

4-1-1998

International Trade and Environmental Law: Brothers in the Expansion of International Law or Cain Versus Abel?

D. Christopher Decker
University of Essex (Student)

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/belj>



Part of the [Environmental Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

D. C. Decker, *International Trade and Environmental Law: Brothers in the Expansion of International Law or Cain Versus Abel?*, 5 Buff. Envtl. L.J. 225 (1998).

Available at: <https://digitalcommons.law.buffalo.edu/belj/vol5/iss2/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Environmental Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

**International Trade and Environmental Law:
Brothers in the Expansion of International Law
or Cain Versus Abel?**

D. Christopher Decker*

Table of Contents

| | |
|---|-----|
| I. Introduction | 227 |
| II. The Gasoline Case Against the United States | 228 |
| A. Facts of the Case | 228 |
| B. Argument of Venezuela and Brazil | 232 |
| C. The United States' Defense | 235 |
| D. The Panel's Findings | 237 |
| E. The United States' Reaction | 243 |
| F. The United States' Appeal | 243 |
| III. Analysis and Possible Implications | 248 |
| IV. Solutions to Strengthening International Environmental Law | 252 |
| V. Conclusion | 255 |

* LL.M. University of Essex (expected 1999); J.D. State University of New York at Buffalo School of Law, 1998; B.A. Purdue University, 1995. Mr. Decker would like to thank Professor Makau Mutua and Wendy Irvine for their comments and guidance in writing this article. Mr. Decker especially thanks Professor Mark Gibney for his continued support and guidance throughout Mr. Decker's academic career. This article is dedicated to Karen Cavalier Decker and David E. Decker.

Hundreds of years of mass pollution have brought the environment to the forefront of the discourse on international law. With the growing realization that pollution is harming the planet, a greater emphasis is being placed on environmental issues as evidenced by the Rio Conference in 1992. While commercial and international trade law developed and evolved over centuries,¹ international environmental law is relatively new and almost completely reactive. The established trade laws, such as the General Agreement on Tariffs and Trade (GATT), are beginning to conflict with efforts at invoking environmental legislation.

The prevailing assumption is that stronger international law will make the world a better place to live by improving human rights, economic prosperity, and security from conflicts, etc. However, many of these laws are beginning to conflict with each other. As these conflicts arise, values are being placed upon certain areas of law. For example, the "worth" of environmental law is being relegated by the "higher worth" of trade. This view is seen in various GATT Dispute Panel findings.² Most recently, the World Trade Organization (WTO)³ has noted that past panel reports seem to limit the environmental clause under GATT⁴ by applying it narrowly to

¹ See ESTIENNE CLEIRAC, *THE ANCIENT SEA-LAWS OF OLERON, WISBY, AND THE HANSE-TOWNS, STILL IN FORCE*, (Guy Miede trans., T. Basset, 1686) *excerpts from* LES US & COUTUMES DE LA MER, (discussing the early trading and shipping laws of towns in France, Sweden and the Hanseatic League). See Gerald A. Bunting, *GATT and the Evolution of the Global Trade System: A Historical Perspective*, 11 ST. JOHN'S J. LEGAL COMMENT 505, 506-512 (1996)(discussing the development of a global economy, international trade policy, and law).

² US-Restrictions on Imports of Tuna, 1994 GATTPD LEXIS 7, DS29/R, June 16, 1994.

³ The World Trade Organization (WTO) is the body in charge of enforcing the General Agreement on Tariffs and Trade (GATT). See generally Timothy A. Harr, *WTO Dispute Settlement Provisions*, in *THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT*, 579 (Harvey M. Applebaum & Lyn M. Schlitt eds., 1995)(supplying documents that establish the WTO and its powers).

⁴ General Agreement on Tariffs and Trade 1947, Oct. 30, part II, art. XX(g), 61 Stat 5, A3, A61, 55 U.N.T.S. 194, 262 [hereinafter GATT].

“restrictions on the export of tradeable goods that could be exhausted as a result of their exploitation.”⁵ These cases set a dangerous precedent that must be more closely observed because these rulings are an assault upon higher environmental standards. Potentially they mark the beginning of a great loss of sovereignty for nations.

I. Introduction

This Paper explores the tension developing between environmental concerns and trade law by examining the law and reasoning used in the recently decided *United States- Standards for Reformulated and Conventional Gasoline*⁶ and the subsequent appeal.⁷ This Paper will demonstrate that the few areas within GATT law that allows for environmental restrictions to override trade regulation are being read narrowly to negate the effect. These narrow interpretations of Article XX⁸ will potentially effect the ability of

⁵ United States-Standards for Reformulated and Conventional Gasoline, 1996 GATTPL LEXIS 3, WT/DS2/R, Jan. 29, 1996, at para. 3.60.

⁶ *Id.*

⁷ United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Apr. 29, 1996 (Report of the Appellate Body)[hereinafter Appellate Body Report].

⁸ Article XX elucidates the General Exceptions to the GATT law. The significant provisions concerning environmental concerns are as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animals or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

states to legislate domestic environmental standards regardless of the WTO's rhetoric to the contrary.

The Paper will first discuss the facts of the Gasoline Case, the basic arguments surrounding the regulations developed by the Environmental Protection Agency [EPA] to implement the Clean Air Act [CAA], and more importantly the United States' appeal which focused exclusively on the environmental aspects of GATT law. Secondly, the paper will analyze the impact that the Panel Report and Appellate Body Report will have on the sovereignty of nations in other areas of regulation. The Paper will demonstrate that the WTO has done an incredible injustice by narrowly reading the chapeau to Article XX of GATT, thereby compromising and leaving uncertain the ability of nations to strengthen their environmental standards and other regulations. Thirdly, the Paper will examine the ramifications of this decision and analyze how the WTO Appellate Body Report failed to seize the opportunity to tie trade with sound environmental policy. Lastly, the Paper will layout a possible plan to remedy the second class status to which trade has relegated environmental law.

II. The Gasoline Case Against The United States

A. Facts of the Case

In January 1995, Venezuela requested the United States to hold consultations regarding the EPA's "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline."⁹ These consultations did not resolve the conflict. Accordingly, Venezuela requested the Dispute Settlement Body [DSB] of the WTO to form a panel to hear their claim against the United States.¹⁰ The DSB formed a panel in mid-April 1995. That same day Brazil requested to hold consultations with the United States regarding the

⁹ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 1.1.

¹⁰ See *id.*

same legislation.¹¹ Brazil's consultations were fruitless and they also requested a panel be formed to hear their matter.¹² The DSB combined the panels at the end of May 1995.¹³

The issue before the panel was the CAA's 1990 amendment,¹⁴ which required the EPA to promulgate regulations aimed at decreasing the amount of pollutants present in gasoline.¹⁵ The regulations would decrease toxic and ozone creating pollutants from vehicle emissions.¹⁶ In particular, the EPA established "nine ozone non-attainment areas." These areas contain cities that had a population of over 250,000 in 1980 and that also had the highest ozone pollution during 1987-89.¹⁷ While conventional gasoline could be sold to the rest of the United States, only reformulated gasoline could be sold in the non-attainment areas.¹⁸

Reformulated gasoline has stricter chemical composition requirements which reduces harmful emissions. The combustion of gasoline emits pollutants into the atmosphere, and by reducing these pollutants, the non-attainment areas would see a decrease in ground level ozone-forming volatile organic compounds.¹⁹ However, reformulated gasoline costs more to produce because it is a higher quality.

Requiring reformulated gasoline to be sold could result in refiners, blenders, and importers selling lower grade fuels, which contain conventional fuel components "dumped" in from the highly restricted reformulated fuel, to the rest of the United States to offset

¹¹ See *id.* at para. 1.1 and 1.2.

¹² See *id.* at para. 1.2.

¹³ See *id.* at para 1.3.

¹⁴ 42 U.S.C. § 7545(k)(1994).

¹⁵ See *id.* § 7545(k)(1).

¹⁶ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.1.

¹⁷ 42 U.S.C. § 7545(k)(10)(D).

¹⁸ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.2; 42 U.S.C. § 7545(k)(1), (10)(E), (10)(F).

¹⁹ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.1, 2.3.

the price difference.²⁰ Such “dumping” would violate the CAA’s provision prohibiting the dumping of pollutants from reformulated gasoline into the conventional gasoline sold to rest of the United States.²¹ This would also offset the environmental benefits achieved by using the reformulated gasoline in the first place.

The CAA aimed to establish limits that refiners, blenders, and importers could not exceed in relation to the “pollutants attributable to gasoline sold or introduced into commerce in the calendar year 1990. . .”²² Therefore, separate individual baselines would be established for all refiners, blenders, and importers. However, if the EPA determined there was insufficient data to calculate an individual baseline, then a statutory baseline would apply.²³ The statutory baseline fluctuated because of the seasonal statutory baseline defined under the CAA and determined by the EPA.²⁴

The EPA proceeded to ascertain the composition of 1990 gasoline to calculate a “baseline,” which would act as a measuring tool to compare conventional and reformulated gasoline in the future.²⁵ The crux of Venezuela and Brazil’s complaint against the United States was the way in which EPA established the baseline because EPA used separate methods for domestic and foreign suppliers of gasoline.

The “Gasoline Rule” mandated that a baseline, reflecting the pollution levels of 1990, be set for each individual domestic refinery.²⁶ To determine the domestic baseline, the EPA developed three sets of criteria.²⁷ The first set defined the baseline using the

²⁰ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.4.

²¹ See *id.* at para. 2.4; 42 U.S.C. § 7545(k)(8).

²² 42 U.S.C. § 7545(k)(8)(A).

²³ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.4.

²⁴ See 42 U.S.C. § 7545(k)(10)(B)(I) and (ii).

²⁵ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para 2.5.

²⁶ See *id.* at para. 2.6.

²⁷ See *id.*

quality and volume data of the individual refineries.²⁸ The second set (used when there is insufficient quality and volume data) required domestic refiners to derive their baseline from the 1990 gasoline blendstock²⁹ quality data and production records.³⁰ If not enough data was available to use either the first or second set of criteria, then “a domestic refiner must turn to a set third set of criteria which was derived from the post-1990 gasoline blendstock and/or gasoline quality data model . . .”³¹

The EPA then adopted a two-fold approach toward reducing pollutants in reformulated gasoline.³² First, for a three year period, starting in January 1995, the “Simple Model” would be in effect.³³ Under this program, reformulated gasoline sold by domestic refiners would be bound to qualities that were no less stringent than the refiners individual quality of 1990.³⁴ Additionally, importers could not use an individual baseline and were forced to abide by the statutory baseline.³⁵ Starting in January 1998, the “Complex Model” would be in effect. This model created statutory emission

²⁸ *See id.*

²⁹ “Blendstock is unfinished gasoline which has to be blended [with higher quality gasoline] in order to be sold as finished gasoline.” *Id.* at para. 3.16 n.62.

³⁰ *See id.* at para. 2.6.

³¹ *Id.*

³² *See id.* at para. 2.9.

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.* The United States argued that because blenders and importers receive gasoline from so many sources that it would be impossible for them to establish individual baseline data, therefore they were assigned a statutory baseline. *See First Submission of the United States, Standards for Reformulated and Conventional Gasoline, available in LEXIS, GATTPD file, 1995 [hereinafter First Submission of the U.S.]*. However, the United States also established an exception that allowed importers, who, in 1990, imported 75 percent of their product from an “affiliated foreign refinery,” to be considered a domestic refiner so that these refiners could establish an individual baseline. *See* 40 CFR 80.91(b)(ii); *see also* United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 6.3. This exception became known as the 75 percent rule. *See id.* at para. 2.7.

requirements that would apply to all producers of reformulated gasoline, and abandoned the individual baselines.³⁶

The EPA proposed an amendment to the Gasoline Rule in May 1994 which would have allowed individual baselines to be established for foreign refiners and importers because many parties' comments were taken into consideration during the rule making process, in May 1994.³⁷ However, this proposal would only apply to reformulated gasoline and would place further controls on foreign refiners in an attempt to assure that the laws were not being circumvented by inaccurate data.³⁸ However, Congress passed legislation that did not fund the proposal.³⁹

B. Argument of Venezuela and Brazil and the United States Response

Venezuela and Brazil argued the Gasoline Rule did not fall within the General Exceptions article⁴⁰ of GATT 1994,⁴¹ and was in opposition to the Most Favored- Nation Treatment article,⁴² and the National Treatment on Internal Tax and Regulation article.⁴³ Venezuela and Brazil further argued the Gasoline Rule violated the Preparation, Adoption and Application of Technical Regulations by Central Government Bodies, Article 2 of the Agreement on Technical Barriers to Trade.⁴⁴ Moreover, Venezuela asserted the Gasoline Rule

³⁶ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 2.10.

³⁷ See *id.* at para. 2.13.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See GATT art. XX.

⁴¹ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 3.1(a),(b).

⁴² See GATT art. I.

⁴³ See *id.* art. III.

⁴⁴ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 3.1(c).

caused damages to the country under the Nullification article of GATT.⁴⁵

1. Most Favored-Nation Treatment

Venezuela and Brazil alleged the Gasoline Rule violated the Most Favored-Nation Treatment [MFN] clause because it allowed importers who bought 75% of their product from a foreign affiliated refiner⁴⁶ to establish an individual baseline through Methods 1-3.⁴⁷ Venezuela and Brazil argued this gave a small number of countries who exported a sizeable amount of their gasoline to the United States an unfair advantage based purely on ownership and volume of the gasoline sold in violation of MFN.⁴⁸ However, the United States asserted that since no importer met the 75% Rule, the matter should not be decided by the Panel.⁴⁹

2. National Treatment on Internal Tax and Regulation

Venezuela and Brazil alleged the Gasoline Rule gave less favorable treatment to its gasoline versus domestic gasoline products because imported gasoline had to meet more stringent regulations (under the statutory baseline), while a like product produced in the United States could be sold as long as it met the individual baseline.⁵⁰ They argued the individual baseline for domestic producers and the

⁴⁵ See GATT art. XXIII:1(b).

⁴⁶ See discussion *supra* note 35.

⁴⁷ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 6.18.

⁴⁸ See *id.*; see also GATT art. I:1.

⁴⁹ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 6.18-6.19.

⁵⁰ See *id.* at para. 3.12.

statutory baseline for foreign producers was in violation of Article III:4 of GATT.⁵¹

Brazil defined the discrimination in three respects. First, domestic refiners were allowed to establish an individual baseline higher than the statutory baseline with which foreign refiners were required to comply.⁵² Second, "the statutory baseline was more stringent than the average of the individual baselines for refineries located in the Eastern and Gulf Coast states (where virtually all Brazilian gasoline was sold) because of the inclusion in the national average of the strict 1990 California standards."⁵³ Finally, domestic refiners could make a greater profit because those domestic refiners producing gasoline cleaner than their baseline were able to import gasoline with pollutants above the statutory limit and blend the two.⁵⁴

The United States claimed that on average there was no discrimination against foreign producers because the statutory baseline was based on an overall average of all gasoline used in the

⁵¹ *See id.* Article III:4 states that:

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. The provisions of this paragraph shall not prevent the application 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.

⁵² *See* United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 3.15.

⁵³ *Id.*

⁵⁴ *See id.* For example, because an individual baseline is an average only of 1990 pollutants in the gasoline, the domestic producer could be currently producing gasoline with less pollutants than their average of that year. This would allow that refiner to purchase more polluted gasoline (at a cheaper cost) and blend it with their domestically produced gasoline, so that the refiner has more gasoline that meets the individual baseline.

United States in 1990.⁵⁵ Therefore, according to the United States, “overall domestically produced gasoline had to be at least as clean as foreign gasoline since roughly half of the domestic gasoline would be ‘cleaner’ and roughly half would be dirtier than gasoline using the statutory baseline.”⁵⁶ The United States further argued the Gasoline Rule actually benefitted foreign producers. Since the majority of foreign producers could not establish a baseline, they would have been prohibited from importing any gasoline altogether.⁵⁷ The United States also advanced a number of other arguments.⁵⁸

C. The United States’ Defense⁵⁹

The key to the United States defense was Article XX of GATT which enumerates the general exceptions to international trade law.⁶⁰ The United States asserted that Article XX was the controlling law, and if the Gasoline Rule was found to violate certain articles of GATT law, then the Panel should rely on Article XX.

⁵⁵ See *id.* at para. 3.17.

⁵⁶ *Id.*

⁵⁷ See *id.* The United States used this argument even though logically the United States could not prevent gasoline coming into the United States because a total ban would be in opposition to GATT.

⁵⁸ The United States argued that the Gasoline Rule only applied to imported gasoline that was being brought into the United States and sold by importers in the United States because importers were the first company that could be regulated by United States law. See *id.* at para. 3.18. In addition, the United States stated that imported gasoline was treated the same as domestic refiners with limited 1990 operations (and data to establish an individual baseline). See *id.* at para. 3.19.

⁵⁹ The United States also submitted an argument based on Article XX(d), but that argument rested on whether the Gasoline Rule constituted law, regulation, or requirement. However, that argument is outside of the scope of this Paper.

⁶⁰ See GATT art. XX, *supra* note 8.

1. Article XX(b)

Under Article XX(b), the United States maintained the Gasoline Rule sought to reduce air pollution “to protect human, animal or plant life or health; . . .”⁶¹ The United States asserted air pollution and ground-level ozone caused cancer and numerous other health problems.⁶² Since the purpose of the CAA and its 1990 amendment is to “protect and enhance the quality of the Nation’s air resources. . . ,”⁶³ the United States alleged this met the spirit of Article XX(b).⁶⁴ Furthermore, the United States claimed that using the baseline method fulfilled the “necessary” portion of Article XX(b) because it was the “quickest and fairest way” to protect human, animal or plant life or health.⁶⁵ The United States believed:

If a single baseline were used for all conventional gasoline, then all producers whose gasoline was dirtier than this baseline for certain gasoline qualities would need to change the characteristics of their production to meet the standard for those qualities, and those producers whose gasoline was cleaner than the baseline could degrade down to the baseline.⁶⁶

Venezuela maintained the United States had not proved the Gasoline Rule was the least restrictive regulation to achieve the stated environmental policy objectives of the United States.⁶⁷ Furthermore, Venezuela developed, in its opinion, four alternative methods that the United States could have employed to obtain greater air control

⁶¹ *Id.*

⁶² *See First Submission of the U.S., supra* note 35, at para. 73.

⁶³ *Id.* at para. 75.

⁶⁴ *See id.*

⁶⁵ *See id.* at para. 79, 80. *See also* United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 3.40.

⁶⁶ United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 3.40.

⁶⁷ *See id.* at para. 3.45.

quality without discriminating against foreign refiners.⁶⁸ Brazil added the United States did not present convincing evidence that foreign refiners could not establish individual baselines using Method 3, and it appeared that the United States had simply made an assumption.⁶⁹

2. Article XX(g)

The United States also argued the Gasoline Rule was justified under Article XX(g).⁷⁰ The United States advanced an interesting theory that clean air is an “exhaustible resource” because air could become “chronically contaminated” by prolonged pollution.⁷¹ Furthermore, since air moves over great distances, pollutants also move and carry pollution to many other areas damaging other parts of the environment.⁷² The United States insisted that by preserving the air, the CAA will help save other natural resources by lessening pollution in lakes and streams and minimizing destruction of crops and forests.⁷³

D. The Panel’s Findings

The Panel went through all the arguments presented by Venezuela and Brazil and ruled on all the individual arguments under each and every article relied on.

1. Most-Favored-Nation Treatment

The Panel agreed with the United States that there was no need to examine Venezuela and Brazil’s claims under Article I:1, the MFN provision under GATT, because the 75% Rule did not apply to

⁶⁸ *See id.*

⁶⁹ *See id.* at para. 3.49.

⁷⁰ *See id.* at para. 3.58.

⁷¹ *See id.* at para. 3.59.

⁷² *See id.*

⁷³ *See First Submission of the U.S., supra* note 35, at para. 126.

any parties. Finally, it did not appear as though the rule would come into effect in the future.⁷⁴

2. National Treatment on Internal Taxation and Regulation

Under Article III:4, National Treatment on Internal Taxation and Regulation, the Panel noted that Venezuela and Brazil were required to show that, “(a) law, regulation or requirement affect[ed] the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and (b) treatment accorded in respect of the law, regulation or requirement that is less favorable to the imported product than to the like product of national origin.”⁷⁵ The Panel then went into a lengthy discussion of what constituted “like products.”⁷⁶ The Panel found that both domestic and imported gasoline fit within the definition of “like products.”

The Panel then examined the second prong of the test to determine the potential favorableness that domestic gasoline received.⁷⁷ The Panel found domestic gasoline received, “in general,” better treatment than imported gasoline.⁷⁸ The Panel recognized the United States’ argument that because the statutory baseline was an average of all gasoline in 1990, some importers received more favorable treatment than other importers, therefore, offsetting the less

⁷⁴ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 6.18, 6.19.

⁷⁵ See *id.* at para. 6.5.

⁷⁶ The concept of “like products” has been difficult to ascertain and although different Panels have tried to come up with consistent ways to develop the definition of “like products,” the definition has only become more confusing over time. See, e.g., Japan-Tariff on Imports of Spruce- Pine- Fir (SPF) Dimension Lumber, B.I.S.D. 36S/167, para. 3.29-3.53 (adopted July 19, 1989); Spain-Tariff Treatment of Unroasted Coffee, B.I.S.D. 28S/102, para. 3.5-3.13 (adopted June 11, 1981).

⁷⁷ See United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at 6.9, 6.10.

⁷⁸ See *id.* at para. 6.10.

favorable treatment.⁷⁹ The Panel noted that no less favorable treatment on the whole was not sufficient in light of past panel reports.⁸⁰ Furthermore, the Panel stated that even on the whole, imported gasoline was being treated less favorably than domestic gasoline.⁸¹ Finding the United States in violation of Article III:4, the Panel then investigated whether the Gasoline Rule fell within the scope of Article XX exceptions to be justified.

3. General Exceptions

a. Article XX(b) and (d)

The Panel stated that since the United States was “invoking an exception” to GATT, it “bore the burden of proof in demonstrating that the inconsistent measures came within [Article XX(b)].”⁸² Moreover, the Panel required the United States to prove:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective; and
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.⁸³

⁷⁹ See *id.* at para. 6.14.

⁸⁰ See *id.* citing United States - Section 337 of the Tariff Act of 1930, B.I.S.D. 36S/345, 1989 GATTPD LEXIS 2, at para. 5.14 (adopted Nov. 7, 1989)(rejecting the belief that “balancing more favorable treatment of some imported products against less favorable treatment of other imported products).

⁸¹ See *id.* at para. 6.15.

⁸² See *id.* at para. 6.20.

⁸³ *Id.* (emphasis in original).

Although the Panel agreed the United States proved the first element, it questioned the *necessity* of the regulations used by the United States to accomplish its policy objective.⁸⁴

The Panel first adopted a definition of “necessary” that was used in a prior GATT Panel report.⁸⁵ They interpreted “necessary” to mean no other alternative law could be developed that was not in violation of GATT law, or an alternative that “entails the least degree of inconsistency with other GATT provisions.” If the measure (law or regulation) was necessary then it is valid.⁸⁶ The Panel then examined and discussed other ways in which the policy could have been implemented without being inconsistent with GATT.⁸⁷ The Panel found the United States did not meet its burden under Article XX(b). In addition, the Panel decided that the United States claim under Article XX(d) was not applicable.⁸⁸

b. Article XX(g)

Likewise, the United States bore an enormous burden in proving the measure was justified under Article XX(g). Once again the Panel laid out the elements the United States had to prove:

(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies related to the conservation of exhaustible natural resources;

⁸⁴ See *id.* at para. 6.21, 6.22.

⁸⁵ See *id.* at para. 6.24.

⁸⁶ *Id.* (quoting United States - Section 337 of the Tariff Act of 1930, B.I.S.D. 36S/345, 1989 GATTPD LEXIS 2 at para. 5.26 (adopted Nov. 7, 1989)).

⁸⁷ See *id.* at para. 6.24 - 6.29.

⁸⁸ See *id.* at para. 6.32, 6.33.

- (2) that the measures for which the exception was being invoked - that is the particular trade measures inconsistent with the General Agreement [GATT] - were *related to* the conservation of exhaustible natural resources;
- (3) that the measures for which the exception was being invoked were made effective *in conjunction* with restrictions on domestic production or consumption; and
- (4) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.⁸⁹

The Panel decided the United States' policy met the first element of the test.⁹⁰ The key to this element rested on how "related" the measure was to the conservation principle of the policy.⁹¹ The Panel turned to the *Herring and Salmon* case to deal with the issue of the meaning of Article XX(g).⁹² The *Herring and Salmon* Panel believed that Article XX(g) was in place to prevent trade from impinging upon countries conservation policies aimed at exclusively protecting exhaustible natural resources.⁹³ The *Herring and Salmon* Panel also believed that while a law "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*

⁸⁹ *Id.* at para. 6.35 (emphasis in original).

⁹⁰ *See id.* at para. 6.37. Although the Panel did find in favor of the United States on this point, the Panel seemed to agree with Venezuela's assertion that clean air was not an exhaustible natural resource like petroleum or coal, but since a past panel had found that a renewable resource could be construed to be an exhaustible natural resource, it allowed air to fall under the meaning of Article XX(g). *See id.* at para. 6.37, 6.38.

⁹¹ *See id.* at para. 6.39.

⁹² Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, 1987 GATTPD LEXIS 8, at para. 4.6 (March 22, 1988).

⁹³ *See id.*

resource to be considered as 'relating to' conservation within the meaning of Article XX:(g) (sic)."⁹⁴

The Gasoline Case Panel closely examined whether the baseline establishment methods which the Panel found to be in violation of Article III:4 were in fact "primarily aimed at the conservation of natural resources."⁹⁵ The Panel, using new terminology, found "no direct connection" between the United States' environmental policy of improving its air quality and giving less favorable treatment to imported gasoline.⁹⁶ In addition, the Panel explained that:

The [] lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligation 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.⁹⁷

Lastly, the Panel emphasized it did not inquire into the "desirability or necessity" of the United State's environmental policy concerning the CAA.⁹⁸ The Panel reiterated that WTO parties can set any environmental agenda they wish, but it must be done within the restrictions enumerated in GATT.⁹⁹

⁹⁴ *Id.*

⁹⁵ United States-Standards for Reformulated and Conventional Gasoline, *supra* note 5, at para. 6.40.

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *See id.* at para. 7.1.

⁹⁹ *See id.*

E. The United States' Reaction to the Panel Decision

The United States expressed its disappointment with the decision and stated the Clinton Administration would not back down from enacting environmental laws.¹⁰⁰ Furthermore, because the United States was in the midst of an election, the decision drew some harsh criticism from Patrick Buchanan, a Republican presidential candidate.¹⁰¹ The United States Trade Representative (USTR), Mickey Kantor, pointed out that the WTO panel report had 'no force under US law, but he neglected to note that if the United States failed to abide by the decision it would be a politically costly move.¹⁰² The United States was one of the major proponents for establishing the WTO.¹⁰³ If the United States ignored the ruling it would weaken the structure that it helped to create. By ignoring rulings against it, the United States had more to lose than to gain because the United States had numerous cases before the WTO with much more money at stake than what was before the Gasoline Panel. Therefore, it was assumed the United States would simply appeal the ruling.¹⁰⁴ On February 21, 1996, the United States did appeal.

F. The United States' Appeal

The United States' appeal was based solely on the argument that the panel erred in finding the Gasoline Rule was not justified

¹⁰⁰ See *WTO backs Venezuela in Dispute Over Gasoline*, THE HOUSTON CHRONICLE, Jan. 18, 1996, available in LEXIS, NEWS Library, CURNEWS file.

¹⁰¹ See Evelyn Iritani, *First WTO Ruling Provides Grist For Opponents Citing Threat to U.S. Law*, LOS ANGELES TIMES, Jan. 19, 1996, available in LEXIS, NEWS Library, CURNEWS file.

¹⁰² See Frances Williams, *US May Appeal Against WTO Ruling*, FINANCIAL TIMES (London), Jan. 19, 1996, available in LEXIS, NEWS Library, CURNEWS file.

¹⁰³ See generally William F. Buckley, *Has the WTO Threatened Us?*, BUFFALO NEWS, Jan. 27, 1996, at C3.

¹⁰⁴ See generally Editorial, *The WTO Rules*, JOURNAL OF COMMERCE, Jan. 23, 1996, available in LEXIS, NEWS Library, CURNEWS file.

under Article XX(g).¹⁰⁵ The appeal centered on whether the baseline rules are “related to” conserving clean air under Article XX(g).¹⁰⁶

Venezuela and Brazil reiterated some of their previous claims in favor of the panel decision. Furthermore, Venezuela claimed that for a law to be “relating to” or “primarily aimed at” conservation [] the measure [must be] both: (i) primarily intended to achieve a conservation goal; and (ii) ha[ve] a positive conservation effect.”¹⁰⁷

The Appellate Body took a more logical approach to examining GATT articles. Instead of trying to develop concrete meanings behind many of the terms in Article XX, the Appellate Body looked toward international laws concerning construction to find meaning within the law.¹⁰⁸ The first question the United States wanted clarified was whether “measures,” which is used in the chapeau of Article XX and Article XX(g), applies to the entire Gasoline Rule or to just the establishment of the baseline section of the rule.¹⁰⁹ The Panel decision was unclear whether the whole Gasoline Rule or just the baseline establishment method violated Article III:4.¹¹⁰ The Appellate Body surveyed statements made by all the parties establishing, in their understanding, that it was only the baseline establishment method rules which were in violation of Article III:4.¹¹¹ With this established, the Appellate Body explored the reasoning the Panel used to find the Gasoline Rule was “not primarily aimed at the conservation of exhaustible natural resources.”¹¹²

The Appellate Body highlighted the Panel finding that air was an exhaustible natural resource, and that the United States policy to prevent depletion of this resource was not inconsistent with Article

¹⁰⁵ See Appellate Body Report, *supra* note 7, at II.A.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* at II.B.

¹⁰⁸ See *id.* at III(B).

¹⁰⁹ See *id.* at III(A).

¹¹⁰ See *id.*

¹¹¹ See *id.* at n.29.

¹¹² *Id.* at III(B).

XX(g).¹¹³ The Appellate Body quoted a paragraph from the Panel Report which seemed to demonstrate the Panel posed an incorrect question.¹¹⁴ The Panel appeared to have questioned whether the Gasoline Rule, which they concluded resulted in less favorable treatment under Article III:4, was “primarily aimed at” conserving air quality, rather than whether the baseline establishment methods (or “measures”) were “primarily aimed at” the conservation goal.¹¹⁵ The Appellate Body found a severe error with the Panel analyzing its own legal conclusion rather than the baseline establishment methods under Article XX(g). Moreover, the Appellate Body stressed that the Panel interpreted the United States’ measures were not “necessary” under Article XX(b); however, the Panel also seemed to extend this analysis to Article XX(g) where it is not appropriate.¹¹⁶

The Appellate Body looked to the *Vienna Convention on the Law of Treaties* which states that a treaty should be interpreted “with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹⁷ Using this construction, the Appellate Body showed that each clause of Article XX uses different qualifiers, and it appears that was the intent of the WTO members.¹¹⁸ Because Article XX(a), (b), and (d) use the word “necessary,” a higher standard, and Article XX(c), (e), and (g) use “relating to,” a lower standard, the Panel should not have applied the “necessary” standard to Article XX(g).¹¹⁹ Considering Article 31 of the Vienna Convention with the chapeau of Article XX and Article XX(g), the panel concluded that “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*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331).

¹¹⁸ See *id.*

¹¹⁹ See *id.*

commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible resources.”¹²⁰ Consequently, the Appellate Body found there was a “substantial relationship” between the baseline establishment methods and the conservation requirements of the Gasoline Rule which meets the second element of the test put forth by the Panel.¹²¹

The Appellate Body continued the analysis that the Panel ended when it concluded the United States had not proved the second element under Article XX(g).¹²² The Appellate Body began to explore the last half of Article XX(g) which states, “if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹²³ While the United States wanted the Appellate Body to interpret the clause to mean that measures cannot be placed “solely” on imported gasoline, Venezuela and Brazil argued the measure must also be primarily aimed at “domestic production and consumption.”¹²⁴ Furthermore, Venezuela believed the measure must not only have a “purpose,” but must also have a positive effect.¹²⁵ The Appellate Body employed the construction of plain language to interpret the clause.¹²⁶ The Appellate Body found:

[t]hat the clause “if such measures are made effective in conjunction with restrictions on domestic product or consumption” is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline

¹²⁰ *Id.* (quoting Canada Measures Affecting Exports of Unprocessed Herring and Salmon, *supra* note 92, at 98, para. 4.6).

¹²¹ *See id.* *See also supra* note 89 and accompanying text.

¹²² *See* Appellate Body Report, *supra* note 7, at III(C). *See supra* note 89 and accompanying text.

¹²³ Appellate Body Report, *supra* note 7, at III(C).

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.¹²⁷

The Appellate Body decided the baseline establishment methods sufficiently restricted domestic refiners.¹²⁸ Furthermore, the Appellate Body stated that it did not interpret this clause as an “effects test;” meaning that the measure does not have to produce effects for it to fall within the exception of Article XX(g) as Venezuela argued.¹²⁹ Accordingly, the baseline establishment methods fulfilled the third element of the test.

The Appellate Body moved to examine the baseline measure within the context of the fourth element; the chapeau of Article XX.¹³⁰ The Appellate Body stated, “[t]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of [GATT].”¹³¹ The Appellate Body broke the chapeau into three parts the measure would have to pass.¹³² The Appellate Body understood the three terms to not be mutually exclusive, and they more or less required an overall assessment of the motives of the measure.¹³³ Immediately thereafter, the Appellate Body

¹²⁷ *Id.* at 23.

¹²⁸ *See id.* at 24.

¹²⁹ *See id.* One of the reasons for this rationale was that, especially with environmental measures or laws, it can take a long time for the effects to be seen. *See id.*

¹³⁰ *See id.* at IV. *See supra* note 89 and accompanying text.

¹³¹ *Id.*

¹³² *See id.* The three terms that the Appellate Body broke down were: “(a) ‘arbitrary discrimination’ (between countries where the same conditions prevail); (b) ‘unjustifiable discrimination’ (with the same qualifier); or (c) ‘disguised restriction’ on international trade.

¹³³ *See id.*

stated that the United States had other options available to it in order to effectuate the policy goals of the Gasoline Rule. Incredibly, the Appellate Body seemed to return to the same “necessary” test that it faulted the Panel for using incorrectly.¹³⁴

The Appellate Body rebuked all the arguments the United States put forward for its rationale behind the development of the baseline establishment methods.¹³⁵ The Appellate Body did not know of any actions by the United States government to rectify their claim that it would be too difficult, if not impossible to determine foreign refiners’ baselines.¹³⁶ In addition, the Appellate Body did not like that the United States was concerned with the physical and financial problems domestic refiners would face if a statutory baseline was imposed, but was not concerned with the problems of foreign refiners.¹³⁷ Finally, the Appellate Body reasoned that the Gasoline Rule was discriminatory and not justified under the chapeau because the United States did not attempt any administrative scheme involving all the parties, or did not consider the costs of adhering to the statutory baseline to foreign refiners.¹³⁸ The Appellate Body decided, “these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.”¹³⁹

III. Analysis and Possible Implications of the Gasoline Case and Appeal

This was the first case decided under the new WTO structure and it left much to be desired. It is astounding that “experts” in trade law, who are the judges on the Panel, would have rendered such a

¹³⁴ See *id.* See text accompanying *supra* notes 113-120.

¹³⁵ See Appellate Body Report, *supra* note 7, at IV.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ *Id.*

perfunctory decision in the first case. The undoing of the United States in both cases was whether the baseline establishment methods were "necessary." The Panel and the Appellate Body seem to be saying that if these adjudicatory bodies can find another method to enact the policies a country is trying to accomplish, then the measure will never fall within the spirit of the chapeau of Article XX. While the Appellate Body gave a broader reading of Article XX(g) in relation to other reports, it turned around and put a noose on prior interpretations concerning the chapeau of Article XX.¹⁴⁰ Under the *United States - Canada Tuna* panel report and the *United States - Imports of Certain Automotive Spring Assemblies* report, to avoid being viewed as "unjustifiable" or "arbitrary," the measures under review were required to apply to all foreign countries to avoid the measure being viewed as "unjustifiable" or "arbitrary."¹⁴¹ Furthermore, to avoid falling within the "disguised restriction" the measure need only be publicly announced.¹⁴² The Appellate Body chose to ignore these prior interpretations, and has not only given a different meaning to these decisions but they also extended the reach of the WTO's jurisdiction by establishing a quasi - "necessary" test for the chapeau of Article XX.¹⁴³

This should be of great concern for members of the WTO. While the WTO dictating the legality of environmental regulatory

¹⁴⁰ See Anna B. Snoderly, Note, *Clearing the Air: Environmental Regulation, Dispute Resolution, and Domestic Sovereignty Under the World Trade Organization*, 22 N.C. J. INT'L L. & COM. REG. 241, 292-93 (1996).

¹⁴¹ See *id.* at 293.

¹⁴² See *id.*

¹⁴³ But see Jeffrey Waincymer, *Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?*, 18 MICH. J. INT'L L. 141, 170-76 (interpreting the Appellate Body Report concerning the chapeau to apply a "foreseeability" and "reasonableness" standard). Nowhere in the Report does the Appellate Body state that it is using the standards of "foreseeability" or "reasonableness." Rather, it appears that the Appellate Body is adopting an "any other possible means" or "necessary" test. Meaning that if there is "any other possible means" to realize the policy goal of conserving an exhaustible resource, those means must be employed.

methods is startling, this decision could have more far reaching effects because trade is so interrelated to other areas of law within a country. In the future, WTO may be legislating for countries over a number of expansive issues. For example, if the Food and Drug Administration (FDA) does not approve a drug for sale in the United States because it fears that significant testing has not been done, yet it approves a similar domestic drug, the WTO may call into question the entire FDA framework for adopting drugs.¹⁴⁴

The meaning of this decision can not be underscored enough. The Appellate Body upheld countries' rights to enact legislation to protect human health and the environment, but it also stated clearly that the WTO may decide what methods a country may use to implement the legislation. Although the WTO is still in its infancy, the Panel and the Appellate Body in this case have marked out a very wide area within a countries domestic law which will now come under its adjudicatory control. For the United States, this means that any of the government agencies under the executive branch which are charged with developing regulatory schemes and enforcing those regulations now fall within the auspices of the WTO.

Since the WTO has oversight of laws passed by Congress and signed by the President, the people of the United States should be concerned because the "experts" sitting on these panels and the WTO officials that appoint them are not elected.¹⁴⁵ The Panel Report and Appellate Body Report mark the first time that regulations developed for the enforcement of laws passed by the United States' Congress are being adjudicated by people who are not elected by the citizens of the United States.¹⁴⁶ This creates concern because the United States government is accountable to its citizens, but the WTO "experts" are bound to upholding "mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade

¹⁴⁴ The assumption in this scenario is that the drug would be considered a "like" treatment for similar ailments in patients.

¹⁴⁵ See Snoderly, *supra* note 140, at 300.

¹⁴⁶ See *id.*

relations. . . .”¹⁴⁷ It goes without saying that the WTO’s goal’s are not necessarily in the best interest of the United States.

It is not clear whether the United States intended to relinquish this much sovereignty. However, it is clear that some governmental officials did fear such problems with the WTO. The WTO Dispute Settlement Review Commission Act, sponsored by Senator Robert Dole, was set up to review all decisions against the United States.¹⁴⁸ The United States’ reaction to upcoming decisions which signal the United States’ willingness to stay within the structure of the WTO since the rationale for adhering to this decision is that it will benefit the United States far more than what the United States lost.¹⁴⁹

In addition, the Appellate Body may have closed the door to merging environmental issues with trade because many environmental measures impair trade. Furthermore, since there are so many different interests competing to set political agendas, it is “difficult to construct environmentally sustainable, politically viable, and internationally enforceable environmental measures that do not affect foreign producers differently than domestic producers.”¹⁵⁰ Even if one agrees with the Appellate Body Report, the “experts” clearly did not recognize the opportunity they had to elaborate on the proper balance between trade and the environment. Had the Appellate Body elaborated on the importance of the environment in relation to trade, or simply stated in their decision that as long as some effort is made to mitigate the potential economic harm to foreign countries, environmental regulations will be found consistent within the meaning of the chapeau of Article XX, then the Appellate Body

¹⁴⁷ Agreement Establishing the World Trade Organization, Item 1, preamble, reprinted in JOHN H. JACKSON, ET AL, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: DOCUMENT SUPPLEMENT, (3rd ed. 1995).

¹⁴⁸ S. 1438, 104th Cong. (1995); H.R. 1434, 104th Cong. (1995).

¹⁴⁹ With the recent loss of the United States case against Japan concerning Eastman Kodak and Fuji Film, it will be interesting to see whether there are more calls within the United States to leave the WTO.

¹⁵⁰ Snoderly, *supra* note 140, at 295.

would have developed some precedent that would have alleviated the fears of environmentalists and isolationists.

The Appellate Body had an opportunity to establish environmental law within the sphere of trade to give it some effect within trade decisions, but they chose not to attempt this. Perhaps the Appellate Body was simply working within a system that needs to be reformed. Environmentalists have long been concerned with the narrowly defined environmental articles of GATT in the face of overly broad trade articles.¹⁵¹ There are ways in which these two sets of rules can be harmonized, and international environmental law strengthened. However, the Appellate Body stopped short and left many questions unanswered. More importantly, the Appellate Body has significantly narrowed the overall effect of the chapeau of Article XX.

IV. Solutions to Strengthening International Environmental Law

Environmentalists want international environmental law strengthened, or at least domestic environmental regulations safeguarded because they fear trade liberalization grants greater access to markets that spurs growth causing mass waste production and unsustainable development.¹⁵² Furthermore, lesser environmental standards translate into a comparative advantage which in turn places pressure upon countries with stronger environmental regulations to reduce those requirements.¹⁵³ In addition, some environmentalists would like to see the linking of trade restriction to transboundary environmental problems.¹⁵⁴ Some nations are concerned about how the WTO will deal with prior treaties that use trade restrictions to

¹⁵¹ See Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 328 (1997).

¹⁵² See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 42 (1994).

¹⁵³ See *id.*

¹⁵⁴ See *id.*

strengthen international environmental treaties.¹⁵⁵ Conversely, some experts believe the whole WTO system may be in danger of collapse.¹⁵⁶

The WTO's Committee of Trade and Environment (CTE) is supposed to be exploring all the issues this Paper discussed and many more.¹⁵⁷ However, it is impossible to achieve consensus because the CTE is composed of each member of the WTO.¹⁵⁸ While the CTE developed a paper framing the arguments concerning a number of trade and environment issues, it has done little else.¹⁵⁹ Clearly this committee must take more of an advisory role, and develop more analysis on issues relevant to the WTO.¹⁶⁰

It has been noted that a "relatively large number of international environmental pacts [] contain provisions dealing with trade, [while] international trade agreements rarely address environmental matters."¹⁶¹ The logical conclusion is that "while it is

¹⁵⁵ See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 281.

¹⁵⁶ See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 300-02 (1996); see also G. Richard Shell, *The Trade Stakeholders Model and Participation By Nonstates Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 361. Nichols and Shell agree that:

The rigidity of the dispute resolution process in the World Trade Organization, [], presents a special danger. To the extent that the World Trade Organization forces countries to reform their laws so as to exalt the value of free trade over other values, the empirical legitimacy of national laws could be eroded. Countries asked to choose between obedience to the World Trade Organization and having empirically legitimate laws may choose to ignore the World Trade Organization.

Nichols, at 300 (citations omitted).

¹⁵⁷ See Schoenbaum, *supra* note 155, at 269.

¹⁵⁸ See *id.* at 270.

¹⁵⁹ See *id.* at 269.

¹⁶⁰ See *id.* for a more elaborate explanation of the future duties of the CTE.

¹⁶¹ *Id.* at 282.

not necessary to protect the environment to facilitate trade, it is often necessary to regulate trade to protect the environment."¹⁶² This is precisely the reason why it will be very difficult to achieve full harmony between the two sets of law. While trade law has something to offer environmental law, namely an enforcement mechanism, environmental law has nothing to offer trade law.

One way in which the two may become more linked is by amending GATT to create a new general exception under Article XX which would allow prior multilateral environmental treaties to retain their clauses which utilize trade restrictions to enforce environmental standards.¹⁶³ By bringing these multilateral treaties within the GATT structure they would become part of the GATT law which must be observed. Furthermore, because the environmental treaties were drafted by environmental experts, presumably, they would take into account factors that trade experts could not. However, using international environmental treaties still may not strengthen the role of the environment within trade because the panels and appellate bodies are comprised solely of trade experts.

Lastly, the WTO could expand the expertise of the experts on the panels or allow nongovernmental groups to advise the experts. According to the Dispute Settlement Understanding [DSU], the agreement that sets the rules and procedures for the panels that hear cases, "panels shall be composed of well-qualified governmental and/or nongovernmental individuals, including [people in the field of trade]."¹⁶⁴ Professor Nichols urges that this clause be utilized to bring experts from other fields to add perspective to the panels.¹⁶⁵ Furthermore, Article 8(2) states that; "Panel members should be

¹⁶² *Id.*

¹⁶³ *See id.* at 284.

¹⁶⁴ Nichols, *supra* note 156, at 328. *See also* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art 8(1), *reprinted in* JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, (3rd ed. 1995) [hereinafter DSU].

¹⁶⁵ *See* Nichols, *supra* note 156, at 328.

selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.”¹⁶⁶ These two clauses provide the justification for appointing experts in environmental science to these panels to give greater insight into some of the effects that panel decisions may have.

These recommendations will not cure the inevitable clash of the two sets of law because they are in opposition to one another. However, until there is either an intergovernmental body for environmental concerns or a greater world movement toward pollution control, environmental policy must be maximized through the use of the WTO. This will require using all of these recommendations plus many other theories.

V. Conclusion

The first Panel Report and Appellate Body Report by the WTO have been landmark decisions in numerous ways, few of them positive. The Panel was haphazard in its ruling by using many terms interchangeably, using incorrect standards, and misinterpreting prior panel decisions. While the Appellate Body did a marginally better job, it dealt huge blows to national sovereignty, left numerous questions surrounding the status of environmental protection, and narrowed the General Exceptions clause of GATT significantly. Hopefully, future Panel Reports and Appellate Body Reports will exercise greater control of their supervisory positions, yet more clearly define the General Exceptions clause of GATT.

¹⁶⁶ DSU, *supra* note 164, at art. 8(2).

