



1998

## The World Trade Organization Appellate Body - United States v. Venezuela: Interpreting the Preamble of Article XX - Are Possibilities for Environmental Protection under Article XX(g) of GATT Disappearing

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### Recommended Citation

Hans J. Crosby, *The World Trade Organization Appellate Body - United States v. Venezuela: Interpreting the Preamble of Article XX - Are Possibilities for Environmental Protection under Article XX(g) of GATT Disappearing*, 9 Vill. Envtl. L.J. 283 (1998).

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THE WORLD TRADE ORGANIZATION APPELLATE BODY—  
*UNITED STATES v. VENEZUELA*: INTERPRETING THE  
PREAMBLE OF ARTICLE XX—ARE POSSIBILITIES FOR  
ENVIRONMENTAL PROTECTION UNDER ARTICLE XX(g) OF  
GATT DISAPPEARING?

I. INTRODUCTION

In 1963, Congress passed the Clean Air Act (CAA)<sup>1</sup> in response to increasing air pollution caused by automobiles and industrialization.<sup>2</sup> Subsequently, in 1990, Congress amended the CAA to address vehicle emissions resulting from fuel constituents.<sup>3</sup> Pursuant to these amendments, the United States Environmental Protection Agency (EPA) enacted the rule formally entitled the Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline (Gasoline Rule)<sup>4</sup> in order to control pollution caused by the combustion of gasoline manufactured in or imported into the United States.<sup>5</sup> It is this Gasoline Rule that became the subject of dispute between the United States and Venezuela on January 23, 1995.<sup>6</sup>

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1. Air Pollution Prevention and Control Act (Clean Air Act), Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified at 42 U.S.C. §§ 7401-7671 (1994)).

2. See Clean Air Act § 101(a)(2), 42 U.S.C. § 7401(a)(2) (stating Congress found "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare . . ."); Cynthia M. Maas, *Should the WTO Expand GATT Article XX: An Analysis of United States - Standards for Reformulated and Conventional Gasoline*, 5 MINN. J. GLOBAL TRADE 415, 415 (1996) (stating Congress passed CAA to halt air pollution caused by industrialization and automobiles); Pamela Cohn, *Automobile Pollution: Japan and the United States - Cooperation or Competition?*, 9 EMORY INT'L L. REV. 179, 193 (1995) (stating CAA passed as federal response to poor air quality due to industrialization and use of automobiles).

3. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2684 (1990) (codified at 42 U.S.C. § 7545(k) (1994)); Maas, *supra* note 2, at 415 (stating 1990 amendments to CAA addressed vehicle emissions due to fuel constituents); see generally First Submission of the United States, World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274 (Jan. 16, 1996) [hereinafter *Submission of the United States*] (stating 1990 amendments to CAA regulate air pollution caused by motor vehicle fuels).

4. See 40 C.F.R. § 80 (1996). EPA has been given responsibility for enforcing the CAA. See Clean Air Act § 211(k)(8)(A), 42 U.S.C. § 7545(k)(8)(A).

5. See Maas, *supra* note 2, at 415 (stating EPA promulgated Gasoline Rule to facilitate compliance with 1990 CAA amendments).

6. See World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Panel Report*), 35

In *World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (Gasoline Appellate Report)*,<sup>7</sup> the World Trade Organization's Appellate Body (Appellate Body), in its first proceeding, reviewed a prior panel's finding that the baseline establishment rules of the Gasoline Rule violated provisions of the General Agreement on Tariffs and Trade (GATT).<sup>8</sup> The newly created World Trade Organization (WTO) was designed to promote free trade while allowing countries to pursue measures designed to protect the environment.<sup>9</sup> However, no domestic environmental measure has ever survived a challenge before a GATT dispute resolution panel.<sup>10</sup>

Consequently, it was not surprising that the Appellate Body found the baseline establishment rules to be inconsistent with GATT.<sup>11</sup> The Appellate Body came to this conclusion in two steps. First, the Appellate Body interpreted and applied the requirements found within the Article XX(g) exception of GATT.<sup>12</sup> Second, the Appellate Body interpreted and applied the Preamble to Article XX.<sup>13</sup> Although it found that the baseline establishment rules met the requirements of the Article XX(g) exception, the Appellate Body found that the baseline establishment rules did not meet the requirements of the Article XX Preamble.<sup>14</sup>

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I.L.M. 274 (Jan. 16, 1996). Pursuant to the General Agreement on Tariffs and Trade (GATT), consultations first took place between the United States and Venezuela on January 23, 1995. *See id.* at 277. Similar consultations took place between the United States and Brazil on May 1, 1995. *See id.* Neither of these consultations produced a satisfactory solution to the matter. *See id.* Thus, a panel was established to examine both Venezuela's and Brazil's complaints. *See id.* For a discussion of the report of this panel, see *infra* notes 118-26 and accompanying text.

7. 35 I.L.M. 603 (May 20, 1996). This is the first ruling by the World Trade Organization's Appellate Body.

8. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

9. For a discussion of principles incorporated into the WTO, see *infra* notes 72-73 and accompanying text.

10. See William J. Snape, III & Naomi B. Lefkovitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777, 797 n.124 (1994) (discussing four different GATT panel's findings that domestic environmental measures are GATT inconsistent). For a discussion of GATT panels that have found environmental measures to be GATT inconsistent, see *infra* notes 78-126 and accompanying text.

11. *See Gasoline Appellate Report*, 35 I.L.M. at 633.

12. *See id.* at 617-26. For a discussion of the Appellate Body's interpretation and application of the requirements found in Article XX(g), see *infra* notes 132-64 and accompanying text.

13. *See id.* at 626-33. For a discussion of the Appellate Body's interpretation and application of the Article XX Preamble requirements, see *infra* notes 165-83 and accompanying text.

14. *See id.* at 617-34.

This Note will explore the WTO Appellate Body's ruling in *Gasoline Appellate Report*.<sup>15</sup> Specifically, it will explore how the Appellate Body's ruling will affect the ability of domestic governments to justify environmental legislation under Article XX.<sup>16</sup> Initially, Part II of this note will discuss the CAA, the Gasoline Rule, GATT, WTO and panel decisions that have interpreted and applied Article XX of GATT.<sup>17</sup> Then, Part III will set forth the Appellate Body's analysis as well as a critique of this analysis.<sup>18</sup> Finally, Part IV will discuss the impact of the Appellate Body's analysis, suggesting that the Appellate Body's findings may make it more difficult for nations to protect the environment through legislation.<sup>19</sup>

## II. BACKGROUND

### A. The CAA and the Gasoline Rule

The CAA divides the United States gasoline market into two areas.<sup>20</sup> Within the first area, the non-attainment areas,<sup>21</sup> only reformulated gasoline may be sold.<sup>22</sup> Within the second area, consisting of the rest of the United States,<sup>23</sup> both conventional and reformulated gasoline may be sold.<sup>24</sup>

15. For a discussion of the Appellate Body's analysis and findings, see *infra* notes 127-83 and accompanying text.

16. For a critical analysis of the Appellate Body's analysis and findings and a discussion of the impact on environmental legislation, see *infra* notes 184-219 and accompanying text.

17. For a discussion of the CAA, the Gasoline Rule, GATT, WTO and panel decisions that have interpreted and applied Article XX of GATT, see *infra* notes 20-126 and accompanying text.

18. For a discussion of the Appellate Body's analysis and a critique of this analysis, see *infra* notes 127-214 and accompanying text.

19. For a discussion of the impact of the Appellate Body's analysis, see *infra* notes 215-19 and accompanying text.

20. See Clean Air Act § 211(k), 42 U.S.C. § 7545(k)(1994).

21. See Clean Air Act § 211(k)(10)(D), 42 U.S.C. § 7545(k)(10)(D). Section 7545(k)(10)(D) of the Clean Air Act states that "[t]he 9 ozone nonattainment areas having a 1980 population in excess of 250,000 and having the highest ozone design value during the period 1987 through 1989 shall be 'covered areas' for purpose of this subsection." *Id.* One-third of the gasoline consumed in the United States is consumed within the non-attainment areas. See *Oversight of the Reformulated Gasoline Rule, Hearing Before the Senate Committee on Environment and Public Works*, 103d Cong. 44 (1994)[hereinafter *Senate Oversight Hearing*] (testimony of Mary Nichols, Assistant Administrator for Air and Radiation, EPA).

22. See *Submission of the United States, supra* note 3, at 1 (acknowledging "legislative mandate to 'reformulate' gasoline sold in major population centers . . ."). "Reformulated gasoline" is gasoline that has had its compositional specifications altered so as to reduce harmful emissions below levels present in 1990 gasoline. See Clean Air Act § 211(k)(10)(E), 42 U.S.C. § 7545(k)(10)(E).

23. See *id.*

24. See *Maas, supra* note 2, at 416-17 (stating conventional gasoline is less

The Gasoline Rule provides several methods to ensure that reformulated gasoline meets the compositional and performance specifications that the CAA dictates. Until January 1, 1998, refiners, blenders and importers may use the "simple model" to certify that their gasoline meets the compositional and performance specifications of reformulated gasoline.<sup>25</sup> To this effect, the "simple model" uses both specific requirements and a non-degradation standard, which requires that certain gasoline constituents not exceed 1990 levels.<sup>26</sup> On January 1, 1998, the "simple model" will be replaced by the "complex model."<sup>27</sup> The "complex model," however, is not at issue in the present dispute.<sup>28</sup>

The non-degradation standard's 1990 baselines, an integral part of the Gasoline Rule's enforcement mechanism, are discriminatory because they differentiate between domestic and foreign refiners.<sup>29</sup> Baselines are established either by statute (statutory baselines) or by refiners calculating their own baselines (individual baselines).<sup>30</sup> Domestic refiners must calculate their own individual baselines using one of three techniques established by the Gasoline

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clean than reformulated gasoline but may be sold in less populated areas of United States). Conventional gasoline is gasoline that is as clean as the average gasoline in 1990. See Clean Air Act § 211(k)(10)(F), 42 U.S.C. § 7545(k)(10)(F).

25. See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. 603, 608-09 (May 20, 1996); *Senate Oversight Hearing*, *supra* note 21, at 45-46; Maas, *supra* note 2, at 417.

26. See Maas, *supra* note 2, at 417. Under the "simple model," gasoline must meet certain specifications for Reid Vapor Pressure, oxygen, benzene and toxics performance to be considered reformulated. See *id.* In addition, reformulated gasoline must meet certain "non-degradation requirements" by maintaining amounts of sulphur, olefins and T-90 at or below 1990 levels. See *Gasoline Appellate Report*, 35 I.L.M. at 608; Maas, *supra* note 2, at 417.

27. See *Gasoline Appellate Report*, 35 I.L.M. at 608-09; *Senate Oversight Hearing*, *supra* note 21, at 45-46; Maas, *supra* note 2, at 417. Unlike the "simple model," the "complex model" requires that all ingredients of reformulated gasoline meet specific requirements. See Maas, *supra* note 2, at 417-18. Thus, the "complex model" does not apply the non-degradation requirement. See Maas, *supra* note 2, at 417.

28. The "complex model" has not yet come into force nor does it utilize the non-degradation standard of the "simple model." For a brief discussion of the "simple model" and "complex model," see *supra* notes 25-27 and accompanying text.

29. See Maas, *supra* note 2, at 418. The Gasoline Rule relies upon 1990 baselines as a means of ensuring compliance by domestic and foreign refiners and importers. See 40 C.F.R. § 80.91 (1996).

30. The Gasoline Rule contains detailed baseline establishment rules. See *id.* One goal of the Gasoline Rule is to deny refiners the ability to choose between compliance techniques by eliminating their options. See 40 C.F.R. § 80. This reflects the concern that if given options, refiners will pick the simplest method, resulting in dirtier overall gasoline. See *id.* Another goal is to obtain accurate and reliable data. See *id.*

Rule.<sup>31</sup> If a domestic refiner is unable to establish an individual baseline, it must follow the statutory baseline set forth in the Gasoline Rule.<sup>32</sup> Foreign refiners, however, are treated differently than domestic refiners in that the Gasoline Rule does not provide for foreign individual baselines.<sup>33</sup> Rather, foreign refiners must comply with the statutory baselines set forth in the Gasoline Rule.<sup>34</sup>

Limiting individual baselines to domestic refiners may result in the imposition of different requirements for foreign and domestic refiners.<sup>35</sup> Under statutory baselines, foreign refiners may be required to produce cleaner gasoline than they formerly produced.<sup>36</sup> Individual baselines, however, allow domestic refiners to produce gasoline which is dirtier than the average gasoline produced in 1990.<sup>37</sup> EPA has offered two justifications for limiting individual baselines to domestic refiners: feasibility<sup>38</sup> and enforceability.<sup>39</sup>

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31. See 40 C.F.R. § 80.91(c). Under the first method, data consisting of "quality (composition and property data) and volume records of gasoline produced in or shipped from the refinery in 1990, excluding exported gasoline" are used to establish individual baselines. 40 C.F.R. § 80.91(c)(1)(i). "A refiner or importer must determine a baseline fuel parameter value using only Method 1-type data if sufficient Method 1-type data is available . . . ." 40 C.F.R. § 80.91(c)(4)(i). "If a refiner has insufficient Method 1-type data for a baseline parameter value determination, it must supplement that data with all available Method 2-type data, until it has sufficient data." See 40 C.F.R. § 80.91(c).

Method 2 "type data shall consist of 1990 gasoline blendstock quality data and 1990 blendstock production records . . . ." *Id.* "If a refiner has insufficient Method 1- and Method 2-type data for a baseline parameter value determination, it must supplement that data with available Method 3-type data, until it has sufficient data . . . ." *Id.* Method 3 "type data shall consist of post-1990 gasoline blendstock and/or gasoline quality data and 1990 blendstock and gasoline production records . . . ." *Id.*

32. See 40 C.F.R. § 80.91(b)(4)(iii). Most refiners are unable to calculate individual baselines because they lack the necessary data.

33. See *id.*

34. See *id.*

35. See Maas, *supra* note 2, at 420.

36. See *id.* Statutory baselines require foreign refiners to produce gasoline containing the average level of constituents contained in all gasoline consumed in the United States in 1990. See *id.* However, this average 1990 standard may represent cleaner gasoline than foreign refiners previously produced. See *id.* Thus, foreign refiners may be required to produce cleaner gasoline. See *id.*

37. See *id.* If a domestic refiner's individual baseline average represents gasoline dirtier than the 1990 average, the domestic refiner will be able to produce gasoline dirtier than average 1990 levels. See *id.*

38. See Maas, *supra* note 2, at 420. Individual baselines are not feasible for foreign refiners because of problems with establishing the refinery of origin, inadequate data, and changes in foreign sources and production processes. See *id.*

39. See *id.* Because U.S. officials cannot inspect and monitor foreign refineries, enforcement of individual baselines would be problematic. See *id.* (citing *Submission of the United States*, *supra* note 3, at 3, 97, 98).

## B. GATT

GATT is the principal legal framework that has governed international trade relations since World War II.<sup>40</sup> More than 100 countries have signed the document.<sup>41</sup> In order to achieve its principal objective of bringing order and stability to international commerce,<sup>42</sup> GATT promotes trade-liberalizing principles including: (1) most-favored-nation treatment, (2) national treatment, and (3) the elimination of quantitative restrictions.<sup>43</sup> However, GATT does provide environmental exceptions<sup>44</sup> to these trade-liberalizing principles in addition to providing a mechanism for dispute

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40. See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989) [hereinafter JACKSON, *WORLD TRADING*]; JOHN H. JACKSON & W.J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986); see also KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984); JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990); JOHN H. JACKSON, *WORLD TRADE LAW AND THE LAW OF GATT* (1969).

41. See GATT, *supra* note 8. In 1992, there were 103 contracting parties to GATT. See *id.* It is the Protocol of Provisional Application which brings GATT into effect under international law, not GATT itself. See Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308.

The United States has become a member of GATT by proclamation, making GATT part of United States domestic law. See Proclamation No. 2761A, 3 C.F.R. 139 (1943-48); JACKSON, *WORLD TRADING*, *supra* note 40, at 75 (citing JACKSON & DAVEY, *supra* note 40, at § 4.9); R.E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States, in THE EUROPEAN COMMUNITY AND GATT 201* (Hilf, Jacobs & Petersmann eds. 1986)). "International law is part of our law . . ." Paquete Habana, 175 U.S. 677, 700 (1900). While GATT has not been given the advice and consent of the Senate nor ratified by the President, Congress has recognized United States participation through successive legislation. See Jeanne J. Grimmer, *Environmental Regulation and the GATT*, CRS Report for Congress 2 n.2 (1991) (on file with author); see also John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 253 (1967); Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 463 n.53 (1993); but cf. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STANFORD J. INT'L L. 479, 486 (1990) (stating Congress has not enacted comprehensive implementing legislation and clear congressional intent does not exist).

For a general discussion of how international law relates to the United States' domestic law, see Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

42. See Skilton, *supra* note 41, at 463 (stating GATT's principle objective is order and stability in international commerce).

43. See *id.* For a discussion of GATT's trade-liberalizing principles, see *infra* notes 46-55 and accompanying text.

44. For a discussion of GATT's environmental exceptions, see *infra* notes 56-62 and accompanying text.

settlement.<sup>45</sup>

### 1. GATT's Trade-Liberalizing Principles

Article I of GATT embodies the most-favored-nation principle.<sup>46</sup> This principle requires that the products from one country be given the most favorable treatment granted to products from any other country.<sup>47</sup> Trade measures that discriminate between "like products" are prohibited by most-favored-nation treatment.<sup>48</sup>

Article III of GATT expresses the national-treatment principle.<sup>49</sup> Because the parties to GATT recognize that internal taxes, laws, regulations and requirements can be used as effective substitutes for tariff protection,<sup>50</sup> the national-treatment principle requires that imported goods receive treatment no worse than that of "domestically produced goods."<sup>51</sup> This principle assists the general goal of reducing restraints on imports because imported products cannot be treated differently than "domestically produced goods."<sup>52</sup>

Article XI expresses the general rule prohibiting the use of

45. For a discussion of GATT's mechanism for settling disputes, see *infra* notes 63-66 and accompanying text.

46. See OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 5 (1985). The most-favored-nation principle is often referred to as the cornerstone of GATT. See *id.* This most-favored-nation principle, embedded in Article I of GATT, states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." See GATT, *supra* note 8, art. I:1.

47. See JACKSON, WORLD TRADING, *supra* note 40, at 133.

48. See Matthew Hunter Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal To Amend the GATT In Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098, 2101 (1992); Snape & Lefkovitz, *supra* note 10, at 790-91.

49. See GATT, *supra* note 8, art. III:2. Article III:2 of GATT establishes the national treatment principle in stating:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable 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.

*Id.*

50. See GATT, *supra* note 7, art. III:1; Skilton, *supra* note 42, at 463.

51. JACKSON, WORLD TRADING, *supra* note 40, at 189. It should be noted that Article III:2 of GATT uses the phrase "like domestic products" rather than "domestically produced goods." See GATT, *supra* note 8, art. III:2. GATT does allow, however, "the applications of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." GATT, *supra* note 8, art. III:4.

52. JACKSON, WORLD TRADING, *supra* note 40, at 189; Snape & Lefkovitz, see *supra* note 10, at 791 n.86.



quantitative restrictions.<sup>53</sup> This general rule prohibits the use of "quotas, import or export licenses or other measures" to restrict imports or exports.<sup>54</sup> There are, however, several notable exceptions to these trade-liberalizing principles.<sup>55</sup>

## 2. Article XX: GATT's Environmental Exceptions

Clauses (b) and (g) of Article XX provide exceptions to GATT's trade-liberalizing principles.<sup>56</sup> These two exceptions have been referred to as the "soft" most-favored-nation clause and the national-treatment obligation.<sup>57</sup> The result is that countries often invoke these clauses in order to justify the use of trade measures in pursuit of domestic environmental policies.<sup>58</sup>

Unfortunately, "there is little documentary evidence to show the intentions of the drafters of Article XX."<sup>59</sup> Nevertheless, the

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53. GATT, *supra* note 8, art. XI:1. Article XI:1 of GATT states that: [N]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 8, art. XI:1.

54. GATT, *supra* note 8, art. XI:1; JACKSON, WORLD TRADING, *supra* note 40, at 129.

55. First, there are exceptions designed to safeguard a country's balance of payments. See GATT, *supra* note 8, arts. XII, XIII, XIV & XV. Second, there are exceptions that allow a developing country to promote a particular industry in order to raise the country's general standard of living. See *id.* arts. XII, XVIII. Finally, there is an exception that allows restrictions on agricultural and fishery imports to stabilize national agricultural markets. See *id.* art. XI:2.

56. See *id.* art. XX(b),(g). The Article XX(b) exception allows measures "necessary to protect human, animal or plant life or health . . ." *Id.* art. XX(b). Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . ." *Id.* art. XX(g).

57. See JACKSON, WORLD TRADING, *supra* note 40, at 207. It should be noted that clauses (b) and (d) of Article XX explicitly state that the measures employed must be necessary to accomplish their purposes. See *id.* art. XX(b) and (d). In contrast, clause (g) merely states that a measure must be "primarily aimed at" its purpose. See *id.* art. XX(g).

58. For a discussion of cases in which parties invoked Article XX as justification for their domestic environmental policies, see *infra* notes 78-126 and accompanying text.

59. Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 711 (1992). Some commentators have shed light on the drafters' intentions underlying Article XX. First, some commentators have noted that the text of Article XX is similar to exceptions traditionally written into bilateral treaties of friendship, commerce and navigation. See JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: DOCUMENTS SUPPLEMENT 1 ch. 28 (1989). Second, others have noted that Article XX has the following characteris-

two exceptions in Article XX are modified by the Preamble to Article XX, which explicitly states that an exception must not constitute "arbitrary or unjustifiable discrimination between countries" and must not be a "disguised restriction" on international trade.<sup>60</sup> Moreover, GATT panel decisions have interpreted Article XX's exceptions to be limited and conditional,<sup>61</sup> especially those exceptions contained in clauses (b) and (g).<sup>62</sup>

### 3. *Dispute Settlement Under GATT*

When GATT was first conceived in 1947, the primary dispute settlement provision was Article XXIII.<sup>63</sup> In 1955, GATT members

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tics: (i) it contains no requirement that a country claiming the exception negotiate with affected countries or even provide notice; (ii) the contracting party claiming the exception evidently decides on its own whether the measure satisfies Article XX; and (iii) it contains no provision for safeguarding international obligations or for compensating adversely affected countries. See Schoenbaum, *supra*, at 711.

60. GATT, *supra* note 8, art. XX. "In other words, a measure properly falling under Article XX would have to meet some most favored nation and national treatment standard [as contained in the Preamble to Article XX], but not as high a standard as a measure falling outside Article XX [and thus subject to the standards contained within Articles I and III of GATT]." Eric Phillips, *World Trade and the Environment: The Cafe Case*, 17 MICH. J. INT'L. L. 827, 849 (1996) (citing JACKSON, WORLD TRADING, *supra* note 40, at 207). The Preamble to Article XX states:

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 . . . .

GATT, *supra* note 8, art. XX.

61. At least two cases have interpreted the Article XX(d) exception narrowly. See GATT Dispute Panel Report on United States - Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at ¶¶ 5.9 & 5.27 (1990) (interpreting Article XX(d) exception narrowly); GATT Dispute Panel Report on Canada - Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at ¶ 5.20 (1984) (same).

62. For a discussion of cases that have strictly and narrowly construed the environmental exceptions of Article XX(b) and (g), see *infra* notes 78-126 and accompanying text.

63. See JACKSON, WORLD TRADING, *supra* note 40, at 94 (claiming that Article XXIII is "centerpiece for dispute resolution process"); see also OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 73 (1985) (concluding that early dispute settlement process evolved through custom and practice); Robert E. Hudec, *Adjudication of International Trade Disputes*, 16 THAMES ESSAY 7 (1978) (finding that Article XXIII provides skeletal rules for dispute settlement process); David M. Schwarz, *WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest*, 10 AM. U.J. INT'L L. & POL'Y 955, 958 (1995) (stating that Article XXIII constitutes primary dispute adjudication provision). Article XXIII of GATT states in pertinent part as follows:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired

adopted a panel procedure whereby a panel was authorized to investigate a dispute and issue a report stating its recommendations on how to resolve the dispute.<sup>64</sup> Unfortunately, the panel process contained two weaknesses: (1) panel reports could be adopted by consensus only,<sup>65</sup> and (2) the legal significance of panel reports was unclear.<sup>66</sup>

### C. The World Trade Organization

On December 15, 1993, the 117 GATT signatories reached a tentative agreement in the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round).<sup>67</sup> The objectives of the Uruguay

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or that the attainment of any objective of the Agreement is being impeded . . . the contracting party may . . . make written proposals to the other contracting party or parties which it considers to be concerned.

GATT, *supra* note 8, art. XXIII:1.

If under Article XXIII:1, the disputing parties were unable to resolve the dispute, GATT members would, pursuant to Article XXIII:2, investigate and make recommendations to the disputing parties. *See id.* art. XXIII:2. In some circumstances, Article XXIII:2 of the GATT may "authorize a contracting party or parties to suspend application to the other contracting parties of such concessions or other obligations under the Agreement as [GATT members] determine to be appropriate in the circumstances." *Id.*

64. *See* JACKSON, *WORLD TRADING*, *supra* note 40, at 95; Schwarz, *supra* note 63, at 958; *see also* Hudec, *supra* note 63, at 7-8 (claiming dispute settlement process was experimental and primitive prior to panel process).

65. *See* GATT, *supra* note 8, art. IX; John H. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, in 1 *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 149, 154 (Niels Blokker & Sam Muller eds., 1994) [hereinafter *Legal Meaning*]. Members of GATT generally interpret consensus to mean that there can be no dissent, or at least no significant dissent. *See Legal Meaning, supra*, at 154. Thus, if either disputing party disagreed with the decision, the panel's report could be blocked unilaterally. *See id.*

66. For a discussion of the various legal meanings of a GATT panel report, *see Legal Meaning, supra* note 65, at 156-60.

67. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND* vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter *Final Act*]. Under GATT, the first round of multilateral trade negotiations took place in 1947 in Geneva; the second in Annecy, France in 1949; the third at Torquay, England in 1950; the fourth at Geneva in 1956; the fifth, the Dillon round, named in honor of U.S. Under-Secretary of State Douglas Dillon, in Geneva in 1960; the sixth, the Kennedy round, in honor of President John F. Kennedy, in Geneva in 1964; the seventh, the Tokyo round, in Geneva in 1973. *See* ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS* 3 n.3 (1996). The eighth such multilateral trade negotiation, the Uruguay Round, opened in Punta del Este, Uruguay, on September 22, 1986. *See id.* at 3; 1 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* 7 (Terence P. Stewart ed. 1993) [hereinafter *GATT NEGOTIATING HISTORY*]; Schwarz, *supra* note 63, at 964. The Uruguay Round was eventually signed on April 15, 1994. *See* Snape & Lefkovitz, *supra* note 10, at 781 n.15.

Round, reflected in the Punta del Este Declaration,<sup>68</sup> recognized the need for a more efficient GATT dispute settlement procedure.<sup>69</sup> In an effort to fulfill these objectives, the GATT members created the WTO.<sup>70</sup>

The WTO does not replace GATT, rather it provides an institutional legal framework for the conduct of trade relations.<sup>71</sup> More-

68. Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept. 20, 1986, 25 I.L.M. 1623 (1986) [hereinafter Punta del Este Declaration]. The Punta del Este Declaration is a statement of negotiation objectives that mandated the Uruguay Round. See GATT NEGOTIATING HISTORY, *supra* note 67, at 7.

69. The Punta del Este Declaration provided that "in order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process." Punta del Este Declaration, *supra* note 68, at 1623; see also GATT NEGOTIATING HISTORY, *supra* note 67, at 58; Schwarz, *supra* note 63, at 965.

70. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. On January 1, 1995, the WTO Agreement became effective. See Qureshi, *supra* note 67, at vii.

71. See *id.* at vii, 3. Article II:1 of the WTO Agreement states that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement [including GATT]." WTO Agreement, *supra* note 70, at art. II:1. Thus, GATT remains in its amended form one of the pillars of the newly created WTO. See Qureshi, *supra* note 67, at vii. The international community has "denied the existence of GATT 1947 as an organisation [sic]." *Id.* at 3. The WTO is important, however, because it represents the commitment of the international trading community to an international trading system with legal obligations and benefits. See *id.* For the first time, the international trading system has "a firm constitutional footing." See *id.*

Unfortunately, international decision-making poses several problems for democratic governments. First, there is the question of what standard of review should apply and what amount of deference should be accorded to the decisions of national governments. See, e.g., GATT Dispute Panel Report on United States - Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990); GATT Dispute Panel Report on United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT Doc. ADP/8, at ¶¶ 43-67 (1992); GATT Dispute Panel Report on Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, GATT Doc. ADP/92, at ¶¶ 208-13 (1993); GATT Dispute Panel Report on United States - Taxes on Automobiles, 33 I.L.M. 1397, ¶¶ 5.11-5.15 (Oct. 11, 1994); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996). Second, there is often a lack of public participation in international decision making. See, e.g., Robert F. Housman, *Democratizing International Trade Decision Making*, 27 CORNELL INT'L L.J. 699 (1994); Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation*, 94 MICH. L. REV. 1267 (1996). Third, conflicts of interest may arise in international organizations. See Schwarz, *supra* note 63, at 958. It is this last problem with which the United States Congress was concerned when it approved the WTO. See Uruguay Round Trade Agreements (Dispute Settlement Panels and Procedures), Pub. L. No. 103-465, 108 Stat. 4830 (1994) (codified at 19 U.S.C. § 3533 (1994)). While state sover-

over, the objectives of this new international trading system are spelled out in the WTO Agreement.<sup>72</sup> These objectives, however, must be pursued in light of several limitations.<sup>73</sup>

Governed by the Understanding on Rules and Procedures Governing Disputes (Understanding on Disputes), the WTO provides for a new dispute resolution process, which has several important aspects.<sup>74</sup> First, the WTO establishes an Appellate Body.<sup>75</sup> Second, adoption of panel and appellate reports may be blocked by consensus only.<sup>76</sup> Finally, the losing party risks the imposition of trade

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eighty has at times caused problems for international decision making, the concept is generally seen as dying in an increasingly interdependent world. *See, e.g.*, WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 3 (1964); Wolfgang Friedman, *National Sovereignty, International Co-Operation and the Reality of International Law*, 10 UCLA L. REV. 739 (1963); Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y OF INT'L L. NEWSL., Mar. 1993, at 1.

72. The WTO's objectives are for member states to achieve: (1) higher standards of living; (2) full employment; (3) a substantial and consistent growth in real income and effective demand; and (4) an increase in the production of and trade in goods and services. WTO Agreement, *supra* note 70, at Preamble. The WTO pursues these objectives through the "reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations." *Id.*

73. *See id.* First, pursuit of the objectives must allow for the "optimal use of the world's resources in accordance with the objective of sustainable development." *Id.* Second, the need to protect and preserve the environment is recognized. *See id.* Finally, there is a need for developing countries, especially the least developed, to possess a share in the growth in international trade that matches the needs of their economic development. *See id.*

74. *See* General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 (1994) [hereinafter Understanding on Disputes].

75. *See id.* art. 17. A panel report may be appealed to the Appellate Body of the WTO. *See id.*

76. *See id.* arts. 16.4, 17.14. Thus, unlike the prior GATT panel process, reports cannot be blocked unilaterally. *See id.* Article 16.4 reads:

Within 60 days of the issuance of a panel report to the Members, the report shall be adopted at a [Dispute Settlement Body] meeting unless one of the parties to the dispute formally notifies the [Dispute Settlement Body] of its decision to appeal or the [Dispute Settlement Body] decides by consensus not to adopt the report. If a party has notified its intention to appeal, the report by the panel shall not be considered for adoption by the [Dispute Settlement Body] until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

*Id.* art. 16.4. Article 17.14 reads in relevant part:

An Appellate Body report shall be adopted by the [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute unless the [Dispute Settlement Body] decides by consensus not to adopt the appellate report within thirty days following its issuance to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an appellate report.

*Id.* art. 17.14.

sanctions if it does not implement the panel or appellate report within a reasonable time.<sup>77</sup>

#### D. GATT Article XX Jurisprudence: Panel Decisions

Under the WTO, panel and Appellate Body decisions are binding only on the parties involved in the dispute.<sup>78</sup> Prior panel or Appellate Body adjudications, therefore, do not possess binding precedential value.<sup>79</sup> In practice, however, prior adjudications have some precedential value since many panels make reference to the findings of prior panels.<sup>80</sup>

While there have been eight GATT panel reports where Article XX(b) and (g) exceptions have been asserted as justification for the utilization of certain trade measures, none have been successful.<sup>81</sup> Only five of these panel reports, however, concerned legitimate environmental concerns.<sup>82</sup> Thus, a review of these five panel

77. *See id.* art. 22.1. These trade sanctions can take the form of either suspended concessions or retaliation. *See id.* Articles 22.1 reads:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

*Id.* However, at least one scholar contends that the United States Constitution authorizes rejection of panel and appellate reports. *See* The GATT Lady Sings: What the New WTO Will Mean for the U.S. and World Trade, 11 Int'l Trade Rep. (BNA) No. 15, at 595 (Apr. 13, 1994).

78. *See* Understanding on Disputes, *supra* note 74, arts. 19.1, 19.1 n.9. Article 19.1 reads:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

*Id.* art. 19.1. It is important to note that "[t]he 'Member concerned' is the party to the dispute to which the panel or Appellate Body recommendations are directed."

*Id.* art. 19.1 n.10.

79. *See id.* arts. 19.1 & 19.1 n.10.

80. *See* GATT: Implications on Environmental Laws: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 102d Cong. 1, 29 (1991) (testimony of Joshua Bolten); Jan Klabbbers, *Jurisprudence in International Trade Law: Article XX of the GATT*, 26 J. WORLD TRADE 63, 65 (1992).

81. For an analysis of several of these unsuccessful decisions, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (1991); Jan Klabbbers, *supra* note 80, at 65.

82. For a discussion of five cases where legitimate environmental concerns were involved in asserting Article XX(b) and (g) exceptions as justifications for trade measures, see *infra* notes 83-126 and accompanying text.

reports is necessary.

In *GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (Canada-Salmon)*,<sup>83</sup> the United States claimed that the export restrictions maintained by Canada on unprocessed salmon and herring were inconsistent with Canada's obligations under GATT.<sup>84</sup> The parties to the dispute and the panel agreed that the export restrictions were inconsistent with the general rule against quantitative restrictions embodied in Article XI of GATT.<sup>85</sup> Canada, however, invoked Article XX(g) as justification for the export restrictions.<sup>86</sup>

The panel's interpretation and application of Article XX(g) consisted of several steps.<sup>87</sup> First, the panel and the parties agreed that salmon and herring stocks were "exhaustible natural resources" and that the harvest limitations were "restrictions on domestic production" within the meaning of Article XX(g).<sup>88</sup> Second, the panel found that to be considered "relating to" within the meaning of Article XX(g), a trade measure had to be only "primarily aimed" at the conservation of an exhaustible natural re-

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83. Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989).

84. See *id.* at ¶ 3.1. The challenged regulations were promulgated under the authority of the Canadian Fisheries Act of 1970. See *id.* at ¶ 2.1. The first regulation challenged was the Regulation Respecting Commercial Fishing for Salmon in the Waters of British Columbia and Canadian Fisheries Waters in the Pacific Ocean, which provides "[n]o person shall export from Canada any sockeye or pink salmon unless it is canned, salted, smoked, dried, pickled or frozen and has been inspected in accordance with the Fish Inspection Act . . . ." *Id.* at ¶ 2.2. The second regulation challenged was the Regulation Respecting Fishing for Herring in Canadian Fisheries Waters on the Pacific Coast. See *id.* at ¶ at 2.3.

85. See *id.* at ¶ 4.1. For a discussion of Article XI of GATT, see *supra* notes 53-55 and accompanying text. For the pertinent textual language of Article XI, see *supra* note 53.

86. See *Canada-Salmon*, GATT B.I.S.D. (35th Supp.) at ¶ 4.1. Canada claimed that the export prohibitions were justified under Article XX(g) because the export prohibitions were "relating to" the conservation of salmon and herring stocks and were made effective "in conjunction with" restrictions on the domestic harvesting of salmon and herring. See *id.* at ¶ 4.1. It is important to note that although a domestic measure may be inconsistent with a particular trade-liberalizing principle embodied within GATT, it may still be justified under an Article XX exception. For the text and a discussion of Article XX(g), see *supra* notes 56-62 and accompanying text.

87. See *Canada-Salmon*, GATT B.I.S.D. (35th Supp.) at ¶ 4.5. The panel noted that the only previous case that had addressed Article XX(g) was *GATT Dispute Panel Report on United States - Prohibition of Imports of Tuna and Tuna Products from Canada (United States Tuna)*. See *id.* (citing Feb. 22, 1982, GATT B.I.S.D. (29th Supp.) at 91 (1983)). See *id.* However, since that case had not addressed the meaning of the terms "relating to" and "in conjunction with," the panel decided to interpret these terms by itself. See *id.*

88. See *id.* at ¶ 4.4. For the text of Article XX(g), see *supra* note 56.

source, not “necessary” or “essential” to its conservation.<sup>89</sup> Third, the panel found that a trade measure can only be made effective “in conjunction with” domestic restrictions if it was “primarily aimed at rendering effective these restrictions.”<sup>90</sup> Finally, applying its interpretation of Article XX(g) to Canada’s export prohibitions, the panel found that the prohibitions were unjustifiable because they were primarily aimed at neither the conservation of fish stocks nor rendering effective the restrictions on fish harvesting.<sup>91</sup>

In *GATT Dispute Panel Report on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand Cigarettes)*,<sup>92</sup> the United States challenged the restrictions on cigarette imports<sup>93</sup> maintained by the Royal Thai Government as being inconsistent

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89. See GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at ¶ 4.6 (1989). The panel noted that some subparagraphs of Article XX state that the measure must be “necessary” or “essential” to the achievement of the policy purpose, while subparagraph (g) only refers to measures “relating to” the conservation of exhaustible natural resources. See *id.* This suggests that Article XX(g) covers a wider range of measures than other subparagraphs of Article XX. See *id.* The panel noted, however, that the Preamble to Article XX indicates that the purpose of including Article XX(g) in GATT “was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.” *Id.* Therefore, the panel found that a trade measure had to be “primarily aimed” at the conservation of exhaustible natural resources to fall within the meaning of “relating to” in Article XX(g). See *id.*

90. *Id.* The panel noted that the phrase “in conjunction with” had to be interpreted in a way “that ensures that the scope of possible actions . . . corresponds to the purpose for which it was included in the General Agreement.” *Id.*

91. See *id.* at ¶ 4.7. Canada argued that while the restrictions were not per se conservation measures for the fish in question, they were an integral part of the conservation and management of herring and pink and sockeye salmon. See *id.* Canada supported its argument by pointing out that it had statistical evidence which necessitated the domestic harvesting restrictions. See *id.* The panel found, however, that the following factors, taken together, showed that the export prohibitions were not primarily aimed at the conservation of fish and at rendering effective the restrictions on harvesting fish. See *id.* First, the panel noted that Canada collects statistical data on other species of fish without imposing export prohibitions on them. See *id.* Second, statistics on unprocessed herring and unprocessed salmon would be collected if these fish were exported. See *id.* Third, the export prohibitions limit access to unprocessed salmon and herring supplies only, not salmon and herring supplies in general. See *id.* Finally, Canada limits the purchase of unprocessed salmon and herring by foreign processors and consumers only, not by domestic processors and consumers. See *id.*

92. Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991).

93. See *id.* at ¶ 6. Under Section 27 of the Tobacco Act, 1966, the “importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by license of the Director-General of the Excise Department or a competent officer authorized by him.” *Id.* at ¶ 6. Under Section 4 of the Act, tobacco is defined as “‘cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing to-



with GATT.<sup>94</sup> Thailand submitted that the restrictions on imports were justifiable under Article XX(b).<sup>95</sup> The panel found that the import restrictions were inconsistent with Article XI:1.<sup>96</sup> In addition, the panel found that the import restrictions were not justified under Article XX(b) because they failed to meet the “necessary” requirement therein.<sup>97</sup>

In *GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (Tuna/Dolphin I)*,<sup>98</sup> Mexico challenged the United States’ embargo of tuna imports under the Marine Mammal Protection Act (MMPA)<sup>99</sup> as inconsistent with GATT.<sup>100</sup> As its initial de-

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tacco.” See *id.* The only entity to be granted licenses, the Thai Tobacco Monopoly, has imported cigarettes on only three occasions since 1966. See *id.*

94. See *id.* at ¶ 12. The United States argued that the import restrictions constituted a quantitative restriction inconsistent with Article XI because the Thai Tobacco Monopoly had “imported cigarettes on only three occasions and the Government refused to consider import license applications from any other entity.” *Id.* at ¶ 16. Also, the United States argued that the import restrictions were not justified by the Article XI:2(c) exception to the Article XI:1 prohibition against quantitative restrictions because cigarettes were not an agricultural or fisheries product within the meaning of Article XI. See *id.* at ¶¶ 12, 18. For a discussion of the general rule against quantitative restrictions contained in Article XI, see *supra* notes 53-55 and accompanying text. For a discussion of some notable exceptions to the general rule of Article XI, see *supra* note 55 and accompanying text.

95. See *Thailand Cigarettes*, GATT B.I.S.D. (37th Supp.) at ¶ 14. Thailand argued that the import restrictions were justified under Article XX(b) because the objective of the import restrictions was the health policy of reducing the consumption of cigarettes. *Id.* at ¶¶ 21-35. For the text and a discussion of Article XX(b), see *supra* notes 56-62 and accompanying text.

96. See *Thailand Cigarettes*, GATT B.I.S.D. (37th Supp.) at ¶ 67.

97. See *id.* at ¶ 74. In finding a “necessary” requirement in Article XX(b), the panel stated:

[A] contracting party cannot justify a measure inconsistent with other GATT provisions as “necessary” . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

*Id.* (quoting GATT Dispute Panel Report on United States - Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at ¶¶ 5.26 (1990)). In effect, governments may, through the least trade restrictive means, set levels of health and environmental protection, but it is the panel that determines whether the levels are justified. See Smith, *supra* note 71, at 1273.

98. Unadopted, GATT B.I.S.D. (39th Supp.) at 155 (1993).

99. Marine Mammal Protection Act of 1972, Pub. L. No. 95-552, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-62, 1371-84, 1401-07 (1994)). The Marine Mammal Protection Act of 1972 (MMPA) can be characterized as a United States restriction on yellowfin tuna imports from those countries that kill an excessive number of dolphins while catching tuna in the eastern tropical Pacific Ocean. See Snape & Lefkovitz, *supra* note 10, at 782. Central to the dispute was the ban (embargo) of certain tuna caught by a tuna fishing technique that kills and maims dolphins. See *Tuna/Dolphin I*, GATT B.I.S.D. (39th Supp.) at ¶ 2.5.

fense, the United States claimed that the embargoes on tuna were consistent with GATT.<sup>101</sup> If the embargoes were found to be inconsistent with GATT, the United States claimed, in the alternative, that these restrictions were justifiable under Article XX.<sup>102</sup>

Making a distinction between actual products and practices that produce products,<sup>103</sup> the panel found that the embargoes were not internal regulations consistent with Article III,<sup>104</sup> but quantitative restrictions that violated Article XI.<sup>105</sup> The panel then determined that the tuna embargo could not be justified under Article XX(b) for two reasons. First, the health and safety exception contained in Article XX(b) could not be applied extra-jurisdictionally.<sup>106</sup> Second, Article XX(b)'s "necessary" requirement had not

100. See *id.* at ¶¶ 3.10 - 3.26. Mexico argued that the MMPA was inconsistent with Articles XI, XIII and III of GATT. See *id.* For a criticism of the panel's decision, see Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 399-401 (1993). At best, the panel's treatment of this case indicates GATT's disregard of conservation policies passed in a democratic fora. See Snape & Lefkovitz, *supra* note 10, at 785. At worst, it shows GATT's desire to place international trade beyond the reach of any regulatory oversight. See *id.*

101. See *Tuna/Dolphin I*, GATT B.I.S.D. (39th Supp.) at ¶¶ 3.10-3.26. The United States argued that the embargoes were not inconsistent with GATT, but qualified as an internal regulation and met the national treatment requirement of Article III:4 because the standards that determined application of the embargoes were comparable to those applied to domestic tuna harvesting. See *id.*

102. See *id.* at ¶¶ 3.27-3.32. The United States argued that the MMPA embargo was justified under Article XX(b) because the embargo was necessary to protect the life and health of dolphins. See *id.* at ¶¶ 3.33-3.39. Also, the United States argued that the MMPA embargo was justified under the Article XX(g) exception. See *id.* at ¶¶ 3.40-3.52. For the textual language and a discussion of Article XX(b) and (g), see *supra* notes 56-62 and accompanying text.

103. See *Tuna/Dolphin I*, GATT B.I.S.D. (39th Supp.) at ¶ 5.11. While an importing country may distinguish between actual products, it may not distinguish imported products not produced in conformity with the importing country's domestic policies from products produced in conformity with the importing country's domestic policies. See Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142, 147 (1992).

104. See GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (*Tuna/Dolphin I*), unadopted, GATT B.I.S.D. (39th Supp.) at ¶ 5.14 (1993). In keeping with the above distinction, the panel found that Article III covers "only measures applied to imported products that are of the same nature as those applied to domestic products . . ." *Id.* at ¶ 5.11. Therefore, Article III cannot be employed as a means of evading Article XI in order to regulate production methods that do not affect the character of the imported product. See *id.*

105. See *id.* at ¶ 5.18. The United States did not present any argument that the embargoes were consistent with Article XI.

106. See *id.* at ¶¶ 5.25-5.27. In making this decision the panel relied upon three factors: (1) the drafting history, (2) the purpose of Article XX, and (3) the consequences of applying Article XX extra-jurisdictionally. See *id.* at ¶¶ 5.26-5.27. First, the drafting history showed that the drafters of Article XX(b) were concerned with protecting life or health within the jurisdiction of an importing country. See *id.* at ¶ 5.26. Second, it noted that the purpose of Article XX is to allow the

been met.<sup>107</sup> Finally, the panel found that Article XX(g) could not justify the tuna embargo because its exception could not be applied extra-jurisdictionally.<sup>108</sup>

In *GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (Tuna/Dolphin II)*,<sup>109</sup> only one year after Mexico's successful challenge to the MMPA, the European Community (EC) and the Netherlands challenged the MMPA's tuna embargoes as contrary to Article XI of GATT.<sup>110</sup> Not surprisingly, the United States again claimed that the tuna embargoes were justifiable under Article XX.<sup>111</sup> Making the same product-process distinction as in *Tuna/Dolphin I*,<sup>112</sup> the panel found that the tuna embargoes were quantitative restrictions inconsistent with Article XI, rather than internal regulations allowed under Article III.<sup>113</sup>

The panel developed a three-step analysis in evaluating the

pursuit of domestic policy goals through the promulgation of measures that are inconsistent with GATT. See *id.* at ¶ 5.27. Thus, applying Article XX extra-jurisdictionally would allow each GATT member to unilaterally determine those policies from which other GATT members would not deviate without jeopardizing their own rights under GATT. See *id.*

107. See *id.* at ¶ 5.28. The requirements of Article XX(b) were not met because the United States had not "exhausted all options reasonably available to it." *Id.* Also, a "limitation on trade based on such unpredictable conditions could not be regarded as necessary . . ." within the meaning of Article XX(b). *Id.*

108. See *id.* at ¶¶ 5.30-5.34. The panel's decision was based on two factors. First, under Article XX(g), a measure could only be considered to have been taken "in conjunction with" production restrictions "if it was primarily aimed at rendering effective these restrictions." *Id.* at ¶ 5.31. A country can control production or consumption of an exhaustible resource only when it is within that country's jurisdiction. See *id.* Second, like clause (b) of Article XX, allowing clause (g) of Article XX to apply extra-jurisdictionally would allow a country to unilaterally determine policies from which other countries could not deviate for fear of jeopardizing their own rights under GATT. See *id.* at ¶ 5.32.

109. 33 I.L.M. 839 (June 1994).

110. See *id.* at ¶¶ 3.1-3.6. There are at least two reasons why another party would challenge the MMPA after Mexico's successful challenge in *Tuna/Dolphin I*. First, any recommendation made by a panel or Appellate Body is binding only on the parties to the dispute. See Understanding on Disputes, *supra* note 74, arts. 16.4, 17.14. The EC and the Netherlands were not parties in *Tuna/Dolphin I*. See GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (*Tuna/Dolphin I*), unadopted, GATT B.I.S.D. (39th Supp.) at ¶¶ 1.1-1.3 (1993). Second, the panel report of *Tuna/Dolphin I* was never adopted by the parties. See *id.* For a discussion of the binding effect of panel or Appellate Body recommendations, see *supra* note 78 and accompanying text.

111. See *Tuna/Dolphin II*, 33 I.L.M. at ¶¶ 5.11, 5.28. The United States argued that the tuna embargoes were justified by Article XX(g) "as measures relating to the conservation of dolphins, an exhaustible natural resource." *Id.* at 5.11. The United States also argued that the tuna embargoes were justified by Article XX(b) "as measures necessary to protect the life and health of dolphins." *Id.* at 5.28.

112. See *id.* at ¶¶ 5.6-5.10. For a discussion of *Tuna/Dolphin I* and the product/process distinction, see *supra* notes 98-108 and accompanying text.

113. See *Tuna/Dolphin II*, 33 I.L.M. at ¶¶ 5.9-5.10.

tuna embargo provisions under both Articles XX(g) and XX(b). Under the first prong of the analysis, the panel determined that the MMPA's underlying policy fell within the parameters of Article XX's environmental policies.<sup>114</sup> Second, it determined that the measures did not fall within the requirements of Article XX.<sup>115</sup> It is important to note that, under this second step, the panel found that Article XX(g) may justify measures related to the conservation of exhaustible natural resources even if those resources are outside the country's jurisdiction.<sup>116</sup> Finally, although the panel noted that the third prong of the analysis required a determination of whether the measure was applied in a manner which would constitute a

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114. *See id.* at ¶¶ 5.12, 5.29. For several reasons, the panel determined that the MMPA tuna embargoes met the first prong of the three step analysis under both Articles XX(b) and XX(g). First, the text of Article XX(g) does not place any limitation on the location of the natural resource. *See id.* at ¶ 5.15. Second, two previous panels made no distinction between fish caught inside or outside territorial jurisdictions when considering migratory fish. *See id.* Third, GATT does not absolutely proscribe measures relating to things or actions outside a party's territorial jurisdiction. *See id.* ¶ at 5.16. Finally, under general international law, states are not barred from regulating their nationals and vessels with respect to persons, animals, plants and natural resources outside their territories. *See id.*

115. *See id.* at ¶ 5.12. This prong of the test focused on the particular requirements of Articles XX(b) and (g). *See id.* at ¶¶ 5.27, 5.39. The tuna embargoes did not pass this second requirement contained within clauses (b) and (g) of Article XX. *See id.* Following prior panel decisions, the panel found that the term "necessary" in XX(b) requires that a party use a measure consistent with GATT provisions if such a measure is reasonably available. *See id.* at ¶ 5.35. If the measure is inconsistent, the party must use the least inconsistent measure from among the measures reasonably available. *See id.* Significantly, the panel did not consider that some measures may be more environmentally sustainable, politically achievable, or more enforceable than the least GATT inconsistent measure. *See Snape & Lefkovitz, supra* note 10, at 787.

Additionally, the panel found that a measure must be "primarily aimed at" the conservation of exhaustible natural resources and at rendering effective restrictions on domestic production and consumption to be justified by Article XX(g). *See* GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (*Tuna/Dolphin II*), 33 I.L.M. at ¶ 5.21 (June 1994). Because the tuna embargoes would be effective only if countries changed their harvesting practices, the embargoes failed the "primarily aimed at" test. *See id.* at ¶¶ 5.23, 5.27. One criticism of this panel's analysis is that the panel injected a causation test not supported by the text of Article XX. *See Snape & Lefkovitz, supra* note 10, at 788.

116. *See Tuna/Dolphin II*, 33 I.L.M. at ¶ 5.15. The panel observed that: [T]he text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resource to be conserved . . . . The nature and precise scope of the policy area named in the Article . . . is not spelled out or specifically conditioned by the text of the Article, in particular with respect to the location of the exhaustible natural resource to be conserved. The Panel noted that two previous panels have considered Article XX(g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision.

*Id.*

means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, the panel did not consider this prong because the tuna embargo did not pass the second prong of the analysis.<sup>117</sup>

In *World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline (Gasoline Panel Report)*,<sup>118</sup> Venezuela and Brazil claimed that the Gasoline Rule promulgated by EPA was contrary to both Article I and III of GATT.<sup>119</sup> In response, the United States argued that the Gasoline Rule was justified under Article XX(b), (d) and (g) of GATT.<sup>120</sup> The panel found that the baseline establishment rules of the Gasoline Rule were inconsistent with Article III:4 of GATT.<sup>121</sup>

Dismissing the United States' arguments for justification under Articles XX(d) and (g),<sup>122</sup> the panel listed three elements that a regulation must satisfy to be justified under Article XX(b).<sup>123</sup> First, the regulation must fall within the range of policies designed to

117. See *id.* at ¶¶ 5.12, 5.27.

118. 35 I.L.M. 274 (Jan. 16, 1996).

119. See *id.* at 279. Venezuela and Brazil claimed that:

[T]he rule allowing an importer which was also a foreign refiner to establish its individual baseline, provided that it imported into the United States at least 75 percent of the gasoline produced at that refinery in 1990 ("75 % rule"), granted an advantage to gasoline exported from certain third countries in violation of Article I of [GATT].

*Id.* at 280. Venezuela and Brazil "argued that the Gasoline Rule, by denying foreign refiners the possibility to establish an individual baseline, violated Article III:4 because it accorded less favourable treatment to imported gasoline, both reformulated and conventional, than to US gasoline." *Id.* For the textual language and a discussion of Articles I and III of GATT, see *supra* notes 46-52 and accompanying text.

120. See *Gasoline Panel Report*, 35 I.L.M. at 279-80. The United States argued that the Gasoline Rule was justified under Article XX(b) because the Gasoline Rule was necessary to the protection of human, animal and plant life or health. See *id.* at 284-87. Further, the United States argued that the Gasoline Rule was necessary to secure compliance with the Clean Air Act, and thus within the meaning of the Article XX(d) exception. See *id.* at 287-88. Moreover, the United States argued that the Gasoline Rule was justified under Article XX(g) because the Gasoline Rule was a program to preserve clean air. See *id.* at 288.

121. See *id.* at 294-95. Stating that the "treatment no less favourable" language of Article III:4 required equality of opportunities for imported and domestic products, the panel found that imported gasoline was prevented from benefitting from the favourable sales conditions provided for domestic gasoline. See *id.*

122. See *id.* at 298-300. Concerning Article XX(d), the panel found that the baseline establishment rules were inconsistent with Article III:4 because they did not secure compliance with the baseline system, rather they were simply rules for determining baselines. See *id.* at 298; Maas, *supra* note 2, at 429 n.98. The panel found that the baseline establishment rules were not justified under Article XX(g) because they were not "primarily aimed at" the conservation of a natural resource. See *Gasoline Panel Report*, 35 I.L.M. at 298-300; Maas, *supra* note 2, at 429 n.98.

123. See *Gasoline Panel Report*, 35 I.L.M. at 296.

protect human, animal or plant life or health.<sup>124</sup> Second, the regulation must be necessary to the fulfillment of the policy's objectives.<sup>125</sup> Third, the regulation must meet the requirements of the Preamble to Article XX.<sup>126</sup>

### III. ANALYSIS

#### A. Narrative Analysis

In *World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (Gasoline Appellate Report)*,<sup>127</sup> the Appellate Body addressed the issue of the proper interpretation of Article XX(g) of GATT.<sup>128</sup> Focusing on Article XX(g), the United States appealed from certain conclusions of law and legal interpretations of the Gasoline Panel.<sup>129</sup> In response, Venezuela and Brazil supported the findings of the Gasoline Panel concerning Article XX(g),<sup>130</sup> but argued that if the findings of the Gasoline Panel were overturned, the United States had nevertheless

124. *See id.* The panel agreed with the parties that a policy to reduce air pollution resulting from gasoline consumption was within the range of policies designed to protect human, animal or plant life or health. *See id.*

125. *See id.* Applying the reasoning of two prior panels, this panel considered the term "necessary" to mean the absence of alternative measures consistent with GATT, or less inconsistent with it, which a country could reasonably be expected to employ. *See id.* at 296-97. Furthermore, the panel was not convinced that the United States had met its burden of proving that other measures reasonably available to it and less inconsistent with GATT were not available. *See id.* at 297.

126. *See id.* at 296. Since the baseline establishment rules failed the necessary test of Article XX(b), the panel did not examine whether the regulation before it met the requirements of the Preamble to Article XX. *See id.* at 298.

127. 35 I.L.M. at 603 (May 20, 1996).

128. *See id.* This was an appeal from the panel's decision in *Report of the Panel on United States - Standards for Reformulated and Conventional Gasoline (Gasoline Panel Report)*. *See* 35 I.L.M. 274 (Jan. 16, 1996). For a discussion of the panel decision, *see supra* notes 118-26 and accompanying text.

129. *See Gasoline Appellate Report*, 35 I.L.M. at 606. The United States challenged the panel's interpretation of Article XX(g) as a whole. *See id.* at 613. Specifically, the United States claimed that the panel erred in not finding the Gasoline Rule's baseline establishment rules a measure "relating to" the conservation of natural resources within the meaning of Article XX(g) of GATT. *See id.* The United States claimed that the Gasoline Panel erred in three ways: (1) by failing to further interpret and apply Article XX(g); (2) by not finding that the baseline establishment rules satisfied the other requirements of Article XX; and (3) by not finding that the baseline establishment rules satisfied the introductory provisions of Article XX. *See id.* For a discussion of the Gasoline Rule and Article XX(g), *see supra* notes 20-39 & 56-62 and accompanying text.

130. *See Gasoline Appellate Report*, 35 I.L.M. at 614. Venezuela stated that for a measure to fall within the meaning of "relating to" the conservation of exhaustible natural resources, it must be primarily intended to achieve a conservation goal and have a positive conservation effect. *See id.* Because Venezuela submitted that the United States did not meet its burden with respect to the "relating to" requirement of Article XX(g), Venezuela claimed that it was unnecessary for the Appellate Body

failed to satisfy the additional requirements set forth in Article XX(g).<sup>131</sup>

### 1. Measures

For several reasons, the Appellate Body determined that the proper meaning of the term “measures,” located in both clause (g) and the Preamble to Article XX, was a moot issue.<sup>132</sup> First, the panel had found that only the baseline establishment rules, and not the Gasoline Rule as a whole, were inconsistent with Article III:4 and unjustifiable under Article XX(g).<sup>133</sup> Second, the panel had followed the practice of earlier panels in applying Article XX to only those provisions found to be inconsistent with Article III:4.<sup>134</sup> Finally, the Appellate Body stated that no party had suggested an interpretation of “measures” that required the application of Article XX to any provision of the Gasoline Rule other than the baseline establishment rules.<sup>135</sup> Accordingly, the Appellate Body found

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to address the further requirements of Article XX(g) and the Preamble to Article XX. *See id.*

131. *See id.* Brazil and Venezuela argued that because the measures in issue were restrictions upon the consumption of certain kinds of gasoline, rather than restrictions imposed as direct limits on the production or consumption of clean air, the measures did not satisfy the “made effective in conjunction with restrictions on domestic production or consumption” requirement of Article XX(g). *Id.* Additionally, Venezuela and Brazil submitted that because the measures in issue constituted “arbitrary or unjustifiable discrimination between countries where the same conditions prevail,” as well as a “disguised restriction on international trade,” they violated the requirements set forth in the Preamble to Article XX(g). *Id.*

132. *See id.* at 617.

133. *See id.* The Appellate Body noted that because the panel had considered only the baseline establishment rules to be at issue, there was no need to examine whether the Gasoline Rule as a whole or any of its other parts were justifiable under Article XX(g). *See id.*

134. *See id.* at 618 n.28 (citing GATT Dispute Panel Report on United States - Taxes on Automobiles, 33 I.L.M. 1397 (Oct. 11, 1994); GATT Dispute Panel Report on United States - Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990); GATT Dispute Panel Report on Canada - Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140 (1984)).

135. *See* World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 618 (May 20, 1996). While in earlier submissions the United States had maintained that “the Gasoline Rule” should be examined in light of Article XX(g), the United States later confirmed, in its Post-Hearing Memorandum, dated April 1, 1996, that the “measures” in issue were the baseline establishment rules. *See id.* at 618 n.29. Similarly, in its final submission to the Appellate Body, dated April 1, 1996, Brazil stated that the measures with which this appeal was concerned were the baseline establishment rules, rather than the Gasoline Rule itself. *See id.* Thereafter, Brazil maintained that it challenged only the discriminatory methods of establishing baselines, not the entire rule itself. *See id.* Further, in its summary statement, dated March 29, 1996, Venezuela stated that it challenged that aspect of

that the issue had already been settled.<sup>136</sup>

## 2. *Relating to the Conservation of Exhaustible Natural Resources*

The Appellate Body levied several criticisms against the Gasoline Panel's interpretation of the "relating to the conservation of exhaustible natural resources" requirement of Article XX(g).<sup>137</sup> First, although the panel had concluded that the baseline establishment rules were not justified by Article XX(g) because they were not "primarily aimed" at the conservation of natural resources,<sup>138</sup> the panel had injected the new phrase "direct connection" into its analysis.<sup>139</sup> The Appellate Body noted that the panel's decision cre-

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the Gasoline Rule which requires imported gasoline to use a different system of regulatory baselines than United States gasoline. *See id.*

136. *See id.* at 617-18. The Appellate Body criticized the panel's analysis on this point. By using terms such as "the difference in treatment," "the less favourable treatment" or "the discrimination" to refer to the baseline establishment rules, the panel was referring to the baseline establishment rules in terms of its legal conclusion in respect of Article III:4. *See id.* at 619.

137. *See id.* at 618.

138. *See id.* In interpreting the phrase "relating to," the Gasoline Panel had quoted the following passage:

[A]s the preamble of Article XX indicates, the purpose of including Article XX:(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g).

*Id.* at 619 (citing World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Panel Report*), 35 I.L.M. 274 (Jan. 16, 1996); GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at ¶ 4.6 (1989)).

139. *See id.* at 618-19. The Gasoline Panel had introduced the new phrase "direct connection" in the following manner:

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III – the less favourable baseline establishment methods that adversely affected the conditions of competition for imported gasoline – were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the U.S. objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent that attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was



ated confusion because the panel had originally stated that there was "no direct connection" between the baseline establishment rules and the objective of improving air quality, but thereafter concluded that the baseline establishment rules were not "primarily aimed" at the conservation of natural resources.<sup>140</sup> However, the panel had not made clear whether the phrase "direct connection" was a synonym for "primarily aimed at" or a completely new requirement.<sup>141</sup>

The Appellate Body's second criticism was that the Gasoline Panel had erred in referring to its legal conclusion on Article III:4 instead of the baseline establishment rules themselves.<sup>142</sup> Third, the Appellate Body stated that the Gasoline Panel appeared to have mistakenly applied the "necessary" requirement of Article XX(b) to Article XX(g).<sup>143</sup> Finally, the Appellate Body charged that the Gasoline Panel failed to apply Article 31 of the *Vienna Convention on the Law of Treaties*,<sup>144</sup> a fundamental rule of treaty interpretation.<sup>145</sup>

Consequently, the Appellate Body interpreted Article XX(g)

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underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baselines establishment methods at issue in this case were not primarily aimed at the conservation of natural resources. *Id.* at 619 (citing *Canada-Salmon*, GATT B.I.S.D. (35th Supp.) at ¶ 6.40).

140. See *Gasoline Appellate Report*, 35 I.L.M. at 619-20.

141. See *id.* at 620. "The Panel did not try to clarify whether the phrase 'direct connection' was being used as a synonym for 'primarily aimed at' or whether a new and additional element (on top of 'primarily aimed at') was being demanded." *Id.*

142. See *id.* The Gasoline Panel had considered whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources. See *id.* While there must be a finding of "less favourable treatment" under Article III:4 before proceeding to an analysis of Article XX(g), this is a conclusion of law. See *id.* As the Preamble of Article XX makes clear, the Gasoline Panel should have asked itself whether the baseline establishment rules were "primarily aimed at" the conservation of natural resources. See *id.*

143. See *id.* at 620-22. The text of Article XX(b) includes the word "necessary." See GATT, *supra* note 8, art. XX(b). In contrast, the text of Article XX(g) includes the phrase "primarily aimed at." See *id.* art. XX(g). Thus, it would appear that the Appellate Body suggested that the use of different language in Article XX(b) and (g) implies different requirements. See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 620 (May 20, 1996). For the textual language and a discussion of Article XX(b) and (g), see *supra* notes 56-62 and accompanying text.

144. *Opened for signature* May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*]. Article 31 states in relevant part: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes." *Id.* art. 31. By not applying Article 31 of the *Vienna Convention*, the Gasoline Panel

by using Article 31 of the *Vienna Convention*.<sup>146</sup> Noting that Article XX(g) contains the words “relating to,” while other subsections use different phrases,<sup>147</sup> the Appellate Body concluded it was not reasonable to believe that every subsection required “the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”<sup>148</sup> Nevertheless, the Appellate Body noted that Article 31 requires that Article XX(g) and its phrase, “relating to the conservation of exhaustible natural resources,” needed to be read in such a way as to give effect to the purposes and objectives of GATT.<sup>149</sup> The Appellate Body stated that two prior panels recognized this principle.<sup>150</sup> On the basis of this reasoning, as well as the reasoning

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failed to recognize the different requirements contained in Articles XX(b) and (g). See *Gasoline Appellate Report*, 35 I.L.M. at 621-23.

145. See *id.* at 620. The Appellate Body listed several sources of authority to show that Article 31 of the *Vienna Convention* is a rule of customary or general international law. See *id.* at 621 n.34 (citing *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 18 (1995); *Restrictions to the Death Penalty Cases*, 70 I.L.R. 449 (Inter-American Court of Human Rights 1986); *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 1994 I.C.J. 6 (June 27); D. CARREAU, *DRIT INTERNATIONAL* 140 (3d ed. 1991); OPPENHEIM'S *INTERNATIONAL LAW* 1271-75 (Jennings & Watts eds., 9th ed. 1992); Jimenez de Arechaga, *International Law in the Past Third of a Century* 159 *RECUEIL DES COURS*. 42 (1978)). The WTO has been directed, by Article 3(2) of the Understanding on Disputes, to apply such “customary rules of interpretation of public international law” when seeking to clarify the provisions of the GATT. See *Gasoline Appellate Report*, 35 I.L.M. at 621 (citing *Understanding on Disputes*, supra note 74, art. 3(2)).

146. See *id.* For the textual language of Article 31 of the *Vienna Convention*, see supra note 144.

147. See *Gasoline Appellate Report*, 35 I.L.M. at 621. In enumerating the various types of measures that WTO members may use to pursue differing state policies, Article XX uses different terms for different types of measures: “necessary” in paragraphs (a), (b) and (d); “essential” in paragraph (j); “relating to” in paragraphs (c), (e) and (g); “involving” in paragraph (i); “in pursuance of” in paragraph (h); and “for the protection of” in paragraph (f). See *id.*

148. *Id.* at 622.

149. See *id.* Article XX(g)'s phrase “relating to the conservation of exhaustible natural resources” may not be read to subvert the purpose and object of Article III:4. See *id.* Nor may Article III:4 be read to emasculate the policies and interests of Article XX(g). See *id.*

150. See *id.* at 622. The *Gasoline Appellate Report* stated:

[A]s the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.

*Id.* (quoting World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Panel Report*), 35 I.L.M. 274, 299 (Jan. 16, 1996); GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at ¶ 4.6 (1989)).

of several prior panel reports,<sup>151</sup> the Appellate Body concluded that a measure must be “primarily aimed at” the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).<sup>152</sup>

Using this interpretation, the Appellate Body turned to the question of whether the baseline establishment rules were “primarily aimed at” the conservation of natural resources within Article XX(g).<sup>153</sup> The baseline establishment rules were designed to permit scrutiny and monitoring of the level of compliance with the “non-degradation” requirements of the Gasoline Rule.<sup>154</sup> Without baselines of some kind, such scrutiny would be impossible and the Gasoline Rule’s objective of preventing further deterioration of the level of air pollution would be hindered.<sup>155</sup> Consequently, the Appellate Body found that the baseline establishment rules were “primarily aimed at” the conservation of natural resources for the purposes of Article XX(g).<sup>156</sup>

### 3. *If Such Measures are Made Effective in Conjunction with Restrictions on Domestic Production or Consumption*

Having found that the baseline establishment rules satisfied the first requirement of Article XX(g), the Appellate Body next considered whether the baseline establishment rules satisfied the “made effective in conjunction with restrictions on domestic production or consumption” requirement of Article XX(g).<sup>157</sup> Once

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151. See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 622 n.37 (May 20, 1996) (citing GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (*Tuna/Dolphin II*), 33 I.L.M. 839 (June 1994); GATT Dispute Panel Report on United States - Taxes on Automobiles, 33 I.L.M. 1397 (Oct. 11, 1994)). The Appellate Body noted that all of the parties to the appeal accepted the validity of this view. See *id.* at 622.

152. See *id.* at 622-23. However, the Appellate Body noted that the phrase “primarily aimed at” was not itself treaty language and thus was not a litmus test for the inclusion or exclusion of measures from Article XX(g). See *id.* at 623. Unfortunately, the Appellate Body did not elaborate further on this point.

153. See *id.*

154. See *id.* The Appellate Body noted that the baseline establishment rules could not be understood in isolation, but rather needed to be read in relation to the “non-degradation” requirements set out elsewhere in the Gasoline Rule. See *id.*

155. See *id.* The Appellate Body noted that the relationship between the establishment rules and the “non-degradation” requirements of the Gasoline Rule was not negated by any inconsistency between the baseline establishment rules and Article III:4. See *id.*

156. See *Gasoline Appellate Report*, 35 I.L.M. at 623.

157. See *id.* The United States argued that this second requirement of Article XX(g) should be interpreted to mean that the burdens associated with regulating pollutants must not be imposed only on imported gasoline. See *id.* In contrast,

again applying Article 31 of the *Vienna Convention*,<sup>158</sup> the Appellate Body determined that the phrases “made effective” and “in conjunction with,” taken together, refer to “governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources.”<sup>159</sup> However, the Appellate Body indicated that this was a requirement of even-handedness, not identical treatment.<sup>160</sup> Applying this requirement of even-handedness to the baseline establishment rules, the Appellate Body found that the rules met the requirement because the restrictions on the consumption or depletion of clean air through the regulation of the domestic production of gasoline were established jointly with corresponding restrictions for imported gasoline.<sup>161</sup>

Finally, the Appellate Body stated that the clause “if made effective in conjunction with restrictions on domestic production or consumption” did not establish an empirical “effects test” under Article XX(g).<sup>162</sup> An effects test was considered inappropriate be-

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Venezuela and Brazil pointed to prior panel reports which indicated that a measure must be “primarily aimed at” making effective certain restrictions on domestic production or consumption. *See id.* at 624 n.38 (citing GATT Dispute Panel Report on United States - Restrictions on Imports of Tuna (*Tuna/Dolphin II*), 33 I.L.M. 839 (June 1994); GATT Dispute Panel Report on United States - Taxes on Automobiles, 33 I.L.M. 1397 (Oct. 11, 1994); GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at ¶¶ 4.6-4.7 (1989)). Venezuela and Brazil also argued that clean air was not a natural resource under Article XX(g), thus making impossible the existence of restrictions on domestic production or consumption of a natural resource. *See id.* at 623. Finally, Venezuela claimed that the United States had failed to meet its burden of showing that the baseline establishment rules have had “some positive conservation effect.” *Id.* at 624 n.39.

158. *See id.* at 624.

159. *Id.* The Appellate Body stated that the ordinary meaning of “made effective” when used in connection with a governmental measure could be seen to refer to such governmental measure being “operative,” as “in force,” or as having “come into effect.” *See id.* at 624 (citing THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 786 (L. Brown ed. 1993)). The Appellate Body also concluded that the phrase “in conjunction with” could mean “together with” or “jointly with.” *See id.* at 624 (citing THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 481 (L. Brown ed. 1993)).

160. *See id.* at 625. The Appellate Body noted that there was no textual basis for requiring identical treatment of domestic and imported products. *See id.*

161. *See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (Gasoline Appellate Report)*, 35 I.L.M. at 625 (May 20, 1996). The Appellate Body noted that the fact that imported gasoline had been accorded “less favourable treatment” than domestic gasoline was irrelevant under the Article XX(g) analysis. *See id.* The Appellate Body also noted that Article XX(g) speaks “disjunctively of domestic production or consumption.” *See id.* (emphasis added).

162. *See id.* at 625-26.

cause not only is determining causation difficult, but a substantial period of time may have to elapse before the effects of an implemented measure can be observed.<sup>163</sup> However, the Appellate Body added that considerations of predictable effects of a measure may be appropriate in particular cases.<sup>164</sup>

#### 4. *The Introductory Provisions of Article XX: Applying the Preamble*

Having found that the baseline establishment rules of the Gasoline Rule fell within the terms of Article XX(g), the Appellate Body stated that it must determine whether those rules met the requirements set forth in the Preamble to Article XX(g).<sup>165</sup> The Appellate Body had little guidance in determining the requirements of the Preamble because only two prior panels had applied the Preamble to Article XX.<sup>166</sup> Noting that the Preamble addresses the question of how a measure is applied,<sup>167</sup> the Appellate Body stated

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163. *See id.* Unfortunately, the Appellate Body did not elaborate on why determining causation is difficult or why a substantial period of time may have to elapse before the effects of an implemented measure may be observed.

164. *See id.* The Appellate Body elaborated by stating that if a particular "measure cannot in any possible situation have any positive effect on conservation goals," the measure was probably not "primarily aimed at [the] conservation of natural resources. . . ." *Id.* Unfortunately, the Appellate Body did not give an example of such a measure.

165. *See id.* at 626.

166. *See Gasoline Appellate Report*, 35 I.L.M. at 628 n.46 (citing GATT Dispute Panel Report on United States - Prohibition of Imports of Tuna and Tuna Products from Canada (*United States Tuna*), Feb. 22, 1982, GATT B.I.S.D. (29th Supp.) at ¶ 4.8 (1983); GATT Dispute Panel Report on United States - Imports of Certain Automotive Spring Assemblies (*United States Spring Assemblies*), May 26, 1983, GATT B.I.S.D. (30th Supp.) at ¶¶ 54-56 (1983)).

In *United States Spring Assemblies*, a panel found that an exclusion order was not applied in a manner that constituted a means of arbitrary or unjustifiable discrimination *because* the order was directed against imports of automotive spring assemblies produced in violation of United States patent law "from *all* foreign sources, and not just from Canada." *See United States Spring Assemblies*, GATT B.I.S.D. (30th Supp.) at ¶ 55 (emphasis added). The panel found two reasons why the exclusion order was not applied in a manner that constituted a disguised restriction on international trade. *See id.* at ¶ 56. First, notice had been published in the Federal Register. *See id.* Second, before the exclusion order could be issued, the validity of a patent and its infringement had to be established. *See id.*

In *United States Tuna*, import prohibitions on tuna were found to not necessarily be arbitrary or unjustifiable discrimination *because* actions were not taken against Canada only, but also against Costa Rica, Ecuador, Mexico and Peru for similar reasons. *United States Tuna*, GATT B.I.S.D. (29th Supp.) at ¶ 4.8 (emphasis added). Further, the import prohibitions on tuna were not considered a disguised restriction on international trade *because* they were taken as trade measures and publicly announced. *See id.* (emphasis added).

167. *See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline* (*Gasoline Appellate Report*), 35

that the purpose and object of the Article XX Preamble is to prevent the abuse of Article XX exceptions.<sup>168</sup>

Applying a corollary to Article 31 of the *Vienna Convention*,<sup>169</sup> the Appellate Body concluded that the Preamble to Article XX cannot refer to the same standards used to find a violation of a substantive rule of GATT.<sup>170</sup> Noting that the field of application of the standards set forth in the Preamble to Article XX was not at issue, the Appellate Body stated that the Preamble's standards are applicable to all situations in which an allegation of a substantive rule has been made and justification under an exception of Article XX has been invoked.<sup>171</sup> Such a reading was in accordance with the common understanding of the parties.<sup>172</sup> In addition, the Preamble's phrase "nothing in this Agreement shall be construed to pre-

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I.L.M. at 623, 626 n.43 (May 20, 1996) (citing *United States Spring Assemblies*, GATT B.I.S.D. (30th Supp.) at ¶ 56).

168. *See id.* at 623, 625 n.44. The Preamble embodies the principle that while Article XX exceptions may be invoked as a matter of legal right, these exceptions must not be used to defeat legal obligations under GATT. *See id.* at 626. The Appellate Body noted that the burden of showing that a measure does not violate the Preamble rests on the party invoking the exception. *See id.* at 626-27. This is a heavier burden than showing that a measure falls within the exception of Article XX(g). *See id.*

169. *Id.* at 627 n.45. This corollary states that an interpreter must give meaning and effect to all terms of a treaty and may not adopt a "reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *Id.*

170. *See id.* at 627. To conclude otherwise would render both the Preamble and the exceptions in paragraphs (a) through (j) devoid of meaning. *See id.* Such a recourse would confuse the question of whether there was a violation of a substantive rule of GATT with the question of whether the violation was justifiable under Article XX. *See id.*

171. *See id.* at 628. As a result of the Preamble, a measure falling within the exception of Article XX(g) is prohibited if it constitutes "(a) arbitrary discrimination between countries where the same conditions prevail; (b) unjustifiable discrimination between countries where the same conditions prevail; or (c) disguised restriction on international trade." *Id.* at 627.

172. *See Gasoline Appellate Report*, 35 I.L.M. at 627-28. The United States assumed that the phrase "between countries where the same conditions prevail," included in the "arbitrary discrimination" and "unjustifiable discrimination" standards, referred to conditions in importing and exporting countries as well as between exporting countries. *See id.* With respect to the standard "disguised restriction on international trade," the United States assumed that it was applicable to a case in which a violation of Article III:4 had been found. *See id.* at 628. These assumptions were not challenged by Venezuela or Brazil. *See id.* Rather, Venezuela argued that the United States had failed to meet all of the standards included in the Preamble. *See id.*

The Appellate Body further noted that the term "countries" in the Preamble is textually unqualified. *See id.* at 628-29 n.46. In addition, treaties comparable to GATT have used specific terms, not included in GATT, to show a specific intent. *See id.* However, these comparable treaties are not noted as pertaining to the "travaux préparatoires" of GATT. *See id.*

vent the adoption or enforcement by any contracting party of measures . . ." supported the parties' common understanding.<sup>173</sup> Accordingly, the Appellate Body determined that the standards set forth in the Preamble could be best read side-by-side, imparting meaning to one another.<sup>174</sup>

Next, the Appellate Body considered the United States' justifications for using statutory baselines that did not differentiate between domestic and imported gasoline.<sup>175</sup> First, the United States claimed that individual baselines for foreign refiners were not implemented because they would generate administrative problems, including verification and enforcement.<sup>176</sup> However, the Appellate Body found that the United States failed to adequately explore existing means, especially government cooperation, to mitigate these administrative problems.<sup>177</sup> Second, the United States argued that the statutory baseline requirements were not imposed on domestic refiners because of the physical and financial problems this would

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173. *Id.* at 628. Such a reading of the Preamble to Article XX gives effect to the words "nothing in this Agreement" and Article XX as whole. *See id.*

174. *See id.* at 629. In so doing, the Appellate Body noted the fundamental theme of avoiding abuse or illegitimate use of Article XX exceptions. *See id.* Accordingly, the Appellate Body found that: (1) "disguised restriction" includes disguised discrimination in international trade; (2) concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction;" and (3) disguised restriction includes restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure within an Article XX exception. *See id.* Considerations pertinent to deciding whether a measure amounts to "arbitrary or unjustifiable discrimination" may also be used to determine the presence of a "disguised restriction" on international trade. *See id.*

175. *See id.*

176. *See id.* at 629-30. The United States claimed that if "individual baselines were established for several foreign refiners, the importer would be tempted to claim the refinery of origin that presented the most benefits in terms of baseline restrictions, and tracking the refinery of origin would be very difficult because gasoline is a fungible commodity." *Id.*

177. *See* World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 631-32 (May 20, 1996). In the area of international trade, there exists "established techniques for checking, verifying, assessing and enforcing data relating to imported goods." *Id.* at 631. The Appellate Body concluded that the United States must have known that cooperative arrangements with foreign governments were necessary and appropriate for these techniques to be effective. *See id.* Therefore, there arose a strong implication that the United States did not explore such cooperative arrangements, at least not to the point where uncooperative governments would have been discovered. *See id.*

Noting that it was not speculating on the limits of effective international cooperation, the Appellate Body noted several methods used by countries to solve the problems of enforcement agencies whose relevant law and authority does not cross national borders. *See id.* at 631 n.52. Such methods include cooperative agreements between governments and agreements within the framework of the WTO that recognize the significance of this type of cooperation. *See id.*

have caused the domestic refiners.<sup>178</sup> Yet, the Appellate Body noted that there was no evidence that the United States considered the problems faced by foreign refiners as a result of imposing the statutory baselines.<sup>179</sup>

In sum, the Appellate Body found the United States guilty of two omissions.<sup>180</sup> First, it found the United States guilty of failing to adequately explore available means, especially government cooperation, of mitigating administrative problems.<sup>181</sup> Second, it concluded that the United States failed to consider the costs to foreign refiners which would result from the imposition of statutory baselines.<sup>182</sup> Finally, noting that the resulting discrimination must have been foreseen rather than inadvertent or unavoidable, the Appellate Body held that the baseline establishment rules of the Gasoline Rule constituted “unjustifiable discrimination” and a “disguised restriction on international trade.”<sup>183</sup>

## B. Critical Analysis

### 1. *Treaty Interpretation: Canons of Treaty Interpretation and Article 31 of the Vienna Convention*

For several reasons, the Appellate Body acted correctly in its application of both the general rule of treaty interpretation expressed in Article 31 of the *Vienna Convention* and the corollary to Article 31 to interpret Article XX(g) of GATT.<sup>184</sup> First, with respect to international law, there are three different canons of interpretation: (1) “the text as the authentic expression of the intention of the law-maker;”<sup>185</sup> (2) the intention of the law-maker as a subjective

178. *See id.* at 632. The United States stated that the imposition of the statutory baselines on domestic refiners would have been “physically and financially impossible because of the magnitude of the changes required in almost all US refineries; it thus would have caused a substantial delay in the programme.” *Id.* (quoting World Trade Organization Dispute Panel Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Panel Report*), 35 I.L.M. 274, 287 (Jan. 16, 1996)).

179. *See id.* at 632.

180. *See id.* Although the Appellate Body did not indicate what was a minimal omission that would violate Article III:4 of GATT, the Appellate Body noted that these omissions went “well beyond what was necessary” to find a violation of Article III:4. *Id.*

181. *See id.*

182. *See Gasoline Appellate Report*, 35 I.L.M. at 632.

183. *See id.*

184. For a discussion of the Appellate Body’s use of Article 31 of the *Vienna Convention* and the corollary to Article 31, see *supra* notes 146-52, 157-61 & 169-74 and accompanying text. For the textual language of Article 31 of the *Vienna Convention* as well as a corollary to Article 31, see *supra* notes 144 & 169.

185. DANIEL P. O’CONNELL, *INTERNATIONAL LAW* 251-64 (2d ed. 1970); OPPEN-



element independent of the text;<sup>186</sup> and (3) “the declared or apparent objects and purposes of the legal rule concerned.”<sup>187</sup> The second canon, however, is unsuitable for the interpretation of international agreements primarily because of the manner in which international agreements are drafted.<sup>188</sup> Thus, the Appellate Body’s use of Article 31 was proper since it is in accordance with the first and third canons of interpretation, but disregards the second canon.<sup>189</sup> Next, as the Appellate Body pointed out, Article 31 has attained the status of a rule of customary international law.<sup>190</sup> Customary international law is binding on international organizations such as the WTO.<sup>191</sup> Moreover, the WTO has been expressly directed to use “customary rules of interpretation of public international law” to clarify “covered agreements” of the Agreement Establishing the World Trade Organization, including GATT.<sup>192</sup>

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HEIM’S INTERNATIONAL LAW, *supra* note 145, §§ 631-633; HENRY G. SCHERMERS & NIELS M. BLOCKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY § 1346 (1995); MALCOLM N. SHAW, INTERNATIONAL LAW 583-84 (3d ed. 1991). When interpreting international agreements, the text is usually given priority. *See* SCHERMERS & BLOCKER, *supra*, § 1347. However, it should be noted that because of the living character of international organizations, the “primacy of the wording of the text” may be of lesser importance. *Id.*

186. *See* O’CONNELL, *supra* note 185, at 251-64; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 145, at §§ 631-633; SCHERMERS & BLOCKER, *supra* note 185, at § 1346; SHAW, *supra* note 185, at 583-84.

187. O’CONNELL, *supra* note 185, at 251-64; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 145, at §§ 631-633; SCHERMERS & BLOCKER, *supra* note 185, at § 1346; SHAW, *supra* note 185, at 583-84.

188. *See* SCHERMERS & BLOCKER, *supra* note 185, at § 1348. Article 32 of the *Vienna Convention* on the Law of Treaties classifies the intention of the law-maker a “supplementary means of interpretation.” *See Vienna Convention, supra* note 144, art. 32; SCHERMERS & BLOCKER, *supra* note 185, at § 1348. Moreover, the International Court of Justice has expressly stated that there is no need to refer to preparatory documents if the text is sufficiently clear. *See* SCHERMERS & BLOCKER, *supra* note 185, at § 1348. Furthermore, although a common intention can be identified only from statements made at the drafting of the treaty, many parties may not have been present at the drafting. *See id.* Finally, too many parties have been involved in the drafting of the treaty to ascertain a clear intention. *See id.*

189. *See* OPPENHEIM’S INTERNATIONAL LAW, *supra* note 145, at §§ 631-37; SHAW, *supra* note 185, at 583-84.

190. It is widely accepted that the provisions of the *Vienna Convention* are either a codification of customary international law, or have become customary international law. *See, e.g.,* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 418 (3d ed. 1993). The U.S. Executive recognizes the *Vienna Convention* as an authoritative guide to customary international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987). For a listing of the Appellate Body’s authority for the proposition that Article 31 of the *Vienna Convention* is customary international law, see *supra* note 145.

191. *See* SCHERMERS & BLOCKER, *supra* note 185, at § 1339.

192. Understanding on Disputes, *supra* note 74, art. 3(2). Article 3 of the Understanding on Disputes states:

The dispute settlement system of the WTO is a central element in provid-

## 2. Interpretation of Article XX(g)

Several aspects of the Appellate Body's interpretation of Article XX(g) lend hope that Article XX(g) may be used to justify environmental, but GATT-inconsistent measures.<sup>193</sup> First, in interpreting the phrase "relating to" to mean "primarily aimed at,"<sup>194</sup> the Article XX(g) exception is still read broader than the Article XX(b) exception.<sup>195</sup> Second, the Appellate Body's interpretation of the phrase "made effective in conjunction with restrictions on domestic production or consumption" guards against protectionism but allows governments to justify environmental legislation that is GATT inconsistent.<sup>196</sup> Finally, in rejecting an empirical effects test, the Ap-

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ing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

*Id.*

Of interesting note is the fact that at least two scholars claim that use of the phrase "customary rules of interpretation of public international law" is a "direct, albeit implicit, invocation of the Vienna Convention of the Law of Treaties." Crowley & Jackson, *supra* note 71, at 200.

193. For a discussion of those aspects of the Appellate Body's decision that may allow domestic environmental measures to be justified under Article XX(g), see *infra* notes 194-97 and accompanying text.

194. For a discussion of the Appellate Body's interpretation of the phrase "relating to" to mean "primarily aimed at," see *supra* notes 137-56 and accompanying text.

195. See Eliza Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL. L. REP. 10,599, 10,602 n.39 (citing GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) (1989)). "'Relating to' has been interpreted by a GATT panel as implying a wider range of measures than only those that could be characterized as necessary or essential." *Id.* Further, GATT panels have consistently interpreted the Article XX(b) exception to include a "necessary" test. See *id.* For a discussion of cases that interpret and apply the requirements of Article XX(b) and (g), including the Article XX(b) necessary test, see *supra* notes 78-126 and accompanying text.

196. The Appellate Body held that this phrase includes the requirement that environmental measures must impose restrictions on both foreign and domestic refiners. See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 624 (May 20, 1996). Because restrictions must apply domestically as well as abroad, it is difficult for a domestic government to pass protectionist measures. See *id.* at 624-25. Nevertheless, the Appellate Body held that this phrase does not require identical treatment. See *id.* at 625. Domestic governments may choose from a greater variety of environmental measures, some of which may have different effects abroad than domestically. For a discussion of the Appellate Body's interpretation and application of the phrase "made effective in conjunction with restrictions on domestic production or consumption," see *supra* notes 157-64 and accompanying text.

pellate Body eliminated one mechanism that could have seriously hindered a nation's ability to pass domestic environmental legislation.<sup>197</sup>

3. *Justifications for Environmental Legislation that is GATT-Inconsistent may be Eliminated by the Interpretation of the Preamble to Article XX*

Despite promising elements of the Appellate Body's decision, several aspects of the decision may make it more difficult to justify environmental measures under Article XX.<sup>198</sup> Although it did not define "disguised restriction" in full, the Appellate Body attempted to give some substance to its contents.<sup>199</sup> The Appellate Body declared that the phrase "disguised restriction" includes disguised discrimination.<sup>200</sup> This view is consistent with prior cases that considered the public announcement of measures to be a factor in determining whether they were a "disguised restriction."<sup>201</sup> The Appellate Body also found that the phrase "disguised restriction" included "concealed or unannounced restriction or discrimination."<sup>202</sup> This finding is a minor extension of prior GATT panels' dislike of GATT-inconsistent measures that are not readily apparent.<sup>203</sup> Finally, the Appellate Body's holding that "disguised restriction" embraces "arbitrary or unjustifiable discrimination,"<sup>204</sup> while not clearly justified or explained,<sup>205</sup> has several important implications. It implies that if a measure amounts to "arbitrary or unjustifi-

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197. An effects test would have placed too much emphasis on other provisions of GATT, at the expense of Article XX(g). This is the first time that any WTO body addressed the issue of an empirical effects test. In contrast to the Appellate Body's holding, one commentator believes that an Article XX(g) effects test would be desirable. See, e.g., Phillips, *supra* note 57, at 827-63. For the Appellate Body's rejection of an empirical effects test, see *supra* notes 162-64 and accompanying text.

198. For a discussion of those aspects of the Appellate Body's decision that may make it more difficult to justify environmental measures under Article XX(g), see *infra* notes 199-214 and accompanying text.

199. For a discussion of the Appellate Body's interpretation of the term "disguised restriction," see *supra* notes 165-74 and accompanying text.

200. See *Gasoline Appellate Report*, 35 I.L.M. at 629.

201. See, e.g., *United States Spring Assemblies*, *supra* note 166, at ¶¶ 54-56; *United States Tuna*, *supra* note 166, at ¶ 4.8.

202. See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 629 (May 20, 1996).

203. For a discussion of prior panels' dislike of GATT-inconsistent measures that are not readily apparent, see *supra* note 166 and accompanying text.

204. See *Gasoline Appellate Report*, 35 I.L.M. at 629.

205. See *id.* In defining "disguised restriction," the Appellate Body merely stated that the terms "arbitrary discrimination," "unjustifiable discrimination" and

able discrimination” it may also, but not necessarily, constitute a “disguised restriction.”<sup>206</sup> The Appellate Body’s decision also implies that a measure may constitute a “disguised restriction,” but not “arbitrary or unjustifiable discrimination.”<sup>207</sup>

Several important issues arise in the application of these Article XX Preamble requirements.<sup>208</sup> First, the Appellate Body appeared to analyze the baseline establishment rules under the unjustifiable discrimination prohibition of the Article XX Preamble.<sup>209</sup> In evaluating the justification, however, the Appellate Body appeared to apply a standard similar to the “necessary” test of Article XX(b).<sup>210</sup> Such a reading would emasculate the “primarily

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“disguised restriction” may be read side-by-side, imparting meaning to one another. *See id.*

206. *See id.* The Appellate Body stated that “the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to ‘arbitrary or unjustifiable discrimination,’ may also be taken into account in determining the presence of a ‘disguised restriction’ on international trade.” *Id.*

207. *See id.*

208. For a discussion of the Appellate Body’s application of the Article XX Preamble requirements, see *supra* notes 165-83 and accompanying text.

209. *See* World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 632-33 (May 20, 1996). First, the Appellate Body held that the baseline establishment rules constituted “unjustifiable discrimination.” *See id.* Second, the Appellate Body viewed the United States’ stated difficulties “as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners.” *Id.* at 630. Thus, it is apparent that the Appellate Body applied some type of justification analysis.

210. As interpreted by prior panels, a necessary test requires that a party use a measure consistent with, or least inconsistent with GATT, if reasonably available. *See* Phillips, *supra* note 57, at 830. For a discussion of cases interpreting and applying the Article XX(b) “necessary” test, see *supra* notes 92-126 and accompanying text.

Several Appellate Body statements seem to recognize this necessary test. First, the Appellate Body noted the existence of GATT-consistent measures, the individual baselines. *See Gasoline Appellate Report*, 35 I.L.M. at 629. The implication is that these measures should have been used unless they were not reasonably available. Second, the Appellate Body noted that cooperative arrangements with other governments would have allowed the use of the GATT-consistent measures. *See id.* at 631. However, if the United States inquired into such arrangements, it did not do so “to the point where it encountered governments that were willing to cooperate.” *Id.* The implication is that the United States was obligated to discover whether the GATT-consistent measures were reasonably available to it.

There are two parts of the Appellate Body’s analysis, however, that do not appear to be strictly tailored to a necessary test. First, it was noted that the United States did nothing other than “disregard [costs] . . . when it came to foreign refiners.” *Id.* at 632. Rather than deciding which measures were reasonably available to the United States, the Appellate Body appeared to be judging the reasonableness of the GATT-inconsistent measures actually used. Second, the Appellate Body’s statement that “[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable” is confusing. *Id.* at 633. It can be inferred that if the discrimination was “unavoidable” it would have been excused. Such a

aimed at" requirement of the Article XX(g) exception.<sup>211</sup>

Second, the Appellate Body considered the baseline establishment rules a "disguised restriction on international trade."<sup>212</sup> However, it is not clear how the Appellate Body came to this conclusion.<sup>213</sup> It is these two factors, (1) a stricter "necessary" requirement, and (2) an unexplained "disguised restriction" finding, that could negatively impact a domestic government's ability to protect the environment.<sup>214</sup>

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result would be consistent with a necessary test because if discrimination is "unavoidable," evidently less GATT inconsistent measures are not reasonably available. However, the mere fact that discrimination is "foreseen" cannot cause it to fail the Article XX Preamble requirement. For example, discrimination may be "foreseen," but may result from the only reasonable measure available. It is unlikely that a measure would be considered unjustified under Article XX in such a situation. Similarly, it is unlikely that discrimination would be justified under Article XX just because the discrimination was "inadvertent." Such a reading would allow countries to violate the obligations under GATT by pleading ignorance.

211. Such a reading would require that for a measure to be justified under Article XX(g) it must pass both the "primarily aimed at" test of Article XX(g) and the "necessary test" of the Preamble. However, if a measure is found to be "necessary" to the conservation of exhaustive natural resources, the measure is most likely "primarily aimed at" the conservation of exhaustive natural resources. Therefore, the "primarily aimed at" test is rendered superfluous. Such a result would violate the corollary to Article 31 that states all provisions of a treaty should be given effect. For a discussion of the Article 31 corollary, see *supra* note 169.

212. See *Gasoline Appellate Report*, 35 I.L.M. at 629.

213. First, the Appellate Body found that "disguised restriction" includes "disguised discrimination." See World Trade Organization Appellate Report on United States - Standards for Reformulated and Conventional Gasoline (*Gasoline Appellate Report*), 35 I.L.M. at 629 (May 20, 1996). However, there was no mention of "disguised discrimination" in the Appellate Body's analysis of the baseline establishment rules under the Article XX Preamble. See *id.* at 627-33. Also, like prior cases, the measure was probably not considered "disguised" because the measure was published in the Federal Register. See 40 C.F.R. § 80. For a discussion of cases that considered, within its analysis, publication of a regulation, see *supra* note 166.

Second, the Appellate Body found that "disguised restriction" also includes "concealed or unannounced restriction or discrimination in international trade." See *Gasoline Appellate Report*, 35 I.L.M. at 629. Again, the measure could not be considered "concealed or unannounced" because it was published in the Federal Register. See 40 C.F.R. § 80.

Third, "disguised restriction" includes "arbitrary discrimination." See *id.* Yet, there is no mention of "arbitrary discrimination" within the Appellate Body's analysis of the baseline establishment rules under the Article XX Preamble. See *id.* at 627-33.

Finally, while a measure that amounts to "unjustifiable discrimination" may also constitute a "disguised restriction," such a finding does not appear to be mandatory. See *id.* at 629. Indeed, use of the disjunctive "or" would seem to indicate separate and distinct tests. While the same facts may be used in finding both "disguised restriction" and "unjustifiable discrimination," the Appellate Report does not elaborate upon the relationship between the two. See *id.*

214. For a critique of the Appellate Body's finding of a necessary test in the Preamble of Article XX and its unexplained "disguised restriction" finding, see *supra* notes 198-213 and accompanying text.

## IV. IMPACT

Focusing on trade, GATT was adopted with little emphasis on environmental concerns.<sup>215</sup> Consequently, environmentalists have had to resort exclusively to Article XX(b) and (g) in order to justify environmental measures.<sup>216</sup> Specifically, environmentalists have relied heavily upon Article XX(g) because it has been interpreted more broadly than Article XX(b).<sup>217</sup> In contrast to GATT, the WTO expressly embodies environmental principles in its charter.<sup>218</sup> However, the WTO's Appellate Body threatens to further diminish the effectiveness of protecting environmental measures under Article XX, including Article XX(g).<sup>219</sup>

First, protecting the environment will be more difficult if the Appellate Body has incorporated a "necessary" test into the Article XX Preamble. The possibilities of justification under the Article XX(g) exception will be narrowed because environmental measures will be subjected to a stricter additional test. Further, the other Article XX exceptions may be similarly limited since the Preamble is applicable to all exceptions within Article XX. Second, it is not clear how the Appellate Body's interpretation of the Preamble's disguised restriction prohibition will affect the justification of environmental measures under Article XX. Future cases will necessarily have to flesh out the contents of this prohibition.

*Hans J. Crosby*

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215. See Christopher A. Cherry, *Environmental Regulation Within the GATT Regime: A New Definition of "Product"*, 40 UCLA L. REV. 1061, 1066-67 (1992) (citing Patterson, *supra* note 195, at 10,600) (mentioning Preamble's objective of developing full use of resources of world and expanding production of goods but not mentioning environmental protection or sustainable development); see also Kyle E. McSarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL. L. REP. 10,589, 10,593 (1991) (noting GATT focuses on trade in world that does not consider trade above other policies).

216. For a discussion of cases that have interpreted and applied Article XX(b) and (g), see *supra* notes 78-126 and accompanying text.

217. See Patterson, *supra* note 195, at 10,602 n.39 (citing GATT Dispute Panel Report on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (*Canada-Salmon*), Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) (1989)). "Relating to" has been interpreted by a GATT panel as implying a wider range of measures than only those that could be characterized as necessary or essential." *Id.*

218. For a discussion of those environmental principles expressly embodied in the WTO Agreement, see *supra* note 72 and accompanying text.

219. For a discussion of how the Appellate Body's holding threatens to diminish the effectiveness of protecting environmental measures under Article XX, see *supra* notes 198-214 and accompanying text.

