden under Article XX(a) and Article XX(b) as opposed to Article XX(g). Under Article XX(a) and Article XX(b), the challenged measure must be "necessary" to accomplish the goal; whereas, under Article XX(g), the challenged measure need only be "relating to" the conservation of a natural resource.²¹⁹ In the *Shrimp/Turtle* disputes, endangered sea turtles were deemed an exhaustible natural resource. Thus, the decisions leave open the question as to whether a measure that protects the welfare of a non-endangered species would receive as much protection as a measure that protects an endangered species.

CONCLUSION

Process and production method distinctions made by countries can be powerful forces toward positive environmental and/or animal welfare change. This article has demonstrated how environmental and animal welfare PPM distinctions can coexist with the framework of the international trade regime. Recent interpretations by the WTO Appellate Body have shown that environmental and animal welfare goals, at least in the context of conserving natural resources, need not be thwarted by the WTO/GATT trade regime. Hopefully, future WTO panels will follow these positive first steps to continue to allow appropriately crafted PPM distinc-

215. See *supra* Part I.B.

216. See *supra* Part I.C-D.

217. See *Shrimp/Turtle I*, *supra* note 10, ¶ 125; see also *supra* Part I.C.

218. See *Shrimp/Turtle I*, *supra* note 10, ¶¶ 28, 125, 146; see also *supra* Part I.D.

219. See *supra* note 122 and accompanying text.

tions that protect environmental and animal welfare goals. Hopefully, future WTO panels will follow these positive first steps to continue to allow appropriately crafted PPM distinctions that further environmental and animal welfare goals.